

**GOVERNMENT OF THE VIRGIN ISLANDS
OF THE UNITED STATES
Public Services Commission**

In re:)
)
Petition by the Virgin Islands Department)
of Justice for Forfeiture and Fines against) **PSC DOCKET NO. 602**
Aquatic Management, LLC d/b/a)
SeaTrans)
_____)

REPORT AND RECOMMENDATION

Procedure

By Complaint dated March 28, 2012, the Virgin Islands Department of Justice ("DOJ") filed with the Virgin Islands Public Services Commission ("PSC") a Petition for Forfeiture and Fines requesting the termination of the exclusive franchise of Aquatic Management, LLC d/b/a V.I. SeaTrans (hereinafter "SeaTrans"). By Order 20/2012 dated April 30, 2012, the PSC in Docket 600 ordered that a hearing examiner be appointed. By Order 22/2012 on June 18, 2012, the undersigned was appointed as Hearing Examiner in this matter, and the current docket number was assigned. On June 22, 2012, the Hearing Examiner issued a Pre-Hearing Order as well as a Notice of Hearing setting the hearing for August 16, 2012.

The hearing began and concluded on August 16, 2012. DOJ was represented by Assistant Attorney General Atiim Abraham, Esq. SeaTrans was represented by Frank Schulterbrandt, Esq. The only witness to testify was Captain Marjorie Smith. The following exhibits were admitted: PSC-1; Government Exhibits 1-8; SeaTrans Exhibits 1-6. The following members of the public appeared at the hearing and delivered opinions on the record: Mr. Tyrone Molyneaux; Ms. Mary Moorhead; Mr. Ermin Fahie; Mr. Denby Ible; Mr. Vertrum Bradley; and Mr. Roger Cull. The parties made oral closing arguments and the record was closed. The parties were given until September 7, 2012 to resolve any outstanding issues

regarding docket-specific fines and penalties. If no agreement was reached, the parties were ordered to file briefs on the issue of docket-specific fines by 5:00 p.m. on October 5, 2012.

FINDINGS OF FACT

In July 2002, Triad Associates, pursuant a contract with the Virgin Islands Port Authority ("VIPA"), produced a feasibility study entitled "An Analysis of the Feasibility of a St. Croix/St. Thomas Ferry Service." The study concluded that franchise ferry service between St. Croix and St. Thomas is feasible if subsidized. The study assumed that the operator would make a firm commitment and actively market and promote the services to residents and tourists, and that the Government and VIPA would seek appropriate funds to assist in the development and operation of the service. The study recommended that a request for proposals be issued for ferry operators, and the Government of the Virgin Islands Department of Public Works ("DPW") apply for federal funds to purchase a ferry. In addition, the study recommended that VIPA assess what concessions or allowances it was willing to make to the operator.

Letters were sent to existing ferry companies at the time to solicit interest in operating the ferry route between St. Thomas and St. Croix. Eventually Boston Harbor Cruises was awarded the franchise to run a ferry service between St. Thomas and St. Croix four (4) months per year.

Legislation and PSC Action

On April 18, 2007, the Virgin Islands Legislature passed Act 6918 which grants to SeaTrans an exclusive franchise to operate a public marine passenger ferry service between St. Croix and St. Thomas. Act 6918, Section 1. The Act was signed into law May 10, 2007. The franchise is for fifteen (15) years beginning thirty (30) days after May 10, 2007. *Id.* Section 2. The administration of the franchise regarding adherence to the terms of the franchise, passenger schedules, and fees is within the jurisdiction of the PSC. *Id.* Section 6(b). Within thirty (30)

days after May 10, 2007, the PSC was required to adopt a passenger fee schedule and rules and regulations. *Id.* Section 7. The franchisee is a public utility, and in addition to the specific terms of the franchise, it must comply with the provisions of Section 8 of Chapter 1 of Title 30 Virgin Islands Code.

