

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of

Dutchman Marine, LLC d/b/a Lake
Washington Ferry Service, for Authority
To Provide Commercial Ferry Service;

Seattle Ferry Service, LLC, for Authority
To Provide Commercial Ferry Service; and

Seattle Harbor Tours Limited Partnership,
For Authority to Provide Commercial
Ferry Service.

DOCKET NO. TS-001774
(consolidated)

DOCKET NO. TS-002054
(consolidated)

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COMMISSION STAFF POST
HEARING BRIEF

I. INTRODUCTION:

In this post-hearing brief, Staff will argue that: (1) Argosy L.P's existing certificate to provide service between Seattle and Kirkland does not bar the Commission from granting the authority, or some portion of the authority, that Dutchman Marine, LLC (Dutchman) seeks between Seattle and Kirkland, and that (2) the Commission may grant Seattle Harbor Tours Limited Partnership (Seattle Harbor Tours) leave to amend its application to include a request for

new authority to provide service between Seattle and Kirkland without the need to re-publish notice of its application in the Commission docket.

Staff did not take a position at hearing on whether, or to what extent, the two contested applications (those of Dutchman and Seattle Harbor Tours) should or should not be granted. However, Staff will offer its view of the appropriate legal framework and the scope of discretion that the Commission may exercise in deciding the contested issues in this case.

Finally, Staff will recommend that Seattle Ferry Service LLC should be granted the authority that it has sought through its uncontested application in this consolidated proceeding.

II. ISSUES

1. Does the “territory already served by an existing certificate holder” limitation of RCW 81.84.020 bar the Commission from granting any part of either application?

(a) What is the significance, to this proceeding, of Seattle Harbor Tours’ existing Seattle/Kirkland certificate?

(b) Should Seattle Harbor Tours be permitted to amend its application to include service between Kirkland and the University of Washington?

2. Does the “prohibited by RCW 47.60.120” provision of RCW 81.84.020 bar the Commission from granting the authority sought by either of the Applicants?

3. As required by RCW 81.84.010, do the public convenience and necessity require the service, or some part of the service, that the Applicants are seeking the authority to provide? If so, does the public convenience and necessity require that terms and conditions be imposed on the exercise of the privilege that is sought?

4. Are the Applicants fit to provide the proposed service?

5. Are the two applications mutually exclusive? If they are not, should the Commission grant both applications? If they are, should the Commission: (1) grant one application and deny the other, (2) grant both, but only in part or only with restrictions, so as to prevent the overlap?

III. ANALYSIS

A. Applicable Statutes and Rules

The Commission regulates commercial ferries under Chapter 81.84 RCW. RCW 81.84.010 defines the circumstances under which the legislature has seen fit to require a certificate of public convenience and necessity for operation of a commercial ferry:

(1) No commercial ferry may hereafter operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state, including the rivers and lakes and Puget Sound, without first applying for and obtaining from the commission a certificate declaring that public convenience and necessity require such operation . . .

The standards to be applied by the Commission in deciding whether, or under what conditions, to issue a certificate are set out in RCW 81.84.020:

(1) Upon the filing of an application the commission shall give reasonable notice to the department, affected cities and counties, and any common carrier which might be adversely affected, of the time and place for hearing on such application. The commission shall have power after hearing, to issue the certificate as prayed for, or to refuse to issue it, or to issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as in its judgment the public convenience and necessity may require; but the commission shall not have power to grant a certificate to operate between districts and/or into any territory prohibited by RCW 47.60.120 or already served by an existing certificate holder, 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 certificate or tariffs after the time period allowed to initiate service [five years] has elapsed. . . .

(2) 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. The documentation required of the applicant under this section shall comply with the provisions of RCW 9A.72.085.

The statutes allow an applicant for ferry service five years from the issuance of a certificate to initiate service, and they contemplate the possibility that many of the details of the operation will not have been worked out prior to issuance of the certificate:

(2) The holder of a certificate of public convenience and necessity granted under this chapter must initiate service within five years of obtaining the certificate. The certificate holder shall report to the commission every six months after the certificate is granted on the progress of the certificated route. The reports shall include, but not be limited to, the progress of environmental impact, parking, local government land use, docking, and financing considerations. However, if service has not been initiated within five years of obtaining the certificate, the commission may extend the certificate on a twelve-month basis for up to three years if the six-month progress reports indicate there is significant advancement toward initiating service.

RCW 81.84.010.

B. Does the “territory already served by an existing certificate holder” limitation of RCW 81.84.020 bar the Commission from granting any part of either application?

