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1 P R O C E E D I N G S

2 JUDGE CAILLE: This is the first pre-hearing
3 conference in Docket Number TS-031996. This is an
4 Application for a Certificate of Public Convenience and
5 Necessity to Provide Commercial Passenger Only Ferry
6 Service between Bellingham and Friday Harbor,
7 Washington, by Pacific Cruises Northwest, Incorporated
8 doing business as Victoria San Juan Cruises. My name is
9 Karen Caille, and I am the Administrative Law Judge
10 assigned to this proceeding. Today is June 15th, and we
11 are convened in a hearing room at the Commission's
12 offices in Olympia, Washington.

13 I would like to begin this afternoon by
14 taking appearances of the parties, so if you will please
15 state your name, whom you represent, your address,
16 phone, fax, and E-mail for me, and let's begin with you,
17 Mr. Wiley.

18 MR. WILEY: Thank you, Your Honor, David W.
19 Wiley, I'm with the law firm of Williams Kastner &
20 Gibbs, 2 Union Square, 601 Union Street, Suite 4100,
21 Seattle, Washington 98101-2380. My phone direct line is
22 (206) 233-2895, my fax is (206) 628-6611, and my E-mail
23 is dwiley, W-I-L-E-Y, @wkg.com. I'm appearing today on
24 behalf of the applicant, Pacific Cruises Northwest, Inc.

25 JUDGE CAILLE: Thank you.

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1 Ms. McNeill, why don't you go next.

2 MS. MCNEILL: Okay, thank you. My name is
3 Polly L. McNeill, that's P-O-L-L-Y, middle initial L,
4 and then M-C capital N-E-I-L-L. I am with Summit Law
5 Group. My address is 315 Fifth Avenue South, Suite
6 1000, that's Seattle, Washington, and it's 98109. My
7 phone number is area code (206) 676-7040, my fax number
8 is (206) 676-7041, my E-mail address is
9 pollym@summitlaw.com. I don't think I need to spell
10 that but let me know. And I am appearing today on
11 behalf of the protestant, San Juan Island Shuttle
12 Express, Inc.

13 JUDGE CAILLE: Thank you.

14 MR. THOMPSON: I'm Jonathan Thompson,
15 Assistant Attorney General, my address is 1400 South
16 Evergreen Park Drive Southwest, P.O. Box 40128, Olympia,
17 Washington 98504. My phone number is (360) 664-1225,
18 and frankly my fax number escapes me right at the
19 moment.

20 JUDGE CAILLE: I can look it up, it's okay.

21 MR. THOMPSON: And my E-mail address is
22 jthompso@wutc.wa.gov.

23 JUDGE CAILLE: All right, thank you.

24 MR. THOMPSON: And I'm representing
25 Commission Staff.

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1 JUDGE CAILLE: Thank you.

2 Let the record reflect there are no other
3 appearances.

4 How does the fax 586-5522 sound?

5 MR. THOMPSON: That's got a certain ring to
6 it.

7 JUDGE CAILLE: Okay, we'll use that one.

8 MR. THOMPSON: That was a little pun, sorry.

9 JUDGE CAILLE: All right, let's see, we have
10 no petitions to intervene that I know of, or I haven't
11 received any. Shall we just go ahead through the normal
12 -- do parties believe they will need discovery in this
13 case?

14 MS. MCNEILL: I would like to pursue some
15 limited discovery, Your Honor.

16 JUDGE CAILLE: Okay.

17 MS. MCNEILL: I believe but would like to
18 confirm that the opportunity to utilize a subpoena is
19 available and whether that is a subpoena for witnesses
20 or subpoena duces tecum or both without invoking the
21 discovery rule; is that correct?

22 JUDGE CAILLE: Is that available without --

23 MR. WILEY: Yes, it is.

24 JUDGE CAILLE: I would have to look that up.

25 MR. WILEY: I've got the rule in front of me,

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1 so I can answer that. It's 480-07-400(2)(a), it says,
2 subpoena is always available.

