

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of

Application No. B-79421 of

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

To Transfer All Rights under Certificate
B-120 in the name of San Juan Island Shuttle
Express, Inc.

DOCKET TS-060133

**MOTION TO STRIKE THE PROTEST OF
SEAN MCNAMARA d/b/a PACIFIC SEA
TAXI**

**Hearing Date: March 31, 2006
Hearing Time: 9:30 a.m.**

COMES NOW Pacific Cruises Northwest, Inc. d/b/a Victoria San Juan Cruises, as Applicant-Transferee in the above-captioned proceeding, by and through its attorney, David W. Wiley of Williams, Kastner & Gibbs PLLC, and for a Motion to Strike the Protest of Sean McNamara d/b/a Pacific Sea Taxi in the proceeding, alleges as follows:

I. INTRODUCTION AND OVERVIEW

- 1 This is an application to transfer existing Certificate BC-120, now held in the name of San Juan Island Shuttle Express, Inc. ("SJISE"), to Pacific Cruises Northwest, Inc., d/b/a Victoria San Juan Cruises ("PCNW"), holder of current Certificate BC-10 authorizing commercial passenger-only ferry service between Bellingham and Friday Harbor.
- 2 On or about March 14, 2006, the undersigned counsel received a two-page document from the putative Protestant in this matter which appears to constitute a protest to the transfer of Certificate BC-120 to the above Applicant-Transferee. While the document was received within the 30-day protest period by the undersigned, neither the Applicant-Transferor nor

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MCNAMARA d/b/a PACIFIC SEA TAXI - 1**

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 410
Seattle, Washington 98101-2380
Telephone (206) 628-6600
Fax (206) 628-6611

the Transferee¹ received a copy of the protest. While the undersigned had previously filed and served a protest to Sean McNamara's application (representing the Applicant-Transferee and Island Mariner, Inc.), the Commission docket noticing the above transfer application listed only the Transferor and the Transferee. Neither of these parties were served with McNamara's "protest."

3 By Notice of Prehearing Conference served March 21, 2006, the Commission has set this matter for a joint prehearing conference with Application B-79418, Docket TS-060061, before Administrative Law Judge Dennis J. Moss. This pleading is submitted prior to the prehearing conference for consideration therein.

II. APPLICABLE STATUTES AND ADMINISTRATIVE RULES

4 Pertinent in whole or in part to the instant issues are WAC 480-51-030, WAC 480-51-040, WAC 480-51-050, WAC 480-51-060; RCW 81.84.010, 81.84.020, 81.84.060; WAC 480-07-145, WAC 480-07-150, WAC 480-07-305, WAC 480-07-320, WAC 480-07-355, WAC 480-07-370, WAC 480-07-375, WAC 480-07-395; and RC 34.05.443.

III. STATEMENT OF ISSUES

5 Should the "protest" of Sean McNamara d/b/a Pacific Sea Taxi to the transfer application under Docket TS-060133, on procedural and substantive bases, be stricken? Even under broad interpretations of administrative standing, can an applicant for authority under essentially a limited entry service provision, RCW 81.84.020, be afforded standing where

¹ See Declaration of Mark A. Goodman attached hereto as **Exhibit A**.

it lacks any existing authority from this Commission and where the legal and factual issues for transfer and new applicants are decidedly distinct?

IV. ARGUMENT AND AUTHORITY IN SUPPORT OF MOTION TO STRIKE ON PROCEDURAL FAILURE

A. McNamara's Protest Was Procedurally Deficient.

- 6 It is indisputable that McNamara's pleading dated March 13, 2006 fails to substantially comply with the Commission's procedural requirements for protests. While McNamara served his protest upon Applicant-PCNW's counsel on March 14, 2006 (two days before expiration of the protest period), he did not serve the protest upon either PCNW or SJISE, the only two entities listed on the January 13, 2006 Commission docket as reflected in **Exhibit B.**² That failure alone directly contravenes WAC 480-07-370(f) which declares: "A protestant must serve a copy of the protest upon the applicant."
- 7 While WAC 480-07-150(2) allows service upon the representative of a party once the party has appeared through an attorney in a proceeding, no party has yet appeared for transferor SJISE. Even if Transferee PCNW is deemed to have appeared through the undersigned by virtue of his reference as the attorney of record on the application for the Transferee (albeit not in the primary notice document, the Commission's weekly application docket, *see again*, **Exhibit B**), there was no corresponding appearance for the Transferor and McNamara wholly failed to serve SJISE by any direct or indirect method.

