

1           BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
 2   COMMISSION

3 In re Application No. B-079273            )  
 of AQUA EXPRESS, LLC                                 )DOCKET NO. TS-040650  
 4 For a Certificate of Public                 )Volume I  
 Convenience and Necessity to                 )Pages 1 - 41  
 5 Provide Commercial Ferry Service.     )  
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 7   A prehearing conference in the above matter  
 8 was held on May 21, 2004, at 1:32 p.m., at 1300 South  
 9 Evergreen Park Drive Southwest, Olympia, Washington,  
 10 before Administrative Law Judge ANN E. RENDAHL.

11  
 12   The parties were present as follows:

13   AQUA EXPRESS, LLC, by DAVID W. WILEY,  
 Attorney at Law, Williams, Kastner & Gibbs, 601 Union  
 14 Street, Suite 4100, Seattle, Washington 98101;  
 telephone, (206) 233-2895.

15   WASHINGTON UTILITIES AND TRANSPORTATION  
 16 COMMISSION, by DONALD T. TROTTER, Assistant Attorney  
 General, 1400 South Evergreen Park Drive Southwest,  
 17 Post Office Box 40128, Olympia, Washington 98504;  
 telephone, (360) 664-1189.

18   INLANDBOATMEN'S UNION OF THE PACIFIC, by  
 19 DMITRI IGLITZIN (via bridge line), Attorney at Law,  
 Schwerin, Campbell, Barnard, 18 West Mercer Street,  
 20 Suite 400, Seattle, Washington 98119; telephone, (800)  
 238-4231.

21   KITSAP TRANSIT, by RONALD C. TEMPLETON (via  
 22 bridge line), Attorney at Law, 3212 Northwest Byron  
 Street, Silverdale, Washington 98383; telephone, (360)  
 23 692-4215.

24  
 Kathryn T. Wilson, CCR  
 25 Court Reporter

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

2                    JUDGE RENDAHL: Let's be on the record. Good  
3 afternoon. I'm Ann Rendahl, an administrative law  
4 judge presiding over this proceeding. We are here  
5 before the Washington Utilities and Transportation  
6 Commission this afternoon, Friday, May the 21st, 2004,  
7 for a prehearing conference in Docket No. TS-040650,  
8 also Application No. B-79273, which is captioned, In  
9 the matter of the application of Aqua Express, LLC, for  
10 a certificate of public convenience and necessity to  
11 operate commercial ferry service.

12                    To recap the history of this application  
13 proceeding, on April 8th, 2004, Aqua Express filed a  
14 commercial ferry application with the Commission. That  
15 application was docketed as Application No. B-079273  
16 and docketed as TS-040650. Notice of that application  
17 was published in the Commission's April 12th, 2004  
18 docket. On May 6th, 2004, the Inlandboatmen's Union of  
19 the Pacific filed a protest to the application, and the  
20 30-day docket period ended on May 12th, 2004.

21                    On May 13th, the Commission issued the notice  
22 of prehearing conference in this matter which scheduled  
23 today's prehearing conference. While the notice  
24 indicates the commissioners would be presiding in this  
25 matter, they are not presiding this afternoon, but if

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1 there is a hearing in this matter, they will be  
2 presiding.

3 Then on May 18th, Aqua Express filed a motion  
4 to strike the Inlandboatmen's Union protest, and  
5 yesterday on May 20th, both the Inlandboatmen's Union  
6 and the staff filed responses to the Applicant's  
7 motion. So that's the procedural status of this  
8 application.

9 As I noted off the record, the purpose of our  
10 prehearing conference this afternoon is to take  
11 appearances, to consider any petitions to intervene in  
12 the matter, to hear arguments on Aqua Express's motion  
13 to strike the Inlandboatmen's Union protest, establish  
14 issues for the proceeding, establish a process,  
15 including a procedural schedule for considering the  
16 application as well as the type of hearing or process  
17 involved, and identify any other matters for  
18 discussion.

19 So before we go any further, let's take  
20 appearances. To assist the Commission in organizing  
21 its master service list and to be able to communicate  
22 with all of you effectively, please state your full  
23 name, the party you represent, your full address,  
24 telephone number, fax number, and e-mail address.  
25 Let's begin with the Applicant.

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1                   MR. WILEY: Thank you, Your Honor. David W.  
2 Wiley with the law firm of Williams, Kastner and Gibbs,  
3 Two Union Square, Suite 4100, 601 Union Street,  
4 Seattle, Washington, 98101-2380. Our fax number is  
5 (206) 628-6611. My direct line number is  
6 (206) 233-2895, and my e-mail address is  
7 dwiley@wkg.com. I'm appearing today on behalf of  
8 Applicant Aqua Express, LLC.

9                   JUDGE RENDAHL: Thank you, Mr. Wiley. For  
10 the protestant?

11                   MR. IGLITZIN: My name is Dmitri Iglitzin  
12 with the law firm of Schwerin, Campbell and Barnard,  
13 LLP, 18 West Mercer Street, Suite 400, Seattle,  
14 Washington, 98119.