3 JUDGE CAILLE: Okay.

4 MS. MCNEILL: So when we talk about the
5 schedule, I would just like to build in some time for
6 the opportunity to issue some subpoenas then for
7 Mr. Wiley and his client to respond to them.

8 JUDGE CAILLE: Okay.

9 MR. WILEY: Your Honor, I guess I just wanted
10 to clarify, that would be usually we use a subpoena to
11 get a witness to the hearing, is that what she's saying,
12 and documents?

13 JUDGE CAILLE: Is that what you're saying,
14 Ms. McNeill?

15 MS. MCNEILL: Well, a subpoena duces tecum
16 can be used as a document request I believe to parties
17 to the proceeding. It doesn't have to be a third party.
18 And a subpoena is available to have a third party come
19 to the proceeding. That's my understanding of it, and
20 that's, well, say that's my intention of how I would use
21 them.

22 MR. WILEY: So it wouldn't be to subpoena my
23 clients, who obviously are going to appear, but it would
24 be a third party?

25 MS. MCNEILL: Correct.

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1 MR. WILEY: I don't know, Your Honor, I
2 didn't mean to suggest that would necessarily work under
3 the rule. It just says that they're always available
4 including subpoena duces tecum and that anybody can
5 issue one, an ALJ, an attorney, or a commissioner.

6 JUDGE CAILLE: Yes, that sounds familiar.

7 Okay, so shall we go ahead and invoke the
8 discovery rule as well?

9 MR. WILEY: I'm not in favor of that, Your
10 Honor, just speaking for the applicant. As I look at
11 the rule under WAC 480-07-400, this does not seem to be
12 any -- I mean this is a transportation application case,
13 it's not a rate case. I don't think that the factual
14 issues are very complex in this proceeding, but I do
15 think that the protestant has raised some valid legal
16 issues that we may want to address ahead of time.

17 JUDGE CAILLE: Okay.

18 MS. MCNEILL: And, Judge Caille.

19 JUDGE CAILLE: Go ahead.

20 MS. MCNEILL: I have expressed to Mr. Wiley
21 my interest in pursuing discovery, and I understand that
22 he intended to take a position in opposition to invoking
23 the discovery rule. Literally I have to agree with him
24 when you read the standards under subsection b, and I
25 will say I don't think these have changed but I will

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1 apologize at the outset for this being my first
2 opportunity to actually utilize the new rules in the new
3 format so my highlighting isn't as familiar to me as it
4 was with my old binder, but anyway I guess I have to
5 agree that if you look clearly at the standards you do
6 have I believe as an agent of the Commission the
7 discretion to determine that the discovery rule is
8 needed in this case, but I believe that my areas of
9 interest can be satisfied by using the subpoena for
10 third party witnesses and subpoena duces tecum for
11 documents. And since that bypasses then the need for a
12 dispute about whether the discovery rule can or can not,
13 should or should not be invoked, I think I can just fall
14 back onto that remedy.

15 JUDGE CAILLE: All right.

16 Does Staff have any preference?

17 MR. THOMPSON: I don't think that Staff will
18 have any need for discovery. I'm sure the parties
19 themselves will, you know, flesh out the issues to the
20 extent that they need to be factually.

21 JUDGE CAILLE: All right, then we'll just
22 proceed with the availability of the subpoena and the
23 subpoena duces tecum.

24 So let's see, Mr. Wiley, you mentioned
25 something about some legal arguments, is there a

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1 proposal to brief anything up front before --

2 MR. WILEY: Well, Your Honor, I have to
3 apologize, I reviewed the protest --

4 JUDGE CAILLE: I'm sorry, Mr. Wiley, you're
5 going to have to start over.

6 MR. WILEY: Oh, okay, sorry. I was saying
7 that I reviewed Ms. McNeill's protest when it came in in
8 April and then, or March, and then I reviewed it again
9 this morning, and I had forgotten that there, as I told
10 Ms. McNeill, she raises some issues that I think are
11 relevant on -- in this proceeding, and my suggestion now
12 is that we may want to get a ruling on some of those
13 legal issues to guide the evidentiary presentation. And
14 I can get specific if you want me to in terms of what I
15 saw being raised in the protest that I think, you know,
16 we have strong positions on. They probably are going to
17 be opposing positions, and I think if you revolve them
18 up front, they might guide the evidentiary showings to a
19 significant extent.