² Ironically, the undersigned was not listed in the docket and Transferor SJISE has no attorney representing it in Docket TS-060133.

B. Mr. McNamara's Pleading of March 13, 2006 Failed to Include a Certificate of Service Under WAC 480-07-150(9).

8 It is also incontestable that McNamara's pleading failed to comply with the Commission's certificate of service requirements. There is no certificate of service attached to the two-page letter served upon Transferee's counsel. This requirement has long established prima facie compliance with WAC 480-07-150 in general, and its omission simply compounds the procedural non-compliance issues here. Further, WAC 480-07-145(5) specifies that service and certificate of service are required to perfect or complete service. McNamara's failure in both regards provides independent bases to strike his protest for material procedural deficiencies. His protest was neither properly nor timely served upon the applicants in this proceeding, nor did it facially comply with Commission regulatory requirements.

C. Analysis.

9 While the Commission has occasionally tended to overlook non-compliance with procedural rules, it has previously found that notwithstanding the rule on liberal construction, failure to serve the parties noted on the application docket affects the "substantial rights of a party" whether or not an allegation of lack of actual notice or prejudice is raised, Order M. V. No. 140715, *In re H&K Trucking Inc. d/b/a North Pacific Transport*, App. P-72756 (Jan. 1990).

10 In *H&K Trucking*, the Commission granted reconsideration to effectively strike the petitioners' protests for failing to serve a copy of the protest on the applicant's attorney listed on the weekly application docket. *H&K Trucking* is analogous to the circumstance

here, only the parties not served who were duly noted on the docket were Applicant-Transferee PCNW and Transferor, SJISE.

- 11 Assuming *arguendo* that serving the undersigned was effective service on Pacific Cruises Northwest, Inc., as counsel of record, there was again no indication on the Commission's application docket that either party was represented and indeed, as concerns SJISE, no one has appeared as its representative in any capacity. See **Exhibit A, ¶ 2.**

Where the substantial rights of a party are affected by an error in a pleading or other document filed with the Commission, that error should not be overlooked, notwithstanding the rule on liberal construction. The Commission has traditionally required strict compliance with the requirements for service of pleadings or other documents.

Order M.V. No. 140715 at 2.

- 12 Here again, the deficiencies were twofold. The pleading at issue failed to comply with the Commission's basic requirements at WAC 480-07-150(9), and the protest was not served on either applicant, only on the representative of the Applicant-Transferee who, in turn, was not listed as such on the Commission's February 13, 2006 docket. McNamara's protest should therefore be stricken.

V. ARGUMENT AND AUTHORITY IN SUPPORT OF MOTION TO STRIKE ON SUBSTANTIVE GROUNDS

A. McNamara's Application for Authority Faces Disparate and Difficult Statutory Entry Standards.

- 13 McNamara ostensibly bases his standing to protest solely on a pending application for permanent commercial ferry authority filed on January 10, 2006. In evaluating the validity of this unperfected interest, it is important to remember that the entry standards under this

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Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 410
Seattle, Washington 98101-2380
Telephone (206) 628-6600
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(commercial ferry) Title are not “public convenience and necessity” such as RCW 81.80.070, or even a failure to provide service “to the satisfaction of the Commission,” under RCW 81.77.040, for solid waste carriers. In this Title, the commercial ferry entry standard is far more restrictive for overlapping authority grants, to wit:

... but the Commission shall not have power to grant a certificate 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 or adequate service

RCW 81.84.020.

