

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of

MCNAMARA, SEAN d/b/a BELLINGHAM
WATER TAXI

For Extension of Authority Under Certificate
BC-64619

DOCKET TS-121253 (Consolidated)

SUMMARY ARGUMENT IN
SUPPORT OF GRANT OF
APPLICATION OF PACIFIC
CRUISES NORTHWEST, INC. d/b/a
SAN JUAN CRUISES

.....
In the Matter of the Application of

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

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

DOCKET TS-121395 (Consolidated)

SUMMARY ARGUMENT IN
SUPPORT OF GRANT OF
APPLICATION OF PACIFIC
CRUISES NORTHWEST, INC. d/b/a
SAN JUAN CRUISES

1 Applicant Pacific Cruises Northwest, Inc. ("PCNW"), by and through its counsel Williams Kastner and David W. Wiley, files this summary/closing argument in analysis of the record and legal issues developed on conclusion of public hearings on the applications on Friday, February 1, 2013.

2 BACKGROUND/INTRODUCTION. Due to the finite page limitation imposed by the administrative law judge, PCNW will not detailedly review either the procedural or substantive background to these applications nor as would be typical, profile all testimonial evidence adduced on the record. To summarize though: this is a commercial ferry application under RCW 81.84 seeking authorization to provide commercial ferry service between Bellingham and Friday Harbor, protested by Sean McNamara d/b/a Bellingham Water Taxi ("McNamara") and Island Mariner Cruises, Inc. ("Island Mariner") BC-95 operated by Terry Buzzard. PCNW presented a total of five witnesses in support of its application including its principal, Drew Schmidt, Darrell Bryan and four supporting shippers (the latter to address need/public convenience and necessity for the proposed service). PCNW

SUMMARY ARGUMENT IN SUPPORT OF GRANT OF
APPLICATION OF PACIFIC CRUISES NORTHWEST, INC. d/b/a
SAN JUAN CRUISES - 1

3591688.4

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

has operated as a regulated intrastate commercial ferry service for over two decades and held a certificate between Bellingham and Friday Harbor from 2005 to July, 2012 when it relinquished its certificate on, at a minimum, the basis of a unilateral mistake in belief the WUTC's Staff's position as communicated in DMS-12 would preclude the provision of regulated and unregulated service in the same vessel. Nevertheless, after relinquishment of and a telephonic request to suspend the cancellation on the same day of cancellation, PCNW applied for its former certificated route after McNamara filed for authority to serve between Bellingham, Vendovi and Cypress Islands and Friday Harbor, about two months after his successful permit transfer of much of PCNW's former Certificate BC-10's for small/outlying island commercial ferry service.

3 The issues before the Commission on this consolidated hearing record while stark, are in fact the norm for commercial ferry certificate applications: is applicant PCNW fit, willing and able to perform the proposed service under the criteria set forth in RCW 81.84.020; is there a need, or rather does the public convenience and necessity require the grant of the certificate; and has the existing certificate holder failed or refused to furnish reasonable and adequate service or otherwise failed to provide the service prescribed in its certificate or tariffs under RCW 81.84.020(1)?

4 PCNW believes that it has presented a compelling case for its own financial and operational fitness (in contrast particularly to McNamara's showing) that the public convenience and necessity require the grant of its application and finally, that Island Mariner has not recently provided the applied-for service and, indeed, is not providing the type and kind of service requested for any finding to be made that it is serving the regulated market in the fashion here sought by PCNW.

5 PUBLIC CONVENIENCE AND NECESSITY. PCNW believes both consolidated records establish a need for service between Bellingham and Friday Harbor. McNamara admittedly presented a less focused case on service between those two fixed termini and presented some witnesses who appeared to need service only to outlying islands such as Eliza

and Sinclair, where he already holds authority but has yet to commence service.¹ As noted, PCNW presented four witnesses attesting to a regular need for service, two of whom, Ken Oplinger and Randi Axelsson, also supported a need for larger groups and volume of service between the two termini with Ms. Axelsson especially addressing a need for her hotel for passenger-carrying vessel capacities of 60 and above. The Commission had previously found a need for this specific service in PCNW's 2005 Application case, B-G79240/Docket No. TS-031996. With no present regulated service between Bellingham and Friday Harbor on that route, there seems to be no contravention or, indeed, little argument about a need for the service, only a dispute as to whether offering year-round service would render the route and the operator unviable at least without significant subsidization of the route in winter/slow season by the local, state or federal government which Mr. Bryan's testimony establishes there is little prospect of occurring.