20 JUDGE CAILLE: All right, will you please get
21 specific.

22 MR. WILEY: Yes. Particularly I think the
23 protest raised a number of legal issues, the one that
24 really sort of started this off today is Footnote 1 at
25 page 4 of the protest, which talks about the Island

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1 Mariner reference, which is on the application as you
2 will note, showing that it's an existing certificate
3 holder, and the last sentence of the footnote says:

4 Therefore, presumably applicant must
5 also demonstrate that Island Mariner
6 Corp. has failed or refused to furnish
7 reasonable and adequate service or
8 failed to provide the service described
9 in its certificate.

10 And that really raises the issue to me
11 legally as to whether an absent certificate holder can
12 be used as a proxy for existing service circumstances.
13 I don't believe it can. I understand Ms. McNeill
14 certainly disagrees. I think that's a very important
15 issue, because I don't intend to put on a case about
16 service of a party who did not protest, who indeed
17 supports the application. And I don't --

18 MS. MCNEILL: Right, and that -- I mean that
19 actually does get to one of the issues, and it may be
20 that you would want to wait until after the subpoenas
21 have been issued and responded to. Because as is
22 inferred in that footnote, you know, we think that there
23 needs to be some exploration of why it is that Island
24 Mariner Corp. is not protesting this service and whether
25 they may in fact have some sort of a relationship that

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1 is inconsistent with the regulatory scheme that would
2 motivate them to stay in the sidelines on it.

3 MR. WILEY: Well, Your Honor, of course
4 that's just the issue that I want to address, because I
5 don't think that historically the Commission can impute
6 or infer positions of absent protestants. Whether or
7 not they're subpoenaed or not, the fact that they don't
8 protest means they have no objection. And Island
9 Mariner did not actually protest. I found out the
10 protestant's certificate originally, which was owned by
11 Belairco, it did not protest that certificate. So, you
12 know, the fact that they don't protest doesn't mean to
13 infer anything nefarious or improper, it means that they
14 do not choose to exercise their rights. And a lot of
15 existing carriers do that all the time in a lot of
16 regulated industries.

17 So I think we obviously have a very different
18 view of that issue, and I think the extent to which you
19 want to determine which evidence is appropriately
20 elicited would help in the development of the record, so
21 I -- and I -- there are a couple spinoff issues raised
22 by the protest that I can allude to that I see, but I
23 don't want to interrupt on this if Polly has something
24 or you have something that you want to say on Footnote
25 1.

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1 MS. MCNEILL: Well, the only thing that I
2 would add is that whether there is something, what was
3 the phrase you used, nefarious, whether there is
4 something nefarious or not, I think -- I don't know. It
5 just strikes me as odd that a certificate holder with
6 whom the applicant has some formal business relationship
7 has determined to not protest. And if the issue before
8 the Commission is whether there is in fact a public need
9 and convenience for the certificate out there, then it
10 seems to me relevant if a certificate holder has
11 willingly refrained from protesting an application
12 because they're supporting a business partner, that
13 strikes me then as being inconsistent with the ability
14 for the applicant to prove need if we don't have any
15 evidence about whether the ridership forecasts out there
16 are based on need in a vacuum or based on need with
17 relation to the existing services that are offered.

18 MR. WILEY: Well, Your Honor, she certainly
19 can subpoena if she can use the discovery rules for a
20 third party to try to subpoena in Island Mariner. As I
21 indicated, he did not previously or they did not
22 previously protest the Belairco predecessor permit
23 that's now held by the protestant. You can draw a lot
24 of inferences from that.

25 MS. MCNEILL: But there was no business

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1 relationship with that applicant.