15                   JUDGE RENDAHL: Your telephone number?

16                   MR. IGLITZIN: (800) 238-4231.

17                   JUDGE RENDAHL: And a fax number?

18                   MR. IGLITZIN: (206) 378-4132.

19                   JUDGE RENDAHL: Thank you. Is this 800  
20 number your direct line, or is that the firm's line?

21                   MR. IGLITZIN: It's the firm's line. I don't  
22 have a direct line.

23                   JUDGE RENDAHL: Your e-mail address?

24                   MR. IGLITZIN: Iglitzin@workerlaw.com.

25                   JUDGE RENDAHL: Thank you. For staff,

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1 Mr. Trotter?

2 MR. TROTTER: My name is Donald T. Trotter,  
3 and I'm an assistant attorney general. My address is  
4 1400 South Evergreen Park Drive Southwest, PO Box  
5 40128, Olympia, Washington, 98504-0128. My telephone  
6 number is (360) 664-1189; fax, (360) 586-5522, and my  
7 e-mail is dtrotter@wutc.wa.gov.

8 JUDGE RENDAHL: Thank you. Also on the  
9 bridge line we have Kitsap Transit. Mr. Templeton, are  
10 you making an appearance?

11 MR. TEMPLETON: Yes, Your Honor. My full  
12 name is Ronald C. Templeton. My address is 3212  
13 Northwest Byron Street, Silverdale, Washington, 98383.  
14 My phone number is (360) 692-6415. My fax is  
15 (360) 692-1257. My e-mail is rctempleton@telebyte.com.

16 JUDGE RENDAHL: You are entering an  
17 appearance for Kitsap Transit. Is that the full name  
18 of the intervenor?

19 MR. TEMPLETON: Yes. It is Kitsap Transit, a  
20 Washington Municipal Corporation.

21 JUDGE RENDAHL: Thank you. I will be  
22 including as an attachment to the prehearing conference  
23 order a list of representatives with all of this  
24 information. If I have not captured any of it  
25 correctly, if you could please let me know. All of you

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1 can use it to communicate with one another, and the  
2 Commission will use it to communicate with you via  
3 e-mail and mail and fax, if necessary.

4 Okay. Mr. Templeton, there was no filed  
5 intervention, I noted, by Kitsap Transit. Could you  
6 please make an oral motion to intervene?

7 MR. TEMPLETON: We would like to make a  
8 conditional motion to intervene. We would like to  
9 participate only if this proceeding turns into a  
10 protested proceeding, and I think that's going to be  
11 dependent upon the ruling on the Applicant's motion  
12 today. Kitsap Transit is really an integral part of  
13 this application and it supports this application. If  
14 this is not a protested proceeding, we don't see any  
15 need to participate.

16 JUDGE RENDAHL: Beginning with the Applicant,  
17 is there any objection to Kitsap Transit's conditional  
18 motion to intervene?

19 MR. WILEY: None, Your Honor.

20 JUDGE RENDAHL: For Staff?

21 MR. TROTTER: Just a question, Your Honor.  
22 Do I take it correctly that Kitsap Transit is not a  
23 protestant and that is why he did not file a protest?

24 MR. TEMPLETON: That's correct.

25 MR. TROTTER: Mr. Templeton said Kitsap

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1 Transit was an integral part of this matter, but there  
2 was no further information, so if we could have more  
3 information on that for the record, that would be  
4 helpful, if I may ask that, Your Honor.

5 JUDGE RENDAHL: Please go ahead.

6 MR. TEMPLETON: Under the ESHB 1853, your  
7 Honor, several statutes were amended and clearly made  
8 statute governing public transportation benefit areas,  
9 of which Kitsap Transit is one. They've also amended  
10 some of the provisions dealing with ferry service and  
11 ten-mile radii, and then specifically, the DPT's  
12 jurisdiction over passenger-only ferry service, it gave  
13 public agencies, PTBA in particular, until March of  
14 next year the exclusive right to institute  
15 passenger-only ferry service.

16 Kitsap Transit waived its right to institute  
17 passenger-only ferry service and specifically agreed by  
18 resolution that operators such as Aqua Express could  
19 submit certificate applications to the UTC prior to  
20 March of 2005, and we've provided that consent and have  
21 actively supported the Applicant's application.

22 JUDGE RENDAHL: Mr. Trotter, does that  
23 satisfy your concerns about the nature of Kitsap  
24 Transit as an integral part of this application?

25 MR. TROTTER: Your Honor, I'm aware that the

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1 statutes require the PTBA to authorize the application  
2 in this case to be filed, and there is a resolution  
3 attached to the Application in which Kitsap Transit did  
4 agree that this application could be filed pursuant to  
5 statutes 81.84.020, specifically, and I'm also aware  
6 that after application is granted, if it is in this  
7 case, a contract with Kitsap Transit will have to be  
8 approved by Kitsap Transit, or an agreement is what  
9 it's called. That is RCW 36.57(a).100.

