

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

|                                  |   |                          |
|----------------------------------|---|--------------------------|
| In the Matter of the Application | ) |                          |
| No. B-79276                      | ) | DOCKET NO. TS-040794     |
|                                  | ) |                          |
| KITSAP FERRY COMPANY, LLC        | ) | ORDER NO. 02             |
| d/b/a KITSAP FERRY CO            | ) |                          |
|                                  | ) | DENYING PROTEST TO       |
| For a Temporary Certificate of   | ) | TEMPORARY CERTIFICATE OF |
| Public Convenience and Necessity | ) | PUBLIC CONVENIENCE AND   |
| to Operate Commercial Ferry      | ) | NECESSITY                |
| Service                          | ) |                          |

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1     *SYNOPSIS: The Commission denies the Inlandboatmen’s Union of the Pacific’s Protest against the temporary certificate issued to Kitsap Ferry Company by prior Commission order. The Commission finds and concludes that there is an urgent and immediate need for passenger-only ferry service between Bremerton and Seattle and that granting a temporary certificate authorizing Kitsap Ferry Company to provide such service is in the public interest.*

**SUMMARY**

2     **PROCEEDINGS:** On April 29, 2004, Kitsap Ferry Company, LLC, d/b/a Kitsap Ferry Co. (Kitsap Ferry or Applicant) filed an application (No. B-079276) for a temporary certificate of authority to provide passenger-only ferry service between Bremerton and Seattle. On May 6, 2004, the Commission entered Order No. 01 – Final Order Granting Temporary Certificate of Public Convenience and Necessity and provided notice of the temporary certificate as required by WAC 480-51-060(5). On May 21, 2004, the Inlandboatmen’s Union of the Pacific (IBU) filed a protest against the application pursuant to WAC 480-51-060(5).

3     The Commission exercised its discretion under WAC 480-51-060(6) and conducted a brief adjudicative *proceeding* on the protest. The Commission held a

prehearing conference on June 25, 2004, and set the matter for hearing on June 28, 2004. Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, Commissioner Patrick J. Oshie, and Administrative Law Judge Dennis J. Moss presided at hearing.

4 **PARTY REPRESENTATIVES:** Matthew Crane, Bauer Moynihan & Johnson LLP, Seattle, Washington appeared for Kitsap Ferry. Dmitri Iglitzin and Judith Krebs, Schwerin Campbell Barnard LLP, Seattle, Washington, represent the IBU. Lisa Watson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).<sup>1</sup>

5 **COMMISSION DETERMINATION:** The Commission, finding the criteria for issuance of a temporary certificate under RCW 81.84.070 and WAC 480-51-060 satisfied, and finding IBU's protest not supported by substantial competent evidence, determines that IBU's protest should be denied. The Commission determines that Kitsap Ferry's temporary certificate, issued on May 6, 2004, remains valid pending determination of the company's parallel application for permanent authority. Kitsap Ferry has all necessary authority to commence service.

## MEMORANDUM

### **I. Governing Law**

6 RCW 81.84.070 provides in relevant part that:

The commission may, with or without a hearing, issue temporary certificates to operate under this chapter, but only after it finds that the issuance of the temporary certificate is necessary due to an

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<sup>1</sup> In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "ex parte wall" separating the Commissioners, the presiding ALJ, and the Commissioners' policy and accounting advisors from all parties, including Staff. RCW 34.05.455.

immediate and urgent need and is otherwise consistent with the public interest. The certificate may be issued for a period of up to one hundred eighty days.

7 WAC 480-51-060 provides in relevant part that:

1) The commission may issue temporary certificates for authority to provide service for a period not to exceed one hundred eighty days.

\* \* \*

(3) The commission shall only issue temporary certificates upon finding that the issuance is due to an urgent and immediate need and is otherwise consistent with the public interest. In determining whether to grant the requested temporary certificate, the commission will consider evidence of the following factors:

(a) An immediate and urgent need for the requested service;

(b) Any available service capable of meeting the need;

(c) The fitness of the applicant; and

(d) Any other circumstance indicating that a grant of temporary authority is consistent with the public interest.