2 MR. WILEY: Well, whether there was or wasn't
3 I don't think is relevant to whether they -- that can be
4 as a stocking horse or a proxy for lack of need, and so
5 I do see that as an issue that, you know, certainly we
6 can address in post hearing, but I thought it might be
7 relevant as a legal issue to tailor the evidence that we
8 present.

9 I also see a couple other legal issues raised
10 by the protest which I acknowledge is certainly not a
11 stock worn protest which certainly provides a lot of
12 discussion of the differences of the parties. One issue
13 that occurs to me --

14 MS. MCNEILL: I think he meant that as a
15 compliment, I'm not exactly sure.

16 MR. WILEY: I certainly did. You know, one
17 issue that occurs to me from the protest, Your Honor, is
18 whether this is territory already served by a protesting
19 certificate holder under 81.84.020 since the protestant
20 has not -- has discontinued service under Commission
21 order for the last few years, and the question is
22 whether this is territory already served by that
23 protestant, and then what's the appropriate test period
24 for examining operations by the protesting carrier.

25 MS. MCNEILL: And I concede that there is a

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1 -- there is -- I mean one of the reasons that I put in
2 the protest the fact that San Juan Island Shuttle
3 Express has obtained the Commission's approval to
4 suspend service is that I did not want to come to the
5 pre-hearing conference and have that be a surprise to
6 either the Administrative Law Judge or the Staff's
7 Attorney General. It is a fact, and we concede it. But
8 as I have said in the protest, it is not -- an
9 authorized suspension is not the same as a waiver or a
10 cancellation of its authority rights. And, in fact, it
11 is one of the principal reasons that we question the
12 applicant's ability to actually demonstrate a need for
13 the certificate out there.

14 The, you know, part of the reason that we
15 have sought a suspension is that there is not the demand
16 for our services that we would have expected when the
17 application was filed and what we of course expect to
18 change in the future. But I mean I concede that there,
19 you know, I do not dispute the fact that my client has
20 an authorized suspension from the Commission for its
21 service right now, but I don't think that there's any
22 legal relevance. It's not our burden to prove what we
23 don't do, it's the applicant's burden to prove what is
24 needed.

25 MR. WILEY: Well, Your Honor, I don't dispute

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1 the last point, but I certainly think the fact that they
2 have not provided regulated service for the last up to
3 three years is entirely relevant to examination of the
4 issue as to whether the territory is already served by
5 the protestant and also what their experience was in
6 going out of business or temporarily I should say
7 suspending operations may be more, you know, due to
8 their own unique financial and operating circumstances.
9 You can hardly draw conclusions as to the public
10 convenience and necessity based on the fact that the
11 existing certificate holder has suspended service.
12 There could be a lot of reasons for that. So I do think
13 the test period for examination of existing operations
14 by the protestant is very relevant and affects the depth
15 of the need evidence that we put on.

16 And the final issue that I saw that I wanted
17 to allude to that maybe you will suggest we brief or
18 somehow put before you before the proceeding, Your
19 Honor, is whether the change in the statute in 2003,
20 particularly House Bill EHB 1388 and the legislative
21 history in that bill directing -- whereby the
22 legislature direct the lifting of barriers to passenger
23 only ferries, whether that relates to the public
24 convenience and necessity standards that you're required
25 to judge in this application. Our position clearly is

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1 that they are. Whether or not the existing certificate
2 that's the subject of the protest was issued under the
3 old law doesn't matter. The standards for granting
4 passenger ferry applications are very much affected by
5 the changes in the law 2003, this is an application in
6 2004, we're governed by those standards.

7 You have to look at the affect of this
8 application on public agencies who are eligible to
9 operate commercial passenger ferries, and you also got
10 to look at the legislative history which clearly
11 declares "an intent to lift those barriers to allow
12 entities other than the State to provide passenger only
13 ferry service." We would argue that that certainly
14 loosens entry into the passenger only field. That's
15 what this application seeks to provide.

16 So again, another issue that if you were to,
17 you know, rule as to the say standard of entry
18 interpreting 81.84.020, it would be very useful to
19 limitations or tailoring of the evidence.