Section 10 of Act 6918 provides as follows:

SECTION 10. The Government of the Virgin Islands expressly reserves the right to commence forfeiture proceedings of this franchise, if the Franchisee or its successor or assignee fails to perform the conditions and obligations under this Franchise Agreement, **including nonuse, misuse or abandonment of the franchise.** Forfeiture proceedings of this franchise shall be filed with the Public Services Commission ("Commission") by the Attorney General of the Virgin Islands on behalf of the Government of the Virgin Islands. **If the Commission finds that the Franchisee has materially breached** the conditions and obligations of the Franchise Agreement, the **Commission may order the forfeiture** of the franchise.

Act 6918, § 10 (emphasis added).

On June 11, 2007, the PSC adopted a temporary schedule of fees and extended the deadline to review SeaTrans rates and services for an additional ninety (90) days from the date of the Order. On July 24, 2007, SeaTrans applied to the PSC for approval of its passenger and cargo fees. After a hearing in Docket 572, on December 11, 2007, the PSC approved a franchise rate schedule and time schedule and adopted temporary rules and regulations for SeaTrans. The adult round trip rate is \$90.

Stipulation Agreements

On April 22, 2008, the Government of the Virgin Islands (the "Government") through DPW and SeaTrans entered into a Stipulation Agreement. Government's Exhibit 6, Stipulation Agreement [f]or Ferryboat Operator Subsidy Funding U.S. Virgin Islands dated April 22, 2008. Some of the relevant provisions include the following: the Government was to provide to SeaTrans a subsidy of \$500,000 to subsidize operations and to help SeaTrans obtain funding to

purchase a vessel. Stipulation Agreement, paragraph 1. The subsidy was only to be used to operate the vessel between Charlotte Amalie and Christiansted, and SeaTrans was to open a separate bank account in which to deposit the proceeds. *Id.*

SeaTrans agreed to comply with any and all requirements of the PSC, including remaining in good standing with the PSC and submitting reports timely, and further agreed that the "failure to adhere to all PSC requirements shall be cause to terminate this Agreement." *Id.* at ¶ 3. SeaTrans also agreed to maintain insurance acceptable to the Government. *Id.* at ¶ 4. (The Stipulation Agreement provided that disputes would be resolved through mediation and then court in the event of an unsuccessful mediation. *Id.* at ¶ 5).

The Government had the right to terminate the agreement, with or without cause, on thirty days' notice to SeaTrans. *Id.* at ¶ 15. The term of the Stipulation Agreement was for a period of one (1) year and expired April 22, 2009. *Id.* at ¶ 2.

On September 23, 2011, the parties entered into another Stipulation Agreement. Government's Exhibit 7, Stipulation Agreement [f]or Ferryboat Operator Subsidy Funding U.S. Virgin Islands dated September 23, 2011. The terms are substantially identical except as follows. The subsidy amount is \$660,000. *Id.* at ¶ 1. The agreement is for one year from September 23, 2011 but "may be extended for an additional year by executing an Exercise of Option to Renew Form." *Id.* at ¶ 2.

Operation of the Ferry Route

Captain Marjorie Smith has been the Director of Operations for SeaTrans since November 2006. She has been in the ferry business for twenty nine (29) years. On July 18, 2008, SeaTrans requested VIPA to permanently waive its wharfage and ship dues. VIPA denied the request.

By Order 61/2008 dated September 16, 2008, the PSC granted a request by SeaTrans for a reduced schedule, from September 1, 2008 through February 28, 2009, providing for no service on Wednesdays. By Order 1/2010 dated October 1, 2009, the PSC approved a schedule providing for service on Fridays, Saturdays, Sundays and Mondays only.

Act 7206 appropriated a subsidy of \$660,000 for SeaTrans. The Act was passed September 22, 2010 and signed into law by the Governor on October 15, 2010.

By letter dated March 7, 2011, SeaTrans again requested VIPA to permanently waive its wharfage fees and ship dues.

SeaTrans agreed to provide ferry service between St. Croix and St. Thomas for \$90 roundtrip provided it received a subsidy. Following the grant of the franchise in 2007, through July 4, 2011, SeaTrans provided scheduled ferry service two (2) times per day, four (4) days per week.

