

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

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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-121253 (Consolidated)

ANSWER OF PACIFIC CRUISES NORTHWEST, INC. d/b/a SAN JUAN CRUISES TO ISLAND MARINER CRUISES, INC.'S PETITION FOR ADMINISTRATIVE REVIEW OF INITIAL ORDER GRANTING APPLICATION WITH CONDITIONS

DOCKET TS-121395 (Consolidated)

ANSWER OF PACIFIC CRUISES NORTHWEST, INC. d/b/a SAN JUAN CRUISES TO ISLAND MARINER CRUISES, INC.'S PETITION FOR ADMINISTRATIVE REVIEW OF INITIAL ORDER GRANTING APPLICATION WITH CONDITIONS

I. PRELIMINARY STATEMENT/INTRODUCTION

1 Pacific Cruises Northwest, Inc. (hereinafter "PCNW," "Applicant" or "Pacific Cruises"), pursuant to WAC 480-07-825(4), files the following Answer to the Petition for Administrative Review served in this matter by Island Mariner Cruises, Inc. (hereinafter "Island Mariner," "Petitioner" or "Protestant"), seeking reversal of the Initial Order No. 3 Granting Application with Conditions. The Petitioner appears to be generally objecting to the Initial Order's findings and conclusions¹ on two primary bases in seeking reversal by the Commission of

¹ The *pro se* Protestant has not conformed its Petition to WAC 480-07-825(3), particularly with respect to identifying findings of fact and conclusions of law it objects to and describing how those specifically affect the outcome it argues should be rejected by the Commission here. Without waiving its objection to the Protestant's failure to conform to applicable rule, and realizing the Commission's historic practice of overlooking defects in Petitions for Administrative Review by parties in order to be responsive to policy issues raised in the public

Initial Order No. 3, to which generalized arguments Applicant will attempt to respond below.

II. ANSWER TO PETITION FOR ADMINISTRATIVE REVIEW/
ARGUMENT IN SUPPORT OF INITIAL ORDER NO. 3

A. The Protestant’s Argument that the Initial Order Coins a New Term “Express Boat” and Creates a Novel Distinction without a Difference in Granting Authority, under RCW 81.84.020, is Contrary to Law.

2 As the hearing record and Initial Order No. 3 repeatedly reflect, and as demonstrated in Exhibit DMS-9, PCNW previously held commercial ferry express service to operate between Bellingham and Friday Harbor which it unilaterally (albeit mistakenly) caused to be cancelled in July, 2012. That authority had previously been granted, after hearing, under Docket No. TS-031966, which had separately found in the Initial and Final Orders in that docket that the then two existing certificate holders, San Juan Island Shuttle Express, Inc. and current Protestant Island Mariner’s flagstop-based certificates which included these Bellingham and Friday Harbor termini, “do not provide reasonable and adequate service in that they are not meeting the needs of the public for direct nonstop service between Bellingham and Friday Harbor.”²

3 Island Mariner now apparently wants to claim “surprise” here and defend its total lack of evidentiary presentation in the hearing record by somehow fashioning an “express boat” premise into an argument that it did not somehow

interest, *see*, i.e., Order M.V. No. 144730, *In re Application P-751911 of Gerald R. Severson*, (Mar. 1992), PCNW will respond to what it perceives to be the substance of Protestant’s legal and factual arguments on review, i.e. that the administrative law judge should have found the proposed service was already being provided by Island Mariner under RCW 81.84.020, which had neither failed nor refused to provide adequate or reasonable service according to the evidence adduced on this hearing record.

² [Emphasis added] Initial Order No. 4, *In re Application No. B-029240 of Pacific Cruises Northwest, Inc. d/b/a San Juan Cruises* (Feb. 2005) ¶ 62, at 22.

comprehend that asking for direct, nonstop service between Bellingham and Friday Harbor portends a different type and kind of service than the flagstop service Certificate BC-95 authorizes. This argument, of course, is contrary both to PCNW's previously-authorized and applied-for certificate route and service proposal and prior interpretations by WUTC Staff of Island Mariner's own certificate.

4 As Pacific Cruises pointed out in its summary argument brief in this proceeding, the WUTC Staff had previous occasion on which to informally interpret Island Mariner's certificated service which letter was an exhibit in Pacific Cruises' previous hearing.³ Moreover, in that proceeding, both the Administrative Law Judge and the Commission found the direct, nonstop service proposed by PCNW was not being provided by Island Mariner [or here as well, the flagstop service proposed by Bellingham Water Taxi] to reasonably and adequately meet the needs of the traveling public. Thus, under RCW 81.84.020, the proposed service could and should be authorized as proposed here in the Initial Order by Administrative Law Judge Adam Torem.