20 MS. MCNEILL: I guess somewhere in there I
21 sort of got lost. What exactly is the legal issue that
22 you think there is on the legislative amendment,
23 Mr. Wiley?

24 MR. WILEY: I think that the -- since 2003 on
25 81.84.020, which is the standard of entry that we're

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1 operating under here, has been modified for passenger
2 only ferries, and the Judge has to consider the impact
3 under Subsection 4 of that provision on public agencies
4 eligible to operate or operating public passenger only
5 ferries, which is a different issue but we got to
6 address that, and number 2, the legislative history
7 declares its intent to lift barriers to allow entities
8 other than the State to provide passenger only ferry
9 service, we think that then modified and liberalizes the
10 entry standard under 81.84.020 now, and that's a legal
11 issue that, you know, if we could get some guidance from
12 would certainly provide some clarity to the record we
13 have to develop.

14 JUDGE CAILLE: Okay, is that -- did you have
15 anything further, Ms. McNeill?

16 MS. MCNEILL: I do.

17 JUDGE CAILLE: Okay.

18 MS. MCNEILL: It's really --

19 JUDGE CAILLE: It's always so interesting
20 when you folks come to the Commission.

21 MR. WILEY: Thank you.

22 JUDGE CAILLE: At least I know that they are
23 never your hum drum issues, they're always interesting
24 issues.

25 MS. MCNEILL: Well, you know, I guess it's a

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1 testimony to Mr. Wiley's creativity.

2 The other legal issue, and I don't know, I
3 mean I apologize, I paused a little bit when you asked
4 whether there were any preliminary issues, but the other
5 legal issue is the application itself and the
6 deficiencies in the application. As we read WAC
7 480-51-030(1)(a), there is a requirement for a, and now
8 of course I can't find it, there is a requirement for
9 the application to include among other things a pro
10 forma for its statement of -- a pro forma financial
11 statement of its operations, ridership and revenue
12 forecast, the cost of service for the proposed
13 operation, an estimate of the costs of the assets to be
14 used, a statement of the total assets on hand of the
15 applicant that will be expended, and statement of prior
16 experience. And 480-51-030 refers to that information
17 as being a prerequisite to the application, not to the
18 determination of whether the certificate will be granted
19 or not.

20 So in our view, I don't know what the
21 appropriate forum would be for this, but I guess I'm not
22 suggesting -- I think it would be unproductive for me to
23 suggest that the application should be dismissed
24 outright for failure to include those matters. It would
25 just be so easy then for it to be cured. I would

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1 suggest, however, that any further proceedings in this
2 matter be stayed until the application's deficiencies
3 are cured so that that information is provided.

4 MR. WILEY: Well, Your Honor, can I respond?

5 JUDGE CAILLE: Hold on just a second, I'm
6 writing.

7 Okay, go ahead, Mr. Wiley.

8 MR. WILEY: Yes, Your Honor, the statute
9 indicates that that is before a certificate is issued
10 that that information must be provided. As you will
11 see, we provided almost all of the referenced
12 information except for the pro forma. The reason that
13 wasn't provided was because it's critical as to when
14 this -- when the hearing is scheduled, we will know
15 where to project out for 12 months. If it is scheduled
16 in the winter and we're looking six months out to run
17 the pro forma, it certainly affects the bottom line,
18 because this is a seasonal business. We have no
19 objection to providing a pro forma, but it will be, you
20 know, we would like to get closer to the hearing date.

21 We're happy to comply, if you want to set a
22 deadline for submission of it, we will honor that, Your
23 Honor, but it's an exercise in futility until we know
24 how -- until we know closer to the hearing date when
25 we're going, because we can project out from that date.

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1 If, for instance, another example, if we weren't to have
2 the hearing until late summer, we probably wouldn't
3 propose to operate until the spring and would then run
4 the pro forma from the spring of 2005 forward 12 months.
5 It is a pro forma, and obviously we will address that
6 issue in testimony and may even have to substitute or
7 revise the pro forma, and that in my experience is why
8 sometimes pro formas in boat cases aren't submitted with
9 the application.