RCW 81.84.02 provides, in part, that:

the commission shall not have power to grant a certificate to operate between districts and/or into any territory . . . already served by an existing certificate holder, unless such existing certificate holder has failed or refused to furnish reasonable and adequate service or has failed to provide the service described in its certificate or tariffs after the time period allowed to initiate service has elapsed . . .

Thus, as a threshold matter, the Commission must consider whether an applicant proposes to operate between districts and/or into territory already served by an existing certificate holder.

The only evidence that has been offered of an existing certificate that might bar the Commission from granting any part of the applications at issue in this proceeding is the certificate that was transferred to Argosy L.P. in December of 1995 and which included authority for service between Seattle and Kirkland. See Tr. 892-93 Blackman.

C. What is the significance, to this proceeding, of Seattle Harbor Tours' existing Seattle/Kirkland certificate?

Argosy L.P.'s existing certificate to provide service between Seattle and Kirkland does not bar the Commission from granting the authority, or some portion of the authority, that Dutchman seeks between Seattle and Kirkland.

There was a good deal of confusion surrounding this certificate at hearing. Staff's review of the Commission's records indicates the following: A certificate that included new authority for service between Kirkland and Seattle was issued to Gray Line Water Sightseeing, Inc. on May 31, 1989. Appendix A. The authority to provide service between Kirkland and Seattle that was included in this certificate was transferred, with the requisite Commission approval, to TMT Corporation and John C. Blackman d/b/a Seattle Harbor Tours Limited Partnership on May 17, 1990. Appendix A.

Effective July 25, 1993, the legislature amended the law concerning boat certificates to include the current requirement that service must be initiated within five years of obtaining the certificate. See Washington Laws, 1993 Ch. 427, Sec. 2.

Language added to RCW 81.84.010 in 1993 provides the following with respect to certificates obtained prior to the 1993 effective date of the act:

(2) The holder of a certificate of public convenience and necessity granted under this chapter must initiate service within five years of obtaining the certificate. The certificate holder shall report to the commission every six months after the certificate is granted on

the progress of the certificated route. The reports shall include, but not be limited to, the progress of environmental impact, parking, local government land use, docking, and financing considerations. However, if service has not been initiated within five years of obtaining the certificate, the commission may extend the certificate on a twelve-month basis for up to three years if the six-month progress reports indicate there is significant advancement toward initiating service.

(3) The commission shall review certificates in existence as of July 25, 1993, where service is not being provided on all or any portion of the route or routes certificated. Based on progress reports required under subsection (2) of this section, the commission may grant an extension beyond that provided in subsection (2) of this section. Such additional extension may not exceed a total of two years.

The statute makes no distinction between those who obtained a certificate before 1993 and those who obtained one after 1993 for purposes of the new requirement to initiate service within five years and to file six-month progress reports during that time. See WAC 480-51-120

(Commission rule concerning failure to initiate service, extensions of time to initiate service, and progress reports). All certificate holders were required to file the progress reports. The only difference in treatment is that if an entity had obtained its certificate prior to 1993, and had failed to initiate service within five years of having obtained that certificate, it was eligible not only for extensions of up to three years as provided for in section (2), but also for additional extensions totaling two years, as provided in section (3).

TMT Corporation and John C. Blackman d/b/a Seattle Harbor Tours L.P., which obtained the certificate to provide service between Kirkland and Seattle in 1990, apparently never sought an extension at the five year anniversary of having obtained the certificate from Gray Line.

Possibly in error, the Commission granted a transfer of the application from TMT and John Blackman to Argosy L.P. on December 13, 1995, without raising the question as to whether the period for requesting an extension had expired. Appendix A. Arguably, under the requirement that a certificate holder must either initiate service within five years of obtaining a certificate or

seek an extension, the Seattle-Kirkland authority had already expired by May of 1995.

Even if one does not reach the conclusion that Argosy had missed its chance by 1995 to seek an extension of time in which to initiate service under its certificate, the most favorable alternative view of the status of this certificate—from Argosy’s point of view—is that the 1995 transfer started the five-year clock of RCW 81.84.010 running anew. But this theory also fails to get Argosy, and its partner Seattle Harbor Tours, to their desired result.

Mr. John Blackman, on behalf of Argosy and Seattle Harbor Tours, testified that neither Argosy L.P. nor Seattle Harbor Tours has initiated service pursuant to the certificate. Tr. 891, 894 Blackman. Neither has Argosy filed the requisite progress reports detailing steps made toward initiation of service for at least the last three or four years. Tr. 927 Stipulation. Even under the theory most favorable to Argosy, the five year period for initiation of service expired in December 2000. Tr. 928. Argosy has failed to apply for an extension of the five year time period for initiation of service. Tr. 928 Stipulation. Even if the Commission were to conclude it could consider an untimely request for an extension of this certificate from Argosy, it would have no basis on which to grant that extension because of Argosy’s failure to file progress reports as required by statute and Commission rule.