In 2010, SeaTrans received the following subsidies from the VI Government: \$125,000 on January 21, 2010; \$150,000 on August 17, 2010; \$165,000 on November 3, 2010. On January 20, 2011, the Office of Management and Budget released \$165,000 to DPW for SeaTrans. SeaTrans received the following subsidies in these years: \$500,000 in 2008; \$620,000 in 2009; \$360,000 in 2010; and \$660,000 in 2011. The subsidies were used to pay operational expenses. SeaTrans received the subsidies from the Government of the Virgin Islands in 2007, 2008, 2009 and 2010. For fiscal year 2011, Bill No. 28-0271 appropriating \$660,000 for SeaTrans was approved by the Legislature as Act 7206 on September 30, 2010, and the Act was signed into law on October 15, 2010.

Based upon the SeaTrans Cancellation Monitor Log, since September 2009 through March 2012, three hundred ninety-five (395) trips were cancelled. Of that amount, forty (40)

were for mechanical reasons, nine (9) for Acts of God, and one hundred ninety-two (192) were unexplained. Between July 8, 2011 and March 25, 2012, one hundred fifty-four (154) cancellations were logged as explained occurrences, referring to the lack of a vessel.

Before July 4, 2011, SeaTrans had one vessel, the Royal Miss Belmar, which it leased on a year-to-year basis for about \$20,000 per month. The lease was for one (1) year, renewable annually, and was renewed annually until February 2012. SeaTrans determined that it could not operate the thirty-eight (38) mile trip seven (7) days per week, as this left no time for repairs or maintenance. SeaTrans knew that operation with one (1) boat was not sustainable, and had discussions with boat builders regarding the acquisition of two (2) additional boats. SeaTrans' business plan called for deployment of a second boat paid for with federal funds. SeaTrans knew that it had only one (1) vessel and was aware of the risk of not providing ferry service if that vessel could not operate. SeaTrans did not maintain business interruption insurance.

SeaTrans leased space from VIPA on St. Croix and St. Thomas. Pursuant to the lease, SeaTrans agreed to pay VIPA \$600 per month on St. Thomas, and \$695 per month on St. Croix. On March 7, 2011, SeaTrans wrote to VIPA to request a waiver of wharf or port fees, which totaled about \$100,000 per year. VIPA had previously reduced the fees for Boston Harbor Cruises by approximately fifty percent (50%).

VIPA filed a collection action against SeaTrans prior to July 4, 2011, and the outstanding fees were paid. SeaTrans terminated the lease with VIPA in February or March 2012. As of the date of the hearing, SeaTrans owed VIPA about \$13,000 for fees accruing after July 4, 2011.

SeaTrans has had an operating loss for every year of operation. Its losses were as follows for these calendar years: \$106,543 for 2007; \$92,482 for 2008; \$237,983 for 2009; and \$96,031 for 2010.

The July 4, 2011 Accident

On July 4, 2011, the Royal Miss Belmar ran aground on St. James Island. At the time of the accident, SeaTrans was about two (2) months in arrears in its lease payments. The owner of the vessel maintained insurance on the vessel, and had the vessel repaired. The vessel was ready to return to service in February of 2012. SeaTrans did not pay the arrearages on its lease, and the lease expired in February 2012, whereupon the vessel was sold. The Coast Guard investigation found the cause of the accident was pilot error.

Since July 4, 2011, SeaTrans has not run a regular ferry service. It leased vessels on two (2) occasions. Immediately following the accident on July 5, 6, and 7, 2011, SeaTrans chartered a replacement vessel for \$12,000 and used it to offer roundtrip service between St. Croix and St. Thomas. After that, service was discontinued. The next year, in April, 2012, SeaTrans chartered a vessel and used it to offer roundtrip transportation to St. Thomas Carnival from St. Croix. The temporary service ended at the conclusion of Carnival.