10 Clearly the Staff felt it was complete, they
11 docketed it, they held it until they got the resolution
12 from the Public Transportation Benefit Authority, but
13 they felt it was complete enough to docket. We will
14 supplement that and we will present testimony on the
15 issues.

16 MS. MCNEILL: I mean I guess I feel that it
17 may be that this is in the regulation, and it may be
18 that Mr. Wiley can argue that the regulation exceeds the
19 statutory authority, but that argument has not been
20 resolved by the Commissioners, and until it is, there's
21 a regulation that has a mandatory requirement. A pro
22 forma is for a 12 month period, and I certainly concede
23 that the ferry business is a lot more active in the
24 summers than it is in the dead of winter, but a pro
25 forma is for a 12 month period, and any 12 month period

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1 is going to include both the active and the slow
2 periods, so I don't know what the difficulty is for
3 doing a 12 month pro forma at any time of year
4 regardless of when the hearing is.

5 MR. WILEY: Well, because, Your Honor, it
6 really is affected by if it's a late in the season start
7 up, it certainly will affect the costs, the costs may be
8 duplicated, it may affect a lot over a 12 month period.
9 It's something that as we get a more definitive
10 potential date as to when service can be initiated,
11 we've, you know, we've got a more accurate pro forma.
12 We certainly can file one in the next week, Your Honor,
13 if you want us to, but it's going to be drastically
14 different than the one we provide at hearing.

15 MS. MCNEILL: Well, it seems to me that
16 there's a reason for these elements to the application.
17 Whether or not the entry standard has been laxened as a
18 result of 2003 legislation, nonetheless there is an
19 entry standard that needs to be satisfied. And in order
20 for a certificate of PCN to be granted, I would suspect
21 that these elements are so that the Commission can
22 confirm that once it is granted this company will have
23 the wherewithal and the business out there to keep it
24 running, which of course circles back to our position as
25 to the fact that our suspension we think is actually

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1 necessary because of the lack of need out there. So
2 we're very interested in seeing the applicant be put to
3 the test of proving its case even at the application
4 level.

5 You know, I don't think Staff can -- Staff
6 does docket these if the application is most of what
7 they need. I think Staff does not view themselves as
8 being in a position of making any kind of a threshold
9 determination other than whether there's a good enough
10 application to move forward into the hearing process.
11 So I don't deem the fact that Staff processed the
12 application further as being any indication that the
13 elements of this regulation have been waived by the
14 Commission.

15 MR. THOMPSON: I wish I could have some input
16 on this, but unfortunately, on Staff's behalf, but
17 unfortunately Bonnie Allen who actually knows how all of
18 this works is not here today, so.

19 MS. MCNEILL: I thought you were just going
20 to say but unfortunately I haven't been given a chance
21 to say anything because Wiley and McNeill won't stop
22 talking.

23 MR. THOMPSON: There's something to that too.

24 MR. WILEY: Well, Your Honor, I wasn't
25 implying that Staff's acceptance of the application

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1 other than the fact that they held clearly from December
2 to March until the resolution was received from the
3 Transportation Benefit Authority. That being said, we
4 certainly can provide a pro forma and at a deadline you
5 want to set, I'm just indicating that it will be
6 revised, it will not be the pro forma that will be
7 presented at the hearing.

8 JUDGE CAILLE: Okay.

9 MS. MCNEILL: And I don't have any problem
10 with that, I just hope you're not indicating that it's
11 just going to be a trumped up pro forma.

12 MR. WILEY: No, I would -- far from that, but
13 I think it will be substantially changed by the time we
14 get to hearing, or it could be modified, let me put it
15 that way, and I don't want that to be, you know, set in
16 stone.

17 JUDGE CAILLE: Okay, anything else, Mr. Wiley
18 or Ms. McNeill?

19 Do you have anything, Mr. Thompson?

20 MR. THOMPSON: No, I -- Ms. McNeill, I guess
21 you don't feel like a motion to dismiss or something
22 like that would be the way to handle this procedurally?