While technically the authority has not been cancelled pursuant to the procedure set out in RCW 81.84.060, at least one of the grounds for cancellation has been established in this case—namely, “[f]ailure 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.” RCW 81.84.060(1). However, cancellation of Argosy’s certificate is not before the Commission in this proceeding

because there has been no complaint by an interested party or by the Commission on its own motion as required by the statute. RCW 81.84.060.

Fortunately, the Commission need not wait for Argosy's expired authority to be cancelled pursuant to RCW 81.84.060 in order to grant an application to operate "between districts and/or into any territory . . . already served by an existing certificate holder." RCW 81.84.020 provides that:

the commission shall not have power to grant a certificate to operate between districts and/or into any territory prohibited by RCW 47.60.120 or already served by an existing certificate holder, *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 certificate or tariffs after the time period allowed to initiate service has elapsed. . .*

[Emphasis supplied.] Argosy admits that it failed to provide the service described in its certificate. It is apparent from the Commission records, attached as Appendix A, that the time period allowed to initiate service has elapsed. As such, the Commission need not consider Argosy's certificate an impediment to granting another carrier a certificate to operate between Kirkland and Seattle.

D. Should Seattle Harbor Tours be permitted to amend its application to include service between Kirkland and the University of Washington?

At hearing, Seattle Harbor Tours' counsel had the following exchange with ALJ Moss:

MR. KOPTA:

* * *

I think it is our intent that to the extent the Commission believes that the certificate has expired and that no further authority has been granted to Argosy for the route between Kirkland and Seattle, that we would as part of this proceeding, as part of this application, be requesting authority from Kirkland to the University of Washington, and we will be narrowing it from Kirkland to Seattle to Kirkland to the University of Washington.

JUDGE MOSS: As a new authority?

MR. KOPTA: As a new authority, I think, because, as Mr. Blackman testified, it's more convenient to have all of the authority held in Seattle Harbor Tours.

* * *

Tr. 924. While it does not appear it was ever phrased as such, this could be regarded as a motion by Seattle Harbor Tours to amend its application to include a request for new authority to provide ferry service between Kirkland and the University of Washington.

Consistent with WAC 480-09-425(4) and (5),¹ the Commission has previously held that it will allow amendment to an application at any time, provided the amendment has no adverse affect on the interests of persons who are not parties to the proceeding. Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (1990). However, as a general rule, an amendment that expands the scope of the authority sought must be re-published in the Commission docket. Id.

While allowing an amendment to include additional authority not included in the original application is ordinarily not done without re-publishing the application because of the prejudicial effect on non-parties, there may be cause for an exception in this case. Potentially interested parties have had notice that an applicant—albeit Dutchman Marine, not Seattle Harbor Tours—is seeking authority for commercial ferry service between Seattle and Kirkland. Presumably, if anyone had an interest in developing the route themselves or in opposing the route on some other ground, they would have come forth as a protestant to Dutchman's application, which is now

1 (4) Liberal construction. The commission will construe pleadings liberally with a view to effect justice among the parties. The commission will, at every stage of any proceeding, disregard errors or defects in the pleadings or proceeding that do not affect the substantial rights of the parties.

(5) Amendments. The commission may allow amendments to the pleadings or other relevant documents at any time upon such terms as may be lawful and just.

consolidated with that of Seattle Harbor Tours.

It appears that all parties put on essentially the same case and engaged in the same cross-examination that they would have had it been clear from the outset that Seattle Harbor Tours was seeking new authority between the University of Washington and Kirkland.

E. Does the “prohibited by RCW 47.60.120” provision of RCW 81.84.020 bar the Commission from granting the authority sought by either of the Applicants?

Staff anticipates that the Applicants will detail the extensive evidence offered as proof that the public interest will not be harmed by the waiver of the RCW 47.60.120 ten-mile restriction. Staff anticipates that the Commission will have ample basis to conclude that the ten-mile restriction should be waived.

F. As required by RCW 81.84.010, do the public convenience and necessity require the service, or some part of the service, that the Applicants are seeking the authority to provide? If so, does the public convenience and necessity require that terms and conditions be imposed on the exercise of the privilege that is sought?

An applicant must demonstrate that the public convenience and necessity require the proposed service. RCW 81.84.010(1). The public convenience and necessity generally is demonstrated by the testimony of witnesses who would use the service if available. SBC Order No. 563, In re Seattle Ferry Service, App. No. B-78811 (2000).