SeaTrans has been in discussions with DPW for more than a year. There is no writing documenting these discussions and no agreement between SeaTrans and DPW. SeaTrans understood that DPW was applying for Federal Highway Funds which could be used to purchase a ferry, and would issue a request for proposals for companies to supply a vessel to DPW to be paid for with the federal funds. SeaTrans believes that \$3.5 million in federal funds was secured by DPW February 2012, but is unable to confirm that. DPW has not issued a request for proposals or other solicitation relating to ferry service.

Captain Smith's father has another vessel, the Sterling, but it is not Coast Guard approved, and SeaTrans does not have a lease or option on that vessel. Captain Smith believes that earliest SeaTrans could provide service would be three (3) months from now.

By letter dated August 23, 2011, SeaTrans wrote to the PSC informing it that the July 4, 2011 accident has brought its operation to a "virtual standstill." SeaTrans stated that it "had no idea" when the Royal Miss Belmar would be seaworthy. SeaTrans acknowledged that it owed the PSC the annual assessment fees but said it was unable to pay.

By letter dated October 7, 2011, SeaTrans advised Senate President Ronald Russell that SeaTrans had only received \$158,400 of the \$660,000 appropriated in fiscal year 2011. SeaTrans also stated that there is no appropriation in the 2012 budget for a subsidy. SeaTrans represented to the Senate President that the Royal Miss Belmar would be repaired by October 30, 2011 and that it does not wish to cease operations.

By letter dated November 11, 2011, SeaTrans wrote to the Governor stating that SeaTrans had provided information to DPW to enable it to apply for federal funds to purchase a ferry.

By Order 21/2012 dated July 26, 2012, the PSC created a separate docket to address docket-specific assessments of SeaTrans.

Annual Assessment Fees

SeaTrans has failed to pay \$20,634.86 in annual assessment fees assessed by the PSC for the years 2008 through 2010. By Order 08/2009 dated October 25, 2008, the PSC assessed SeaTrans \$8,845.91 based upon 2007 gross operating revenues. By Order 17/2010 dated November 23, 2009, the PSC assessed SeaTrans \$6,694.26 based upon 2008 gross operating revenues. By Order 57/2010 dated September 29, 2010, the PSC assessed SeaTrans \$5,094.69 based upon 2009 gross operating revenues. By Order 7/2012 dated February 1, 2012, the PSC imposed an annual assessment fee on Sea Trans for fiscal year 2012 based upon 2010 gross operating revenues in the amount of \$6,56.57.

The PSC issued an annual assessment to SeaTrans totaling \$20,634.86 for the years 2008, 2009 and 2010. PSC Amended Order 08/2009, Order No. 17/2010, and Order No. 57/2010. SeaTrans does not dispute the amount of the assessment, or that the assessments are owed to the PSC.

Docket-Specific Fines

By Order 23/2011, dated January 27, 2011, the PSC imposed fines upon SeaTrans in Docket 593 for failure to comply with the annual assessment orders 57/2010, 17/2010, and 8/2009, and referred the matter to DOJ for action.

ARGUMENTS PRESENTED

Arguments of the Government

The Government made the following arguments: SeaTrans failed to perform the franchise; since July 4, 2011, more than a year ago, SeaTrans has not provided any marine transportation and therefore has "not used" or "has abandoned" its franchise; the failure to operate the ferry and to pay the assessment are violations of Act 6918 and the Stipulation Agreement; SeaTrans has no specific plan or means to provide ferry service in the foreseeable future; SeaTrans has failed to pay \$20,634.86 in annual assessment fees assessed by the PSC for the years 2008 through 2010; the franchise agreement should be rescinded and SeaTrans should be ordered to pay the annual assessment fees; forfeiture and fines are authorized by Section 1 of Title 30 of the Virgin Islands Code, 30 V.I.C. § 1, and by section 10 of Act No. 6918.