(4) An application for a temporary certificate shall be completed legibly on a form furnished by the commission, giving all information requested and accompanied by:

(a) The application fee;

(b) A copy of a certificate or letter from the United States Coast Guard certifying that any vessel to be used under that temporary certificate has been inspected by the United States Coast Guard and is safe and seaworthy for the intended operation;

(c) Evidence of proper insurance as required by WAC [480-51-070](#);

(d) Statements from potential customers, riders, shippers or interested parties demonstrating that there is an immediate and urgent need for the requested service.

(5) The commission shall send a notice of each temporary certificate granted, with a description of the temporary certificate's terms, to all persons presently certificated to provide service; all present applicants for certificates to provide service; the department of transportation; affected cities and counties; and any other person who has requested, in writing, to receive such notices. Interested persons may file a protest with the commission within twenty days after service of the notice. The protest shall state the specific grounds for opposing the application and contain a statement of the interest of the protestant in the proceeding.

(6) The commission may grant or deny the protest without hearing. The commission may, in its discretion, on the application of a party, or on its own motion, order a brief adjudicative proceeding on the protest. WAC [480-07-610](#) governs applications for and procedures in brief adjudicative proceedings.

8 During the 2003 legislative session the Legislature amended chapter 81.84 RCW and chapter 47.60 RCW, both of which concern ferry operations in Washington.<sup>2</sup> In Section 1 of Chapter 373, 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

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<sup>2</sup> Chapter 373, Laws of 2003.

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.

- 9 The Legislature provided an exemption from the so-called ten-mile rule for passenger-only ferries.<sup>3</sup> In addition, the Legislature required the Department of Transportation to allow private operators of passenger-only ferries access to its ferry dock terminals, docks and pier space at fair market rates “taking into account the public benefit derived from the passenger-only ferry service.”<sup>4</sup>

## II. Background and Procedural History

- 10 From the mid-1980’s through September 2003, the Washington State Ferries (WSF) division of the Department of Transportation operated both car ferry service and passenger-only ferry service between Bremerton and Seattle. Both services were successful. During all of 2002, for example, the WSF car ferries transported 448,682 vehicle passengers and 1,048,082 foot passengers.<sup>5</sup> During the same period, the WSF passenger-only ferries transported 681,830 people between Bremerton and Seattle. During 2003, the corresponding figures were 486,203 vehicle passengers and 1,040,831 foot passengers on the car ferries through December, and 443,756 passengers on the passenger-only ferries through September, when WSF ceased providing passenger-only service.

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<sup>3</sup> RCW 47.60.120(5). This statute prohibits commercial ferry operations within ten miles of a route operated by the Washington state ferry system, absent a waiver from the Commission.

<sup>4</sup> RCW 47.64.090(2).

<sup>5</sup> Exhibit No. 4, exhibit “G.” A “passenger” means one passenger-ride. Thus, on passenger making a round trip counts as two passengers.

- 11      WSF terminated passenger-only service between Bremerton and Seattle not because there was a lack of demand for such service, but because of significant reductions in public funds available to support the WSF that followed from Initiative 695. Mr. Greg Dronkert<sup>6</sup> testified for Kitsap Ferry that he believes the termination of WSF's passenger-only service on the passage between Bremerton and Seattle has resulted in significant unmet need for such service. Mr. Richard M. Hayes, who is the Executive Director of Kitsap Transit, testified to similar effect and related his agency's efforts as the local Public Transportation and Benefit Area (PTBA), to initiate publicly funded passenger-only service to meet this need. According to Mr. Hayes, the PTBA efforts failed due to lack of county-wide voter support for increased taxes to subsidize a service that would benefit primarily residents in the more densely populated areas (*e.g.*, Bremerton).
- 12      Mr. Dronkert testified that after WSF terminated its service, and the PTBA initiative failed, a privately owned and operated service appeared to be viable. Accordingly, on April 29, 2004, Kitsap Ferry filed its application B-79276 requesting temporary authority to provide commercial ferry service between Bremerton and Seattle.<sup>7</sup> Kitsap Transit, as the local PTBA, supports Kitsap Ferry's application.
- 13      Kitsap Ferry's application states that the company will provide the proposed service using the "Spirit of Adventure," a 250-passenger, diesel powered, catamaran vessel leased from TMT Corporation. As required under WAC 480-51-060, the application included a copy of a certificate from the United States Coast Guard certifying that the USCG had inspected the vessel and found to be safe and seaworthy for the intended operation. The application was otherwise complete, including the following:

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<sup>6</sup> Mr. Dronkert is President of Pacific Marine Group, Inc., which has a 100 percent ownership interest in Kitsap Ferry.

<sup>7</sup> Exhibit No. 1. We note that Kitsap Ferry filed for permanent authority on June 3, 2004. Kitsap Ferry's application for permanent authority, B079285, is pending in Docket No. TS-041007.

- Vessel's certificate of documentation issued September 23, 2003, that shows TMT Corp. as the current owner and managing owner of the "Spirit of Adventure."
- Agreement between Kitsap Ferry Company, LLC, and Argosy Cruises for dock space along the central Seattle waterfront to be used for loading and unloading passengers.
- Certificate of insurance covering the "Spirit of Adventure" in the required limits.
- Tariff and time schedule that describes the proposed service and the rates and charges for that service.
- Applicant's statement that there is an urgent and immediate need for service between Bremerton and Seattle, including the following points:
  - The Washington State Ferries (WSF) carried 840,079 passengers on its passenger-only ferry service between Bremerton and Seattle in 2001.
  - Washington State Ferries discontinued passenger-only ferry service between Bremerton and Seattle in September of 2003.
  - Kitsap Transit failed in its attempt to re-establish the service under the authority of the Public Transportation Benefit Area.
  - The applicant has reached an agreement with Kitsap Transit to provide passenger-only ferry.
- Supporting statements from:
  - Kitsap County Board of Commissioners, 614 Division Street, MS-4, Port Orchard, WA.

- Cary Bozeman, Mayor of the city of Bremerton Mayor, 239 4<sup>th</sup> Street, Bremerton, WA.
- Kim Abel, Mayor of the city of Port Orchard, 216 Prospect Street, Port Orchard, WA.
- Silvia Klatman, Executive Director, Bremerton Area Chamber of Commerce, 301 Pacific, Bremerton, WA.
- Elizabeth A. Gilje, President KPS Health Plans

14 These letters describe passenger-only ferry service between Bremerton and Seattle as “a key element” in the state’s transportation network, and a “vital link” between Kitsap and King Counties. The letters relate that current WSF service on this route does not fully meet demand in terms of frequency, transit time, and connection opportunities. The letters state that there is an urgent and immediate need for this service. Mayor Kim Abel, states that the “citizens of Port Orchard rely on the ferry for work, education, and entertainment opportunities.” Silvia Klatman, Executive Director, Bremerton Area Chamber of Commerce states that:

For many years, the Chamber has been on record as a strong proponent of passenger-only ferry service. It is key to Bremerton’s revitalization efforts and an important link for commuters, tourists and commerce.

The service is not simply a convenience—it is a necessity for our community. Kitsap County has about 90,000 employable people but roughly only 70,000 jobs. While many organizations and businesses work hard to bring more employment opportunities to the area, there remains a large gap between employees and jobs. Until that gap is eliminated, our friends and neighbors must have reliable and timely ferry service so they can support their families. Passenger-only ferry service is essential because it enables commuters to spend less time away from their families.

Kitsap Ferry Company’s services are also essential for commerce . . . Passenger-only ferry service provides an efficient means for businesspeople to meet with clients and suppliers while saving an



hour of valuable travel time. The time saved enhances productivity and adds to the bottom line of businesses.