- 14 Thus, regulated commercial ferry service envisions normally exclusive operating territories and strictly regulates a permit holder’s tariffs and operating economics accordingly. Establishing need for service by a new applicant requires an affirmative burden on an applicant to show why existing service fails to meet the statutory requirements of adequacy and reasonableness of current service. In so doing, McNamara’s application faces opposition from two existing authorized service providers – SJISE and Island Mariner, Inc. (BC-0095) – both of whose authorized certificates largely overlap the districts and territories sought by McNamara in his request for service between Bellingham and Orcas Island and specified flag stops. Accordingly, McNamara’s successful application to secure an overlapping commercial ferry certificate under the entry provision of RCW 81.84.020 is clearly not a foregone conclusion. Nevertheless, he attempts to thwart the instant transfer application, solely on the basis of this competing new authority application.

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Seattle, Washington 98101-2380
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Fax (206) 628-6611

B. Mr. McNamara’s “Adverse Interest” As a New Permanent Authority Applicant for Commercial Ferry Service Does Not Rise to a Level of Materiality Necessary to Protest an Application for Transfer.

- 15 Whether or not the entry standards described above and the prospects for successful issuance of an overlapping certificate diminish the Protestant’s “adverse interest” status, in weighing the standing issue, consideration should also be given to the nature of the present interest upon which he relies for standing in opposing this transfer application. Here, McNamara is not an existing certificate holder authorized to provide permanent or even temporary commercial ferry service. He is merely an *applicant* for permanent authority confronting the statutory scheme for entry described above.
- 16 The Commission has previously ruled under the much more open motor carrier entry standard, RCW 81.80.070, that temporary operating authority “*is not an interest which would confer standing to protest the application . . .*” Order M. V. No. 145708, *In re ENA Couriers (Seattle), Inc.*, App. E-75722 (Oct. 1992). In this proceeding, we are presented with a party who currently holds no operating authority *whatsoever* from this Commission, yet seeks a participatory status beyond that which a temporary certificate holder protesting a permanent authority application would be granted.³

³ Interestingly, the Commission has also found that a person “seeking to acquire a carrier eligible to protest also has standing to protest. If . . . is a party to an application for transfer and to a contract of purchase and sale, he has the right to file and prosecute his own timely protest to preserve his purchaser’s interest in the permit. Order M.V. No. 141006, *In re Becker Trucking, Inc. d/b/a Becker Trucking: Becker Express*, App. No. E-19787 (Mar. 1990). This case unquestionably validates the parallel right in PCNW to file and prosecute its own protest against the McNamara application, which it has done as the transferee-purchaser of SJISE’s Certificate, BC-120. *Becker Trucking* also appears to implicitly recognize an authority issuance prerequisite in noting that “each of them [protestants] appears to possess the authority to participate as protestants.” Emphasis added. Order M. V. No. 141006 at 4.

17 McNamara has no existing temporary or permanent authority, yet seeks to fully participate in the hearing record for transfer of an existing property right held by SJISE, the determination of which will depend on significantly differing statutory tests than those to be applied to his application.⁴ Under previous Commission rulings, his (at best) “colorable” adverse interest is not only inchoate and incomplete, but lacks recognition as a sufficient existing interest upon which standing is conferred to protestants in transfer application proceedings. Admittedly, the analysis here would be different if we were discussing competing applicants for new operating authority, but we are not. As demonstrated, McNamara stands on a classic and precarious “apples and oranges” comparison in filing this protest, and any scrutiny of his proffered “adverse interest” should result in the failure of his attempt to thwart the commercial ferry certificate interest at stake in this transfer proceeding.

C. **Previous Ashbacker/Contemporaneous Application Holdings by Analogy, at a Minimum, Demonstrate an Abject Lack of Standing in Protestant.**

18 The instant proceeding should also be readily distinguished from principles derived from competing new entry applications for commercial ferry authority. While both McNamara’s application and the application for transfer of Certificate BC-120 were filed within days of each other and indeed appeared on the same weekly docket, they do not constitute “contemporaneous applications” under WAC 480-51-040(2). This rule evolved

⁴ In raising objections to transfer, McNamara is hardly an indispensable or necessary party in his allegations of dormancy or abandonment alluded to in his pleading. The staff of the Commission, through the Attorney General, can at hearing, or through informal or formal discovery under rule, explore any issues related to the Transferee’s fitness, willingness or abilities, or the viability of the property right sought to be transferred. Indeed, the staff is far better situated to efficiently explore such factual and legal issues than an applicant for authority who has never engaged in lawful and/or regulated commercial ferry service.

from the *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327, 80 U.S. L.Ed. 108, 66 S. Ct. 148 (1945), precedent involving competing applications for new, typically mutually exclusive broadcast authority.