Arguments of SeaTrans

SeaTrans made the following arguments: it operated the service for five years in a safe and efficient manner and has not abandoned the franchise even though there have been only four (4) voyages after the accident; DPW intends to purchase a vessel, and SeaTrans would like to

joint venture with DPW to provide ferry service; there are inadequate subsidies to run the service or pay the annual assessment fees; abandonment means to intend to quit, and SeaTrans intends to provide ferry service; the ferry service ended because of the accident; SeaTrans concedes that the annual assessment fees are accurate and due, but argues that it does not have the funds to pay.

OPINIONS BY MEMBERS OF THE PUBLIC

Members of the public expressed various opinions on the record which may be summarized as follows: Some people felt that the franchise should not be removed because the service is important and it is difficult to run. Some St. Croix farmers send their produce to St. Thomas on the ferry. Students, church groups, medical patients, and people who connect with St. Thomas flights use the ferry service. Because SeaTrans has an exclusive franchise, and has not operated, there is no ferry service. The franchise should be ended the service put out to bid.

Other members of the public pointed out that other ferry companies, like Boston Harbor Ferry, which only operated part of the year, have come and ceased to operate. The Government should subsidize SeaTrans because the cost of the seaplane is too high, and ferry service is a vital public transportation link. The Government should also enter into a partnership with SeaTrans when the Government buys a ferry boat. SeaTrans is a local company and that should be considered. Ferries operate in other parts of the Caribbean, such as between St. Kitts and Nevis, or St. Martin and Anguilla, and they should therefore operate in the Virgin Islands as well.

Those opposed to the continuation of the franchise for SeaTrans stated that it had been more than a year without ferry service. When it was operating, SeaTrans did not provide reliable or timely service and ridership fell off. The subsidy is designed to keep the ticket price low, not to fund the operation of the ferry, which is what SeaTrans used it for. Because it is an exclusive franchise, no other company can compete or provide the service.

OPINION

I. Jurisdiction

The PSC has jurisdiction of this matter pursuant to section 1 of Title 30 of the Virgin Islands Code and Act 6918. The DOJ action is authorized by section 10 of Act 6918 and section 39(b) of Title 30 of the Virgin Islands Code.

DOJ, on behalf of Government of the Virgin Islands, may commence forfeiture proceedings against SeaTrans for failure to perform conditions and obligations under the Franchise Agreement, including nonuse or abandonment of the franchise. Act 6918, § 10. All Virgin Islands public utilities are subject to periodic assessment of fees by the PSC based upon a formula related to their gross operating revenues and the Territorial gross revenues of all public utilities. 30 V.I.C. § 25a(b).

II. The Assessments

SeaTrans concedes the amount of the PSC assessment and that it owes that amount to the PSC. Accordingly, SeaTrans should be ordered to pay the annual assessments in the amount of \$20,634.86. The failure to pay the PSC annual assessments also constitutes a material breach of the franchise and grounds for forfeiture, as set forth below.

III. The Franchise

Based upon the record as a whole, and for the reasons stated below, SeaTrans has materially breached the conditions of the franchise agreement and the obligations of its franchise under Act 6918. Act 6918 expressly provides that the franchise is to "operate a public marine passenger ferry transportation service between St. Croix and St. Thomas and St. Thomas and St. Croix." Act 6918, § 1.

A. Nonuse or Abandonment of the Franchise

The record shows that SeaTrans stopped operating "a marine passenger ferry transportation service between St. Croix and St. Thomas and St. Thomas and St. Croix" in July, 2011. SeaTrans concedes that it has no vessel and is not operating a marine passenger ferry transportation service. Therefore, SeaTrans is not using the franchise. The Act specifically provides for forfeiture where the franchisee has materially breached the conditions and obligations of the franchise agreement, "including **nonuse**, misuse or **abandonment** of the franchise." Act 6918, § 10 (emphasis added). Accordingly, "nonuse" is expressly enumerated as a breach of the agreement supporting forfeiture, as is "abandonment". *Id.*

SeaTrans argues that it has not abandoned the franchise because abandonment requires intent, and it does not intend to abandon its franchise. The argument disregards the plain language of the Act, which also includes "nonuse" as a material breach supporting forfeiture. *Id.* at § 10. The word "nonuse" merely connotes the fact or condition of not being used, without reference to intent.