Staff would offer two general observations about the evidence offered by the Applicants on public convenience and necessity. First, none of it was more favorable to one of the two companies than another. Second, the testimony offered on behalf of both witnesses tended to support the view that the University of Washington area of Seattle and the downtown area of Seattle are not substantially overlapping markets.

G. Are the Applicants fit to provide the proposed service?

Before the Commission may issue a certificate of public convenience and necessity, an applicant must show that it has the financial resources to operate the service for 12 months.

RCW 81.84.020(2). Staff anticipates that the Applicants will recount the considerable evidence presented through documentary exhibits and testimony as to the financial wherewithal of the respective applicants.

Because of the phased approach that both applicants presented for initiating service on the various routes they propose, Staff urges the Commission to interpret this requirement as applying to *each route* proposed by the Applicants. Such an approach would be consistent with the progress report requirement imposed by WAC 480-51-120(a) and (b).² Taking this approach, the Commission is free to conclude that it would be premature, for example, to grant Dutchman the Seattle-Kenmore and Seattle-Bellevue routes it seeks because of doubts about the company's ability to raise sufficient capital through revenues generated by the Seattle-Kirkland and Seattle-Renton routes it plans to develop first.

Similarly, the Commission may conclude that neither company is likely to obtain the land use regulatory changes to which the witnesses from the City of Bellevue testified and that the evidence is too speculative, even under the scheme provided in RCW 81.84.010, to conclude that service could be initiated between Seattle and Bellevue within five, or even eight years.

2 (a) If a certificate holder has not initiated service to all or any portion of the route or routes granted in its certificate, the certificate holder must, during the first five years after obtaining the certificate, and during each twelve-month extension period granted by the commission, file written progress reports with the commission every six months after the certificate is granted.

(b) For purposes of these rules the following definitions shall apply:

(i) The term "portion of a route or routes" means service to any named point or points along a route, and service between two or more points named in a certificated commercial ferry certificate; and

(ii) The term "initiating service" means providing regular, ongoing service to all points and between all points granted in a certificated commercial ferry certificate.

It would not be inappropriate for the Commission to be more cautious about granting authority for particular routes when it is clear that another, at least equally qualified applicant has a plan, and an equally good chance of successfully developing the same route. The Commission may decide that it does not want to create a barrier to that company obtaining authority to serve the same route in the future.

H. Are the two applications mutually exclusive? If they are not, should the Commission grant both applications? If they are, should the Commission: (1) grant one application and deny the other, (2) grant both, but only in part or only with restrictions, so as to prevent the overlap?

WAC 480-51-040 allows the Commission to consolidate overlapping pending applications for commercial ferry service pursuant to WAC 480-09-610, for joint consideration. The reason for this rule is the so-called “Ashbacker doctrine.” In Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), the Court held that when two bona fide applications for operating authority are mutually exclusive, the grant of one without a hearing of both deprives the loser of the opportunity that the legislative body chose to give. However, the key to whether the Commission must employ the kind of comparative analysis of claims that is required by Ashbacker is “mutual exclusivity.” When the evidence will not support a finding that the territory sought can support only a single carrier, the issues of Ashbacker are not applicable. Order M. V. No. 136191, In re Pony Express Courier Corporation of America, d/b/a Pony Express Courier, App. No. 19233 (1987).

It is worthwhile to reiterate here the ostensibly overlapping ferry routes that are sought by the three Applicants.

Dutchman seeks to operate in the following territory:

Passenger ferry service across Lake Washington between Bellevue and Seattle, Seattle and Kirkland, Renton and Seattle, and Kenmore and Seattle.

Ex. 101.

Seattle Harbor Tours Limited Partnership (Seattle Harbor Tours) seeks to operate in the territory described as follows:

PASSENGER SERVICE between Kenmore, Bellevue, Renton and the University of Washington.

Ex. 104. It remains to be determined whether Seattle Harbor Tours should be permitted to amend this authority to include Kirkland.

Seattle Ferry Service LLC (Seattle Ferry Service) has applied for authority to serve the route described as follows:

PASSENGER AND FREIGHT SERVICE between Renton (Port Quendall) and Seattle (South Lake Union, as bounded on the east by a line projected northwesterly from the northeastern edge of Waterway No. 8 and on the west by a line projected eastward from the northern edge of the right of way for Comstock Street.

Ex. 105. As noted above Dutchman and Seattle Harbor Tours have agreed to restrict their applications for authority to Renton against the Port Quendall terminus sought by Seattle Ferry service.