B. Island Mariner's Petition Confuses Speed of the Vessel with the Type and Kind of Service Proposed to be Authorized.

5 Protestant next selectively focuses on the operating characteristics of one of the Applicant's three fleet vessels, "Victoria Star," to attack the proposed grant of authority. In so doing, it meanders off topic to make subjective, anecdotal and hearsay observations about hypothetical time schedules and service routes (*See*

³ See PCNW's Post-Hearing Summary Argument ¶ 7 at 3, 4 and footnote no. 2, and Exhibit No. 7, Docket TS-031996.

page 2 of Petition), culminating in a reference to a sustained vessel speed of 18 knots, which it equates to a “promise that Pacific Cruises Northwest will not keep...[s]ince it bases its certificate request on a speed.”⁴

⁶ PCNW of course never predicated its certificate application on a “full throttle” cruising speed, (nor would it, in the interest of safety, fuel consumption, general operating costs and other considerations be prudent to do so). “Express service” merely connotes point-to-point, direct service not necessarily the proverbial “bullet train” equivalent Protestant apparently hypothesizes here.⁵ In short, the Protestant now appears to be basing its overlapping service argument on speed of voyage rather than the variation in route and daily service⁶ that flagstop service in the San Juan Island archipelago⁷ entails, which clearly is far greater than an authorized “point-to-point,” two termini-only service involves. Clearly, the Commission is not in the business of defining commercial ferry service by reference to sustained cruising speeds or other attributes of vessel configuration. Here, it merely draws a logical distinction between authorizing a direct route between two termini and intermittent, “commuter-type” service providing stops at various other embarkation points along a commuting route which PCNW is not seeking nor being authorized to serve in the grant of

⁴ Island Mariner Cruises, Inc.’s Petition for Administrative Review, par. 6, p 2.

⁵ Additionally, the Commission regulates time schedules not by operating certificate, but by separate rule, WAC 480-51-090, which scheduling can vary by season, customer demand and certificate holder operating plans and which are acted upon by the Commission at regular open meetings.

⁶ “Daily” is apparently not actually the type of service the Protestant actually is here proposing. In that regard, under WAC 480-07-495(2)(a)(i)(C), PCNW asks the Commission take official notice of Protestant’s time schedule approved by the Commission on April 25, 2013 which apparently includes only “weekend” service (See, Docket No. TS-130379).

⁷ *See* for illustration, the map, involved distances and the orientation of the San Juan Islands in Initial Order No. 3 at 6.

authority between Bellingham and Friday Harbor, all of which is fully consistent with the requirements of RCW 81.84.020.⁸

C. Island Mariner’s Concluding Salvo Introduces an Argument that it had not Previously made nor is there any Evidence in the Record to Support --- that Unlike Protestant, PCNW will favor Unregulated Passengers over Regulated Customers

7 While at times internally contradictory, Island Mariner’s final argument in opposition to the grant of authority to PCNW seems to suggest that a grant of authority to the Applicant will somehow economically disadvantage Island Mariner because PCNW will deprive “commuters” of sufficient capacity in favor of unregulated, whale-watching customers. The argument is internally contradictory because Island Mariner then describes the former (regulated customers/“commuters”) as its “bread-and-butter clients.”⁹ If that is the case, under Protestant’s own hypothesis then, if this application is granted, wouldn’t there be more “core customers” remaining for Protestant to serve and actually would that not then benefit, rather than harm, Protestant’s business under its rendition of service impacts?

8 What Applicant believes Island Mariner is really arguing here is that it is “surprised” that the Initial Order did not place some artificial limit on the number of passengers Applicant could serve in regulated and unregulated service between Bellingham and Friday Harbor. Of course, again, for support of this premise, it

⁸ The Initial Order on review at ¶ 15, 16 succinctly evaluates the history of authorized service on the proposed route as articulated by the Commission and describes the differentiation between the service proposed by the two applicants here and Island Mariner Cruises, Inc.’s certificated authority. Significantly, the Petition for Administrative Review is silent on any critique of this pivotal observation and does not even attempt to address flaws therein which it would supposedly contend leads to an erroneous result. This illustrates the inherent difficulty in speculating on Protestant’s rationale in criticism of the Initial Order’s outcome.