There is no question that SeaTrans is not using the franchise. It is not "[operating] a public marine passenger ferry transportation service between St. Croix and St. Thomas and St. Thomas and St. Croix," which is how the Act defines the franchise. SeaTrans concedes that it is not operating a ferry service. Accordingly, grounds for material breach on the basis of "nonuse" are present, and this is sufficient for forfeiture regardless of any assertion by SeaTrans as to intent. Moreover, while SeaTrans has made the assertion that it has not abandoned the franchise because it does not intend to, even assuming *arguendo* that intent is required for abandonment, SeaTrans has failed to come forward with evidence in support of its contention which would rise above mere assertions of desire.

SeaTrans has not had a vessel since July 4, 2011, and has not provided ferry service since then. It operated at a loss every year of the franchise, and did not have sufficient funds to pay the lease payments on its vessel, its VIPA fees, or its annual PSC assessment, despite a subsidy from the Government of the Virgin Islands of more than \$2 million. It has no ferry and no tangible prospects of acquiring one. It let its lease for space with VIPA lapse. A mere desire to continue the franchise is insufficient to counter an allegation of abandonment in the absence of any evidence of steps actually taken which would enable it to continue to operate the franchise. By its own admission, SeaTrans could not even envision any ferry operations prior to three (3) months from now in any scenario.

At the time of the accident on July 4, 2011, SeaTrans was in arrears on its lease payments, and after the accident, ferry service stopped. SeaTrans has not acquired another vessel. When repairs on the Royal Miss Belmar were completed and it became available again in February 2012, there is no evidence in the record that SeaTrans made any efforts to pay the arrearages, nor did it enter into another lease. It also ceased payments to VIPA under the lease for the access to the ports. All of the foregoing is ample evidence of both nonuse as well as abandonment of operations, each of which are independent grounds for material breach for purposes of forfeiture of the franchise. *See* Act 6918, § 10 ("including nonuse, misuse *or* abandonment of the franchise") (emphasis added).

SeaTrans further argues that the Triad Associates feasibility study concluded that any ferry service would only be feasible if subsidized, that it did not receive the subsidies in a timely manner, and that VIPA refused to make concessions to its fees. The evidence in the record shows that the Government provided SeaTrans with more than \$2.14 million dollars between 2007 and 2011. Accordingly, the claim that its inability to operate a ferry service was due to the

Government's failure to provide sufficient subsidies is not supported by the facts. There was no evidence that the Government had an obligation to provide unlimited subsidies or that the franchise obligations were contingent on open ended Government funding of the ferry operation.

B. Failure to Pay Annual PSC Assessments

In addition to failure to provide ferry service, the failure of SeaTrans to pay the annual assessments to the PSC is an additional independent ground for forfeiture of the franchise. Act 6918 provides that as a condition of the franchise, SeaTrans will comply with PSC law and regulations. *See* Act 6918 at §§ 7, 8. The failure to pay the annual PSC assessment for 2008, 2009, and 2010 is a material breach of the franchise pursuant to Act 6918 and an additional basis for termination of the franchise. *Id.* at §§ 7, 8, 10.

Based on the foregoing, the evidence in the record shows that SeaTrans materially breached the franchise granted to it under Act 6918 by nonuse, abandonment, and by failure to pay its annual PSC assessment. Therefore, forfeiture is warranted pursuant to the express provisions of section 10 of Act 6918.

RECOMMENDATION

For the foregoing reasons, it is hereby recommended that:

1. The Commission order the forfeiture of the franchise granted to SeaTrans pursuant to section 10 of Act 6918; and
2. SeaTrans be ordered to pay to the PSC the annual assessment fee for 2008, 2009 and 2010 totaling \$20,634.86.

DATED: September 21, 2012

Respectfully submitted,



Lorin M. Kleeger,
Hearing Examiner