Passenger-only ferry service is a key component of revitalization, quality of life and economic development.

- 15 State Representative Phil Rockefeller and Mr. Fred Chang as Chair of the Bremerton Ferry Advisory Committee filed additional letters of support directly with the Commission. Speaking from his vantage point as Vice-Chair of the House Transportation Committee, Representative Rockefeller states with respect to passenger-only ferry service between Bremerton and Seattle:

As you know, this vital service was provided for several years by Washington State Ferries (WSF). In the face of severe budget cuts, WSF eliminated the passenger-only service, maintaining instead only auto ferries on the Bremerton/Seattle run. This limited service does not appear to meet the demand of commuters for increased trip frequency and shorter transit time.

Under legislative authority granted during 2003, Kitsap Transit, acting as the local Public Transportation and Benefit Area, failed in its attempt to reestablish this service. Kitsap Ferry Company has subsequently reached agreement with Kitsap Transit, and has Transit's support to apply to the [WUTC] for a permit to serve this route on an ongoing commercial basis.

With Kitsap Ferry Company's permit application, a new opportunity has been created to reintroduce the much needed transportation system. This service will benefit both daily commuters and visitors, and help stimulate economic activity throughout our region.

- 16 Considering Kitsap Ferry's full and complete application in light of this showing of an immediate and urgent need for the proposed service, the Commission entered its Order No. 01—Final Order Granting Temporary Certificate of Public

Convenience and Necessity on May 6, 2004, and provided notice of the temporary certificate as required by WAC 480-51-060(5).

- 17 On May 21, 2004, the Inlandboatmen’s Union of the Pacific (IBU) filed a protest against the application pursuant to WAC 480-51-060(5). IBU states its interest in this matter as follows:

The Inlandboatmen’s Union of the Pacific (“IBU”) represents deckhands, ticket-takers, ticket-sellers and terminal personnel working for the Washington State Ferries (“WSF”). The IBU also represents snack bar and concessionaire workers who are employed by private companies doing business on the Washington State Ferries. Thus, the IBU is a “Ferry employee organization” under RCW 47.46.011(6) and a labor organization under 29 U.S.C. § 152(5).<sup>8</sup>

By way of protest, IBU asserts that Kitsap Ferry has not shown an urgent and immediate need for passenger-only ferry service between Bremerton and Seattle. In addition, IBU argues that our grant of a temporary certificate is “otherwise inconsistent with the public interest.”<sup>9</sup> IBU asks the Commission “to reverse its decision regarding its issuance of a temporary certificate.”<sup>10</sup>

- 18 The Commission exercised its discretion to conduct a brief adjudicative proceeding to consider IBU’s Protest and reconsider its decision to grant Kitsap Ferry a temporary certificate. The Commission conducted a prehearing conference on June 25, 2004. The parties agreed to the limited nature of the inquiry (*i.e.*, review of the Commission’s decision to grant temporary authority), and to the need for a speedy decision. Counsel for IBU proposed to make a statement and to present one witness whose identity would be disclosed as soon as IBU determined whom that witness should be. Kitsap Ferry proposed to

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<sup>8</sup> IBU Protest at 2.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.*

present two witnesses, as did Commission Staff. To promote a speedy decision, the presiding officer asked whether the parties would consent to a shortened period of seven days following the entry of an initial order to file a petition for administrative review, in lieu of the statutory twenty-one days for seeking review of an initial order. IBU would not consent to this proposal. In light of the parties' desire for a speedy resolution, the Commissioners decided to preside at the hearing, thus allowing for entry of a final order and avoiding the delay that would be required if any party wished to seek administrative review of an initial order.

19 The Commission conducted proceedings to hear testimony and receive documentary evidence on June 28, 2004. Applicant presented two witnesses: Mr. Greg Dronkert, President of Pacific Marine Group, Inc., which has a 100 percent ownership interest in Kitsap Ferry; and Mr. Richard M. Hayes, who is the Executive Director of Kitsap Transit. The Commission determined that it did not need to hear from Staff's witnesses, both of whom had submitted written statements that were made part of the record.<sup>11</sup> Protestant IBU did not present a witness.