6 OPERATIONAL AND FINANCIAL FITNESS. These pivotal issues under RCW 81.84.020(2), due again to page limitations, are best illustrated by the following chart:

Financial and Operational Fitness Comparisons RCW 81.84.020(2)
Of Applicant Pacific Cruises Northwest, Inc.
and Sean McNamara d/b/a Bellingham

Topic	PCNW	McNamara
<p>“Financial resources to operate proposed service for at least twelve months established by a pro forma statement of operations.”</p> <p style="text-align: center;">a. Ridership and Revenue Forecast</p>	<p>See Exhibits DMS-1, and DMS-4 Application TS-121395 and updated balance sheet through 11/31/12 (Exhibit DMS-4)</p> <p>DMS-1; DMS-4; Application TS-121395, page 3 and 12 PCNW net income \$90,764.11 through 11/30/12</p>	<p>No current regular income sources (SCM-14); unspecified \$28,000 cash on hand; personal residence valued at \$350,000 in Alaska with no existing home equity line of credit; currently not employed – no current debt listed</p> <p>SCM-10 and SCM-11</p>

¹ Ironically, there also did not appear to be any supporting shipper testimony directed to service between Bellingham and the two other islands, Cypress and Vendovi, featured in this application.

<p>b. Cost of Service</p>	<p>DMS-1, p. 2: allocated revenue and expenses based on 80% unregulated 20% regulated revenues.</p>	<p>SCM-11 "Start up" projections not based on actual prior operations, formal market study or actual costing of underlying service stop provisions as against – supportable fare revenue projections – Applicant's ballpark estimates.</p>
<p>c. Statement of total assets on hand to be expended on the proposed operation</p>	<p>Three vessels described at DMS-5 (10 pages) and carrying 149, 56 and 42 passengers, "Victoria Star 2," "Salish Sea" and "Viking Star."</p>	<p>No current ownership or lease of any vessel – applicant is looking into acquiring or leasing a vessel to transport 40-50 passengers he testifies</p>
<p>d. Documentation/statements of prior experience</p>	<p>Drew Schmidt has 30 years plus as a captain, DMS Exhibit -8 Coast Guard License for Vessels up to 500 tons</p>	<p>Application TS-121253 response Answer #15, previous charter service experience in the San Juan Islands and recent jet boat tour company river trips in Haines, Alaska area – commercial fisherman and nature photography</p>
<p>Operational abilities Number of vessels/description</p>	<p>Operational and Managerial Experience over three decades running marine transportation businesses</p>	
<p>Docking arrangements</p>	<p>DMS-6; DMS-7 Bellingham; Friday Harbor lease and operating license, respectively.</p>	<p>No existing docking arrangements to date in either Bellingham or Friday Harbor - Occasional service planned to dock apparently needing some repair i.e. at Lieberhaven in Orcas Island –</p>
<p>Vessel insurance</p>	<p>DMS-2</p>	<p>Estimated \$12,000 annual premium cost (SCM-11), no specifics for premium or coverage types provided</p>

7 **Is there already an existing certificate holder serving the route between Bellingham and Friday Harbor?** Under the requisite statutory evaluation pursuant to RCW 81.84.020(1), the Commission is constrained from granting overlapping districts or service territories to an applicant except under the circumstances described in the case synopsis above, at § 3. On examination of the record evidence in this proceeding, PCNW respectfully suggests the

administrative law judge must conclude that Island Mariner is not an incumbent service provider for two reasons: (1): On April 27, 2012, it was authorized to discontinue service on the route authorized by its certificate BC-95 (Staff Cross Examination Exhibit) after the termination of certificate leasing agreements in Docket No. TS-070019 and TS-070020. There is no evidence in this record that Island Mariner provided any regulated service in the year prior to PCNW's application let alone directly prior to that time; and (2) BC-95 does not feature the same type and kind of service as that applied for by PCNW. Island Mariner's permit authorizes a regular route between Bellingham and Friday Harbor but with numerous intermediate island stops and reflects the Bellingham/Friday Harbor service is in fact served "via" [emphasis added] those intermediate destinations.² Time schedules, service and travel time would obviously be significantly different and PCNW has requested an express, non-stop service between Bellingham and Friday Harbor.