⁹ Petition for Administrative Review at 3.

previously introduced absolutely no evidence, or even legal theory, into the hearing record. It also does not now address how its certificate, BC-95, which by its own inference on Petition, includes regulated and unregulated service on the same vessel, could be unfettered by such class of service restrictions while somehow suggesting a “set aside” for regulated passengers for Applicant’s prospective service be imposed. Lastly, the Protestant’s argument omits any acknowledgment that Applicant’s other two certificated vessels might be used in the overall passenger or service mix if customer demand should fortuitously warrant.

9 In reality, this concluding argument by Protestant Island Mariner is really directed at the recognition of the underlying motivation for this application which was the source of much direct and cross-examination of Applicant-Principal, Drew Schmidt and the staff witnesses in the hearing record, and in some exhibits, i.e. Exhibit SCM-1 and Exhibit DMS-12. That motivation was a desire to receive and restore service by Pacific Cruises between Bellingham and Friday Harbor which it had, erroneously, asked to be cancelled under the mistaken belief that it could no longer continue to provide regulated service between the two termini on the same vessel in which it provided unregulated service. While never directly contested by the Protestant at the hearing, it now apparently seeks to argue on Petition that PCNW and its own service necessarily wholly overlap within the meaning of RCW 81.84.020.

10 This belated argument of course overlooks Commission and appellate commercial ferry case law under RCW 81.84.020 which have clarified the meaning of existing service and the provision of “reasonable” and “adequate

service” under law, including service in the “same territory or district” and the meaning of such being “already served.”¹⁰

11 Finally, it erroneously conflates the earlier misdirected premise of vessel type and speed into an argument that because purportedly their vessel speeds and passenger configuration are comparable and the two providers can intermix regulated and unregulated service on those two comparable vessels, this somehow constitutes “overlapping service” within the meaning of RCW 81.84.020 so that only the incumbent, protestant provider should prevail on this record.

12 In contrast to Protestant’s evolving critiques and theories, the 21 page Initial Order No. 3 Granting Application with Conditions¹¹ thoroughly analyzes the statutory, regulatory and Commission case law highlights which strongly support and militate in favor of affirming the proposed grant of authority here to Pacific Cruises Northwest, Inc. It does so by careful review of the statutory standards of fitness to operate, proffered type and kind of service and examination of whether that same service had been provided in the applicable test year¹² before the filing of the application and finds consistent support for grant of

¹⁰ See, for instance, *State ex re: Puget Sound Navigation Co. v. Dept. of Public Works*, 165 Wash. 444, 6 P.2d 55 (1931), Order SBC No. 511 *In re: Pacific Cruises Northwest, Inc.*, Application B-78201 (July, 1995). See also, Order S.B.C. No. 467 *In re: Jack Rood and Jack L. Harmon, Jr. d/b/a Arrow Launch Service*, Application B-308 (May, 1990), where the Commission ruled it was not precluded from granting more than one contemporaneous application for overlapping authority under RCW 81.84.020.

¹¹ Again, those “Conditions” applicant understands to be that it commence service by or before May 25, 2013 and that it be authorized to provide daily, seasonal service which it generally described in the proposed schedule attached to its application as weekends in May, daily sailings in June, July, August to the middle of September and weekends for the balance of September. While it anticipates some adjustments to that schedule once it has commenced service which it would address through WAC 480-51-090, again, PCNW proposes offering weekend or daily service in the May-September period, only, as the testimony of record establishes.

¹² Albeit the same interval in which Protestant, Island Mariner, had expressly discontinued authorized regulated service by Commission Order, in Docket No. TS-120418 (*See*, DMS Exhibit 10).

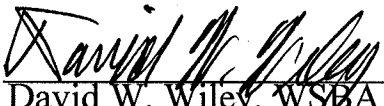
the authority with the conditions specified. For its part, Applicant accepts those defined start-up requirements and seasonal limitations on its service and indeed believes they will materially contribute to the long-term viability of the current proposed and previous regulated service route.

13 In conclusion, for these and the foregoing reasons, Applicant asks that the Petition for Administrative Review of Initial Order No. 3 Granting Applications with Conditions be denied, and that Initial Order No. 3 be affirmed by grant of the certificate as proposed to Pacific Cruises Northwest, Inc.

DATED this 1st day of May, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 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:

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Attn.: Records Center
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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

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