23 MS. MCNEILL: Well, you know, Mr. Thompson, I
24 mean technically it would be, and I considered preparing
25 one for today, but I thought, well, I make a motion to

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1 dismiss, they'll, you know, it's so easily cured. I
2 mean it just seems like sort of an exercise in process
3 that would not lead to a very productive result.

4 MR. THOMPSON: Well, it seems to me that if
5 Mr. Wiley --

6 MS. MCNEILL: But if you want to bring one, I
7 would be happy to join you on it.

8 MR. THOMPSON: Well, it seems to me that if
9 Mr. Wiley, you know, we can shortcut a lot of this if
10 Mr. Wiley commits to have it by a certain date, we would
11 get to the end result anyway.

12 MS. MCNEILL: That's what I would suggest
13 would be the outcome anyway, and I don't think any of us
14 really want to be spending a whole bunch in attorney
15 fees and time on doing a motion when the outcome is
16 going to be the same either way.

17 JUDGE CAILLE: Why don't we go off the record
18 so we can discuss the schedule, and maybe that will kind
19 of help us figure out or help me figure out exactly how
20 to handle some of these legal issues.

21 (Discussion off the record.)

22 JUDGE CAILLE: We have had an off record
23 discussion concerning how to proceed with many of the
24 legal issues that have been outlined earlier in this
25 conference, and we have set a schedule, and that

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1 schedule is as follows. Mr. Wiley's client will file
2 the pro forma for the 12 month period beginning spring
3 2005, and that will be filed on June the 30th.

4 MR. WILEY: Correct.

5 JUDGE CAILLE: Then the parties will file,
6 well, the parties are going to issue subpoenas, and then
7 they will file their motions, whatever those may be, on
8 August the 3rd. We will have responses to those motions
9 due August 31st, and you can expect a ruling from me
10 around September 10th or 13th. And then the hearings
11 will be held either in Bellingham only or Bellingham and
12 Friday harbor on September 22nd and 23rd.

13 Is there anything else that anyone wishes to
14 add at this point?

15 MR. WILEY: I don't think so, Your Honor. If
16 we need a pre-hearing conference for scheduling and, you
17 know, if there are any snafus, I assume you will be
18 available.

19 JUDGE CAILLE: Yes, and I will issue a
20 pre-hearing conference order that memorializes what we
21 have talked about today. I think that's it on my list
22 of things. And in that pre-hearing conference order, I
23 will let you know the number of copies of filings we
24 will need, and I think it will be less than the normal
25 12.

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1 Anything further from anyone?

2 MS. MCNEILL: You won't need extras?

3 JUDGE CAILLE: I don't think so.

4 MS. MCNEILL: Now other than to clarify in
5 your order that you will acknowledge that the parties
6 are going to pursue subpoenas?

7 JUDGE CAILLE: Yes.

8 MR. WILEY: For the hearing.

9 JUDGE CAILLE: Okay, I will do that.

10 MS. MCNEILL: Well, the responses to the
11 subpoenas don't have to be for the hearing. I mean a
12 subpoena duces tecum, if I send a subpoena duces tecum
13 with a, you know, whatever we can agree upon on an
14 appropriate response time, I would like some of the -- I
15 would like responses to the subpoena duces tecum before
16 I prepare my motions.

17 MR. WILEY: Well, the problem with that, Your
18 Honor, is I don't think the rule envisions that as I
19 read 480-07-400.

20 MS. MCNEILL: I'm glad I brought this up.

21 MR. WILEY: Yeah.

22 MS. MCNEILL: Why not?

23 MR. WILEY: I think as I understand the rule
24 that that's the only time you get this stuff is at the
25 hearing, is that you produce -- that you subpoena a

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1 witness and a record that the witness brings for the
2 hearing. Otherwise you would be talking about a
3 deposition or interrogatories and requests for
4 production.

5 MS. MCNEILL: Well, a subpoena duces tecum is
6 essentially a request for production.

7 MR. WILEY: Yeah, it sure is.

8 MS. MCNEILL: Yeah.

9 MR. WILEY: But bring it with the witness to
10 the hearing. There's no forum if the discovery rule is
11 invoked other than the hearing as I understand it.