- 19 The Commission has previously applied the *Ashbacker* precedent directly in the commercial ferry setting, ruling that while RCW 81.84.020 seems to contemplate exclusive authority grants, mutual exclusivity is determined on the facts of a particular case [involving contemporaneous applications for new authority]. See, *In Re Order S.B.C. No. 467, In Re Jack Rood and Jack L. Harmon, Jr. d/b/a Arrow Launch Service*, App. B-308 (May 1990) at 7.
- 20 However, none of these precepts apply where there is a “contemporaneous filing” of an application for transfer of an existing permit and an application for issuance of a new certificate. As found under the parallel solid waste entry statute: “Applications to transfer existing authority involve different rights and different statutory requirements than do applications for the issuance of new authority.” *In re Buchmann Sanitary Service and Browning Ferris Industries of Washington / The Disposal Group, Inc. and Browning-Ferris Industries of Washington, Inc.*, App. Nos. GS-78433 and 78444 (Mar. 1996) at 9.
- 21 The Commission went even further to conclude in *Buchmann Sanitary Service* that applying the contemporaneous application rule to transfer applications “*may constitute an unreasonable interference with a transferor’s property rights.*” Order M.V.G. No. 1772 at

11 [emphasis added]. The Order also cited, at page 12, a number of federal and state cases that found transfer cases inapplicable under the *Ashbacker* doctrine.⁵

VI. CONCLUSION

22 In short, the weight of Commission, state and federal authorities militate decidedly against consideration of McNamara's "protest" to an application for transfer as an interest adverse to SJISE's property right disposition in the present proceeding. As demonstrated, the putative protest is facially deficient, was not served on either applicant and therefore violates Commission rule. It ultimately seeks to elevate legal claims that are substantively dubious, inchoate and highly premature in converting a new authority application to some sort of unspecified, colorable legal right to be afforded full due process participation in a transfer application proceeding, in violation of analogous principles of law announced by the Commission in the context of comparative application proceedings.

VII. REQUEST FOR RELIEF

23 The hearing officer and the Commission, for all of the above reasons, should strike the protest of Sean McNamara, rejecting any premise that a deficient protest by an applicant for new authority under a highly controlled entry statute should be afforded the opportunity to thwart or otherwise delay and impede the transfer of an existing Commission certificate.

⁵ In addition to their ineligibility for joint consideration/contemporaneous review under law, it is also apparent that consolidation of the application proceedings without express Commission approval would be erroneous. *See, e.g.,* Order M.V.G. No. 1668, *In re Brent Gagnan d/b/a West Waste & Recycling*, App. No. GA-70306 (Nov. 1993) at 2 and WAC 480-07-320.

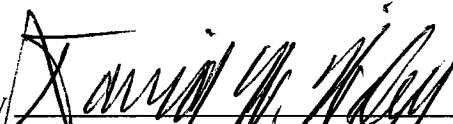
**MOTION TO STRIKE THE PROTEST OF SEAN
MCNAMARA d/b/a PACIFIC SEA TAXI - 10**

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 410
Seattle, Washington 98101-2380
Telephone (206) 628-6600
Fax (206) 628-6611

DATED in Seattle, Washington, this 28th day of March, 2006.