20 The Commission received six exhibits, some including multiple documents, as reflected in Appendix A to this Order. In addition, the Commission has before it the parties' respective pleadings and written argument.<sup>12</sup>

21 The parties were afforded an opportunity for oral argument.

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<sup>11</sup> Exhibit No. 2 (Declaration of Eugene K. Eckhardt); Exhibit No. 3 (Declaration of Bonnie Allen).

<sup>12</sup> These include IBU's Protest, Kitsap Ferry's Answer to Protest, and Staff's Written Statement on Behalf of Commission Staff.

### III. Discussion and Decisions

- 22 As discussed above, the Commission concluded, on the basis of Kitsap Ferry's application and supporting documentation, that it should grant Kitsap Ferry a temporary certificate of public convenience and necessity to provide passenger-only ferry service on the Bremerton/Seattle route. IBU challenges that determination.
- 23 IBU focused its argument at hearing on the issue of urgent and immediate need, asserting that Kitsap Ferry failed to make an adequate showing that its services are urgently and immediately needed within the meaning of RCW 81.84.070 and WAC 48051-060. Although in its Protest IBU recognizes Kitsap Ferry's presentation in its Application of at least some evidence showing urgent and immediate need, IBU made no attempt to rebut that evidence. Thus, we have as un rebutted evidence the informed statement by Applicant that there is an urgent and immediate need for the proposed service, and similar statements of need by various public officials and organizations.
- 24 At hearing, Kitsap Ferry's witness, Mr. Dronkert, testified, on the bases of survey responses from more than 500 respondents, conversations he has had with public officials and private citizens in the affected communities, and his extensive experience in the industry, that there is "pent-up demand" for passenger-only ferry service from a segment of the traveling public that is not being served by WSF or anyone else today. The need is immediate, Mr. Dronkert testified, because "people are ready to use it right now." Mr. Dronkert and Mr. Hayes' testimonies show that commuters' urgently need a service that is more frequent, quicker, and timed to make convenient connections with other public transit (*e.g.*, bus schedules) than is the current service provided by WSF.
- 25 Mr. Dronkert also testified that the need for passenger-only service is urgent and immediate because the longer such service is unavailable the more entrenched former riders will become in alternative means of transit such as commuting by

automobile, potentially undermining the viability of the service for others who would continue to desire it. Moreover, summer is the peak season for ferries and so delay means lost business opportunity.

- 26 IBU presented no evidence that the WSF auto ferries fully satisfy the transit needs of those who wish to travel between Bremerton and Seattle by ferry. Mr. Dronkert and Mr. Hayes, on the other hand, testified at length concerning the unmet need for passenger-only ferry service over this route. Letters of support from public officials and private citizens also show that there is an unmet need. Finally, there is the history of the WSF's successful operation of passenger-only ferries on this route for many years, demonstrated by the ridership data in Exhibit No. 4 and other evidence.
- 27 IBU presented no evidence to show that Kitsap Ferry is not fit to provide service. By contrast, Mr. Dronkert gave testimony both on direct and on cross-examination that shows Kitsap Ferry is both generally and financially fit within the meaning of WAC 480-51-060. Mr. Dronkert presents the picture of an experienced and financially secure applicant that is ready, willing, and able to initiate service.
- 28 WSF has reviewed Kitsap Ferry's application and has no objection.<sup>13</sup> Although Kitsap Ferry may compete with WSF to some degree, Kitsap Ferry's service is planned more as a complement to WSF service than as a competitor to it. Significantly, in this regard, WSF simultaneously operated auto ferries and passenger-only ferries over the Bremerton/Seattle route for many years with considerable success. Kitsap Ferry's schedule is designed to "fill in the gaps" in the WSF's schedule. In addition, Kitsap Ferry's service will offer more frequent service, a quicker transit (*i.e.*, 40 minutes passage compared to 60 minutes on the WSF auto ferries), and convenient timing for passengers to make connections with other forms of public transit at both ends of the route. For these reasons,

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<sup>13</sup> Exhibit No. 6 (Letter from Stan Kuntz, Chief Financial Officer, WSF, dated June 28, 2004 (no objection to application)).