12 MS. MCNEILL: Well, I sure could be wrong,
13 but I didn't think there was any limitation to a
14 subpoena duces tecum to be that the documents had to be
15 delivered at a hearing as opposed to asking for them
16 ahead of time. I mean that's the whole, you know, I
17 said earlier that I would like to pursue the subpoenas
18 before I file my motions.

19 MR. WILEY: Okay, well, Your Honor, my
20 concern is that, and I'm not trying to be cute, I don't
21 know how you have jurisdiction over third parties other
22 than the parties to the application, the applicant or
23 the protestant in a subpoena or even in a discovery rule
24 limitation unless they come to the hearing. Am I
25 missing something, because I don't think the Commission

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1 has jurisdiction over non-parties to litigation.

2 MS. MCNEILL: Well, can a subpoena duces
3 tecum be used with parties to the litigation?

4 MR. WILEY: Absolutely.

5 MS. MCNEILL: Yeah.

6 MR. WILEY: I mean you can get Mr. Schmitt
7 and I can get Mr. Goodman and his corporation. I should
8 say we should get the corporations because they're the
9 parties, not the individuals.

10 MS. MCNEILL: Right.

11 MR. WILEY: But I don't think you can get to
12 a third party through a subpoena if the Commission has
13 no jurisdiction over that person.

14 MR. THOMPSON: I actually disagree with that.
15 There's a statute, there's a particular Commission
16 statute that provides for it, and actually it's under
17 the -- it's a couple places, and one of them has to do
18 with administrative law judges, and I think it
19 explicitly provides for, you know, people who have
20 relevant facts can be subpoenaed.

21 MR. WILEY: Okay, well, and so the parties
22 have to then respond to the subpoena by providing the
23 information?

24 MR. THOMPSON: Well, I think it's probably to
25 appear at hearing.

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1 JUDGE CAILLE: Why don't we go off the record
2 for a minute so I can see if I can find the relevant
3 authority.

4 (Discussion off the record.)

5 JUDGE CAILLE: All right, we have had an off
6 record discussion about discovery rules, subpoenas duces
7 tecum, and we have decided to resolve this, well, take
8 the first step in dealing with this matter by having the
9 parties provide each other with a list, a letter list of
10 the information that they would request from one another
11 and also that they may request from third parties.
12 Shall we specify who this party is?

13 MS. MCNEILL: It's Island Mariner.

14 JUDGE CAILLE: Okay, so it's really one third
15 party.

16 MS. MCNEILL: Correct.

17 MR. WILEY: Well, Your Honor, in my case I
18 probably will want to get some documents out of the
19 current employer of Mr. Goodman on the issue of whether
20 he's ready, willing, and able to provide service under
21 certificate.

22 JUDGE CAILLE: Okay.

23 MS. MCNEILL: See, that's why I kind of think
24 maybe we are going to need your -- I mean perhaps
25 Mr. Wiley in his request can explain why that would be

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1 relevant.

2 MR. WILEY: Well, I mean I --

3 MS. MCNEILL: I mean what his employer would
4 have to say that would be relevant to that.

5 MR. WILEY: Whether there's a contractual
6 commitment that limits him to remaining at the employ of
7 that guy in a way that he couldn't operate the boat.
8 You know, I may have, you know, additional --

9 MS. MCNEILL: Okay, I -- listen --

10 JUDGE CAILLE: Hold on, I don't want to --

11 MS. MCNEILL: I couldn't articulate mine, I'm
12 not a -- but I think we probably need to both of us
13 agree to describe the relevance of the information
14 that's requested.

15 MR. WILEY: Right.

16 MS. MCNEILL: To each other.

17 JUDGE CAILLE: I think that would be very
18 helpful.

19 Okay, anything else?

20 That date for that letter is July the 7th.

21 MS. MCNEILL: Right.

22 JUDGE CAILLE: All right.

23 Okay, if there's nothing further from anyone,
24 this hearing is closed, and thank you for this
25 stimulating discussion, and hopefully things will