Respectfully submitted,

WILLIAMS, KASTNER & GIBBS PLLC

By 

David W. Wiley, WSB #08614
Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Telephone: (206) 628-6600
Facsimile: (206) 628-6611
Email: dwiley@wkg.com

**MOTION TO STRIKE THE PROTEST OF SEAN
MCNAMARA d/b/a PACIFIC SEA TAXI - 11**

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 410)
Seattle, Washington 98101-2380
Telephone (206) 628-6600
Fax (206) 628-6611

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2006, I caused to be served the original and 12 copies of the foregoing document to the following address via first class mail, postage prepaid to:

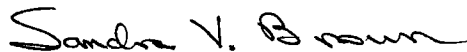
Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

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@wutc.wa.gov

and a copy via email and/or first class mail, postage prepaid, to:

Sean McNamara d/b/a Pacific Sea Taxi 2501 Franklin Street Bellingham, WA 98225 Email: sean@pstaxi.com	Mark A. Goodman San Juan Island Shuttle Express, Inc. 510 East Myrtle Street Bellingham, WA 98225 Email: sjise@aim.com
Michael Fassio Assistant Attorney General Washington Utilities and Transportation Commission 1400 S. Evergreen Park Drive SW P.O. Box 40128 Olympia, WA 98504-0128 Email: mfassio@wutc.wa.gov	

DATED in Seattle, WA, this 28th day of March, 2006.



Sandra V. Brown

**MOTION TO STRIKE THE PROTEST OF SEAN
MCNAMARA d/b/a PACIFIC SEA TAXI - 12**

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 410
Seattle, Washington 98101-2380
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**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of

Application No. B-79421 of

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

To Transfer All Rights under Certificate
B-120 in the name of San Juan Island Shuttle
Express, Inc.

DOCKET TS-060133

**DECLARATION OF MARK A.
GOODMAN OF SAN JUAN ISLAND
SHUTTLE EXPRESS, INC. IN SUPPORT
OF MOTION TO STRIKE THE PROTEST
OF SEAN MCNAMARA d/b/a PACIFIC
SEA TAXI**

Hearing Date: March 31, 2006

Hearing Time: 9:30 a.m.

I, Mark A. Goodman, declare as follows:

1. I am over the age of 18, am competent to testify, and have personal knowledge of the matters set forth below.
2. I am the President and shareholder of San Juan Island Shuttle Express, Inc. San Juan Island Shuttle Express, Inc. is the proposed Transferor in Application No. B-79421, Docket No. TS-060133, by which we seek to transfer all outstanding rights in Certificate BC-120 to Pacific Cruises Northwest, Inc. I am the sole representative of San Juan Island Shuttle Express, Inc. in this matter and have not retained an attorney or any other representative to represent our interests as Transferor.
3. Our application for transfer was listed in the Commission's February 13, 2006 weekly docket.
4. I now understand that our application was protested purportedly by virtue of a two-page letter received by David Wiley, counsel for Pacific Cruises Northwest, Inc.
5. San Juan Island Shuttle Express, Inc. and/or myself were not served with any notice, letter or other communication by Sean McNamara d/b/a Pacific Sea Taxi, that he was objecting to our transfer application.

EXHIBIT A

6. I first became aware of the protest upon my review of the Commission's website, and on or about March 17, 2006, Drew Schmidt, President of Pacific Cruises Northwest, Inc., notified me by telephone that Mr. Wiley had received a two-page letter objecting to the application.

7. I anticipate appearing at any hearing on this application and will address our various efforts to operate under Certificate BC-120.

I declare under penalty of perjury of the laws of the State of Washington that the above is true and correct.

Signed at Bellingham, Washington, this 28 th day of March, 2006.



Mark A. Goodman

Docket

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Chandler Plaza Building
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, Washington 98504

February 13, 2006

This docket of permanent operating authority applications pending and temporary operating authority applications granted is issued pursuant to the provisions of Title 81 and WAC 480 of the Commission's Laws and Rules.

PERMANENT OPERATING AUTHORITY APPLICATIONS PENDING.

As provided in WAC 480-51-040 &/or WAC 480-51-050 COMMERCIAL FERRY application filings are subject to protest for 30 days from the date they appear on this docket. Protests must be filed according to the provisions of rule and must set out the specific grounds for opposing the application and must contain a concise statement of the protestant's interest in the proceeding.