The Commission has held that while RCW 81.84.020 seems to contemplate an exclusive grant of authority to serve a territory, the Commission is not precluded from granting more than one contemporaneous application for overlapping authority, and must base a determination of mutual exclusivity on the particular facts of each case. In a particular case, two services in the same territory may be compatible or even complementary, rather than mutually exclusive.

Order S.B.C. No. 523, In re San Juan Island Shuttle Express, Inc., App. No. B-78433 (1996).

Two competing applications for authority under chapter 81.84 RCW may be granted if the

Commission finds that the nature of the service, the level of need, and the applicants' ability to fully meet the public's needs are consistent with the grant of authority to more than one carrier. Order S.B.C. No. 468, In re Belairco. Inc., App. No. B-313 (May 1990). This view is supported by the language of RCW 81.84.020, which provides in relevant part that "the commission shall not have power to grant a certificate to operate between districts and/or into any territory . . . already served by an existing certificate holder . . ." Because there is no existing property interest at stake in contemporaneous applications for overlapping authority, as opposed to an application that overlaps an existing authority, there is a good reason for this distinction.

While the Washington Supreme Court decision in State ex. rel. Puget Sound Navigation Co v. Dept. of Public Works, 165 Wash. 444, 6 P.2d 55 (1931), concerned a determination of whether an application for new authority overlapped territory already served by an existing certificate holder, the case is instructive of the kind of evidence that is relevant to the question of whether there is an overlap, as well as whether two proposed routes are "mutually exclusive":

The question, what is territory already served, is a question of fact. Before the fact can be determined, it requires consideration of economic conditions, oftentimes involving expert testimony; a consideration of the kinds, means and methods of travel; the question of population warranting additional facilities of transportation, or the possibilities of the additional means of transportation increasing the population . . .

Id. at 425. The court upheld a Department of Public Works grant of new authority between Ballard (Seattle) and Port Ludlow despite the fact that an existing certificate holder served a general territory including Seattle and vicinity. Id.

No party to this case offered evidence that it is inappropriate to at least consider the different cities on the east side of Lake Washington as separate markets. Because of the evidence from both applicants suggesting that a west side terminus at the University of Washington would

largely serve a different market than a Leschi terminus, the Commission could permissibly conclude that authority sought by Dutchman for its proposed Kirkland and Renton routes should be restricted to Leschi, or at least be conditioned to exclude the University of Washington. This could allow the Commission to grant at least part of the authority sought by both applicants while preventing a substantial overlap of territories. The Commission has the authority, “to issue [the certificate sought] for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as in its judgment the public convenience and necessity may require.” RCW 81.84.020(1).

One condition Staff would strongly urge the Commission to impose on any certificate, although it is arguably redundant with the statutory requirement of RCW 81.84.020(2) and WAC 480-51-120, is filing of six-month progress reports, with particular emphasis in this case on the progress toward securing of docking facilities. Neither applicant indicates service is likely to be initiated within six months and the progress report requirement is therefore clearly applicable.

I. Seattle Ferry Service LLC should be granted the authority that it has sought through its uncontested application in this consolidated proceeding.

On June 11, 2001 the parties filed a Settlement Agreement to resolve Seattle Ferry Service’s interest in these consolidated cases. Under the Settlement Agreement, Dutchman and Seattle Harbor Tours agree to withdraw their respective protests against the application of Seattle Ferry Service. They also agree to amend their own applications so as not to include the specific termini sought by Seattle Ferry Service. In return, Seattle Ferry Service agrees to withdraw its “intervention and objections” to the applications of Dutchman and Seattle Harbor Tours. The practical effect is that Dutchman’s application to operate between Seattle and Renton and Seattle Harbor Tours’ application to operate between the University of Washington and Renton are

amended to exclude the area within Renton known as Port Quendall.³

At hearing, Seattle Ferry Service offered uncontested evidence that the public convenience and necessity requires its proposed service, that it is fit to provide the service it proposes, and that a waiver of the ten-mile restriction of RCW 47.60.120 would not be detrimental to the public interest.

Seattle Ferry Service's application should be granted and the two remaining applicants should be granted leave to amend their applications to reflect the restriction provided for in the settlement agreement.

DATED this 20th day of July, 2001.

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³ There really is no need to amend either Dutchman or Seattle Harbor Tours' proposed western termini against Seattle Ferry Service's proposed South Lake Union terminus. Seattle Harbor Tours has proposed a western terminus of the University of Washington—an area which does not extend to South Lake Union. Similarly Dutchman has sought only to serve "across Lake Washington"—a description that excludes service across Lake Union.