8 **Alternate Relief.** Should the Commission somehow fail to find that PCNW has fully met all the statutory criteria to be awarded the certificate to serve between Bellingham and Friday Harbor in regulated intrastate commercial ferry service, PCNW, pursuant to WAC 480-07-870, WAC 480-07-875 and RCW 81.04.200, respectfully asks that the record in Docket No. TS-121174, (SCM-1) *In re Pacific Cruises Northwest, Inc. d/b/a San Juan Cruises*, be reopened for the sole purpose of rescinding the Order issued July 13, 2012 on the applicant's voluntary relinquishment request for cancellation in echoing again, a previous request to rescind which was verbally made to Staff by Captain Schmidt on July 13, 2012, who was then informed it was too late. This unusual procedural request is made here to prevent manifest injustice and to reverse a certificate cancellation that was made, as the uncontroverted record reflects, on the mistaken belief by Applicant that it would not be allowed to offer regulated and unregulated service in the same vessel, as DMS Exhibit 12 establishes.

9 Despite the contradictory testimony of Staff and Captain Schmidt as to the retraction of this critical opinion in a telephone call on the then pending general rate case, there can be no

² A conclusion that was echoed by a June, 1988 informal staff opinion letter entered into the previous record in TS-031996, *In re Application No. B-079240 of Pacific Cruises Northwest, Inc. (March 2005)*, as Exhibit No. 7, which concludes "... the service authorized is not directly from Bellingham to Friday Harbor but must include the additional steps as named on the certificate or [sic] issued by the Commission."

doubt that the applicant believed that the informal staff opinion in DMS-12 was still applicable in Applicant's view until the first day of hearing in this matter, January 31, 2013. Moreover, despite a request and an apparent record search, no written memorialization of the Staff's retraction of its opinion has ever been produced.³

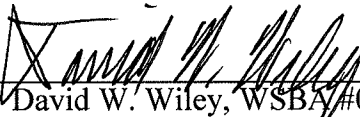
10 CONCLUSION: Thus, based on all of the foregoing, PCNW thus asks that its certificate Application TS-121395 be granted, that the consolidated Application TS-121253 of Sean McNamara be denied for failing to establish on this record the financial and operational fitness and feasibility of his year-round service proposal between Bellingham and Friday Harbor or his ability to initiate or financially support the new service for more than 12 months and instead, that he be first required to demonstrate the operational (and financial) feasibility of his recently transferred certificate authority before additional, overlapping service is authorized.

11 Finally, that if PCNW's certificate application should somehow not be found to have met all statutory criteria for award under RCW 81.84 *et seq.*, that Docket No. TS-121174 be reopened to rescind Order No. 1 cancelling Certificate BC-10, and that the certificate previously held by Pacific Cruises Northwest, Inc. to perform commercial ferry service between Bellingham and Friday Harbor be fully restored.

DATED this 25th day of February, 2013.

Respectfully submitted,

WILLIAMS, KASTNER & GIBBS PLLC

By 
David W. Wiley, WSBA #08614
dwiley@williamskastner.com
Attorneys for Pacific Cruises Northwest, Inc.
d/b/a San Juan Cruises

³ Indeed, one might reasonably surmise that the informal Staff opinion would at least be retracted on an equivalent communication basis as the original position was tendered, i.e. via email, but that does not appear to have been considered by Staff despite, again, the conflicting testimony on the verbal delivery of this significant about-face that mattered so materially to PCNW.

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2013, I caused to be served the original and six (6) copies of the foregoing document to the following address via first class mail, postage prepaid to:

Steven V. King, Acting Executive Director and Secretary
Washington Utilities and Transportation Commission
Attn.: Records Center
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

I certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to: records@utc.wa.gov

and an electronic copy via email and first class mail, postage prepaid, to:

Sean McNamara
d/b/a Bellingham Water Taxi
1028 17th Street
Bellingham, WA 98225
Email: bellinghamwatertaxi@gmail.com

Drew Schmidt, President
Pacific Cruises Northwest, Inc.
355 Harris Avenue, Ste. 104
Bellingham, WA 98225
Email: drew@whales.com

Terry Buzzard
Island Mariner Cruises, Inc.
2621 South Harbor Loop
Bellingham, WA 98225
Email: mariner@orcawatch.com

Michael Fassio
Assistant Attorney General
1400 S. Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
Email: mfassio@utc.wa.gov

Adam E. Torem
Administrative Law Judge
1300 S. Evergreen Park Dr. SW
PO Box 47250
Olympia, WA 98504-7250
Email: atorem@utc.wa.gov


Lyndsay Taylor

SUMMARY ARGUMENT IN SUPPORT OF GRANT OF
APPLICATION OF PACIFIC CRUISES NORTHWEST, INC. d/b/a
SAN JUAN CRUISES - 7

3591688.4

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600