Commercial Ferry

<u>Application</u>	<u>Date Filed</u>	<u>Applicant & Service Desired</u>
DOCKET NO. TS-060061	01-10-2006	MCNAMARA, SEAN d/b/a PACIFIC SEA TAXI 2501 FRANKLIN STREET BELLINGHAM, WA 98225
APPLICATION NO. B079418		

PASSENGER-ONLY FERRY SERVICE between Bellingham and Orcas Island, with flag stops at: Eliza Island, Sinclair Island, Cypress Island, Lopez Island, and Blakely Island.

Commercial Ferry

<u>Application</u>	<u>Date Filed</u>	<u>Applicant & Service Desired</u>
DOCKET NO. TS-060133	01-20-2006	PACIFIC CRUISES NORTHWEST, INC SAN JUAN ISLAND SHUTTLE d/b/a VICTORIA SAN JUAN EXPRESS, INC. CRUISES d/b/a SAN JUAN ISLAND SHUTTLE EXPRESS 355 HARRIS AVE, STE 104 BELLINGHAM, WA 98225
APPLICATION NO. B079421		510 EAST MRYTLE STREET BELLINGHAM, WA 98225

Application for authority to transfer all rights under Certificate No. BC-120 standing in the name of San Juan Island Shuttle Express, Inc., d/b/a San Juan Island Shuttle Express to Pacific Cruises Northwest, Inc., d/b/a Victoria San Juan Cruises. The authority to be transferred is as follows:

WASHINGTON

1905 **UTC** 2005

UTILITIES AND TRANSPORTATION
COMMISSION

Celebrating 100 Years

PO Box 47250 ♦ 1300 S Evergreen Park Drive SW Olympia WA 98504-7250 ♦ Local: (360) 664-1160 ♦ Toll Free: (800) 562-6150
♦ TTY: (877) 210-5963 ♦ Website: www.wutc.wa.gov ♦ E-mail: info@wutc.wa.gov To request availability of the document in alternative formats, call (360) 664-1133

EXHIBIT B

February 13, 2006

Continued

Commercial Ferry

<u>Application</u>	<u>Date Filed</u>	<u>Applicant & Service Desired</u>
DOCKET NO. TS-060133	01-20-2006	PACIFIC CRUISES NORTHWEST, INC d/b/a VICTORIA SAN JUAN CRUISES 355 HARRIS AVE, STE 104 BELLINGHAM, WA 98225
APPLICATION NO. B079421		SAN JUAN ISLAND SHUTTLE EXPRESS, INC. d/b/a SAN JUAN ISLAND SHUTTLE EXPRESS 510 EAST MRYTLE STREET BELLINGHAM, WA 98225

PASSENGER AND FREIGHT SERVICE

Between Friday Harbor and Bellingham, and between Obstruction Pass and Bellingham, with the carrying vessel touching at Obstruction Pass on voyages to and from Friday Harbor.

In conjunction with the above authority, flag stops at Eliza Island, Sinclair Island, Blakely Island, and Lopez Island. This authority to make flag stops will terminate automatically upon termination of the certificate holder's authority to provide the above service between Friday Harbor and Bellingham and between Obstruction Pass and Bellingham.

The above statements of authority exclude freight service between Obstruction Pass-Friday Harbor, Obstruction Pass-Lopez Island, and Lopez Island-Friday Harbor.

Pursuant to RCW 47.60.010(3), the waiver of the ten-mile restriction granted in this certificate is effective until August 8, 2001. This waiver shall become permanent if not appealed within 30 days after this date.

In conjunction with existing authority, flag stop service at Orcas Landing (Harney Channel, Orcas Island).

Excluding freight service between Orcas Island - San Juan Island, Orcas Island - Lopez Island, and Lopez Island - San Juan Island.

Pursuant to RCW 47.60.120 (3), waiver of the ten mile restriction granted in this certificate is effective until May 21, 2003. This waiver shall become permanent if not appealed within 30 days after May 21, 2003.

In conjunction with the existing authority, flag stop service at Brandt's Landing (Orcas Island).

Excluding freight service between Orcas Island - San Juan Island, Orcas Island - Lopez Island and Lopez Island - San Juan Island.