IBU's concern that Kitsap Ferry "will skim the cream off WSF's business" seems, at best, exaggerated. The assertion is, in any event, speculative and unsupported by any study or other evidence that might provide support for the expressed concern.

29 In summary, IBU offers no concrete evidence in support of its protest. By contrast, we find on the evidence presented that Applicant meets all the requirements and criteria specified in WAC 480-51-060. We conclude that our issuance of a temporary certificate was, and is, appropriate. IBU's Protest should be denied.

#### **FINDINGS OF FACT**

30 Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.

31 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including electric companies.

32 (2) On April 29, 2004, Kitsap Ferry Company, LLC, d/b/a Kitsap Ferry Co. filed an application (No. B-079276) for a temporary certificate of authority to provide passenger-only ferry service between Bremerton and Seattle.

33 (3) There is an immediate and urgent need for the proposed service and the requested temporary certificate is otherwise consistent with the public interest.

- 34 (4) There is no available service capable of fully meeting the need for  
passenger-only ferry service over the proposed route.
- 35 (5) The Applicant is generally and financially fit to initiate service under a  
temporary certificate.
- 36 (6) Protestant has failed to present substantial competent evidence to support  
the assertions set forth in its Protest.

### CONCLUSIONS OF LAW

37 Having discussed above in detail all matters material to our decision, and having  
stated general findings and conclusions, the Commission now makes the  
following summary conclusions of law. Those portions of the preceding detailed  
discussion that state conclusions pertaining to the ultimate decisions of the  
Commission are incorporated by this reference.

- 38 (1) The Washington Utilities and Transportation Commission has jurisdiction  
over the subject matter of, and parties to, these proceedings. *Title 81 RCW.*
- 39 (2) The issuance of a temporary certificate to Kitsap Ferry, in Application B-  
79276, is necessary due to an immediate and urgent need and is otherwise  
consistent with the public interest. *RCW 81.84.070.*
- 40 (3) IBU's Protest should be denied. *WAC 480-51-060(6).*
- 41 (4) The Commission should retain jurisdiction to effectuate the terms of this  
Order. *Title 81 RCW.*

ORDER

THE COMMISSION ORDERS THAT:

- 42 (1) IBU's Protest is DENIED.
- 43 (2) Kitsap Ferry's temporary certificate, issued by entry of Commission Order No. 01 in this proceeding on May 6, 2004, was properly issued, and remains valid.

DATED at Olympia, Washington, and effective this 29<sup>th</sup> day of June 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK OSHIE, Commissioner

**NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.**



**APPENDIX A**

| <b>NUMBER</b> | <b>SPONSOR</b> | <b>A/R</b> | <b>DATE</b> | <b>DESCRIPTION</b>  |
|---------------|----------------|------------|-------------|---|
| 1             | Kitsap Ferry   | A          | 6/28/04     | Commercial Ferry Application B-79276 with attachments   |
| 2             | Staff          | A          | 6/28/04     | Declaration of Eugene K. Eckhardt   |
| 3             | Staff          | A          | 6/28/04     | Declaration of Bonnie Allen   |
| 4             | IBU            | A          | 6/28/04     | Composite Exhibit including Declaration of Judith Krebs and exhibits "A" through "H"                    |
| 5             | Staff          | A          | 6/29/04     | Composite Exhibit— Multiple Letters filed with the Commission concerning Application B-79276            |
| 6             | Staff          | A          | 6/28/04     | Letter from Stan Kuntz, Chief Financial Officer, WSF, dated June 28, 2004 (no objection to application) |
|               |                |            |             |   |
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**EXHIBIT LIST**