10 So it appears that the transit authority has  
11 a role before and after this case. It's not as  
12 apparent that it has an independent role during the  
13 case; although, I do understand that the transit  
14 authority is very supportive of this transportation  
15 application. Having said all that, if it turns out  
16 that the Protestant IBU is permitted in, then we might  
17 as well have everybody in, but I think they are hanging  
18 on a thin reed, so on that basis, we will conditionally  
19 object to the intervention.

20 JUDGE RENDAHL: From Mr. Iglitzin, please.

21 MR. IGLITZIN: The IBU has no objection to  
22 Kitsap Transit's conditional motion to intervene.

23 JUDGE RENDAHL: This may be taking the cart  
24 before the horse, but at this point, I would grant the  
25 conditional intervention to intervene pending our



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1 discussion of the motion to strike the IBU's protest.

2           Is there any other person appearing in the  
3 room or on the line that wishes to make an appearance  
4 in this matter or intervene? Hearing nothing, we will  
5 go on to the issue of the motion to strike. I've read  
6 through all of the written materials, but I would like  
7 to hear from the parties any oral argument or statement  
8 you would like to make, and then we will take it form  
9 there. Go ahead, Mr. Wiley.

10           MR. WILEY: Thank you, Your Honor. I did  
11 wish to offer a few comments to the filings from  
12 yesterday afternoon that I had an opportunity to review  
13 this morning before I headed down here. I wanted to  
14 respond particularly to the IBU's reply on a number of  
15 points.

16           The first one is that the motion to strike  
17 versus the motion to dismiss, we are all laboring under  
18 some very new procedural rules that were implemented in  
19 January of 2004. I still believe that the appropriate  
20 nomenclature for what this motion is is a motion to  
21 strike, having read the revised procedural rules, but I  
22 don't think that whether it's a motion to dismiss or to  
23 strike that the Protestant was prejudiced because we  
24 are operating under an expedited prehearing conference  
25 procedure that the prehearing conference noted at

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1 480-07-440, and all parties have now had an opportunity  
2 to provide written response in addition to the oral  
3 comments today. So no one is being prejudiced, whether  
4 it's a motion to dismiss or to strike, and there are  
5 different time periods applicable.

6 As far as another comment that the IBU made,  
7 clearly your decision about granting or denying our  
8 motion, particularly if it's granted, is subject to  
9 interlocutory review under WAC 480-07-810, so there is  
10 no prejudice there. The Commission can consider a  
11 denial of participation under the current rule.

12 Now, I also wanted to note that there was  
13 some dispute in both the Staff's and the IBU's  
14 responsive pleadings about our reliance upon the  
15 standards for review of agency order and whether they  
16 are coextensive with the considerations of standing to  
17 participate in an administrative proceeding. I think  
18 whether or not you feel they are synonymous, the point  
19 that the Applicant was trying to allude to is that the  
20 standards that have been used in appellate procedure  
21 under either federal or state APA have been referred to  
22 by the Commission in making threshold standing  
23 determinations in administrative proceedings, and those  
24 are the injury and fact and the zone of interest test.

25 Whether or not it's ultimately proper to

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1 equate them as being synonymous, they certainly have  
2 been used by this commission to evaluate the interest  
3 that is raised in a possible protest or intervention  
4 motion, and we've cited to the Rosario Utilities case  
5 as a footnote of Page 3 of our brief.

6 I also was able to identify another case this  
7 morning where the Commission has referred to the  
8 standards that are applicable for appeal in  
9 administrative agency decision and threshold standing  
10 arguments in administrative proceedings, and low and  
11 behold, there was a young attorney about 21 years ago  
12 who was on the wrong end of that decision in a case  
13 called Brown's Limousine Crew Car, Inc., Order MVCH No.  
14 950. There the Commission found -- and the assistant  
15 attorney general was apparently a Mr. Trotter in that  
16 case. There, the Commission found that the  
17 protestant's counsel won Mr. Wiley's argument that  
18 because a taxicab had a license from the Commission to  
19 transport packages, it could, in fact, protest a  
20 passenger charter party application. The Commission  
21 found that the protestant lacked standing. While it  
22 could prove injury and fact, it could not prove that it  
23 had a zone of interest sought to be protected by the  
24 statute citing data processing service which we cite in  
25 our brief.

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1           Commission there also said, and I quote,  
2 "Public interest cannot be served if the elements of  
3 public convenience and necessity require consideration  
4 of activities over which the Commission has no power to  
5 control, to supervise or to regulate in any fashion.  
6 The Commission has no power to protect the interest of  
7 businesses which it does not regulate."

8           JUDGE RENDAHL: Would you please repeat the  
9 MVH number and the other identifying information?

10           MR. WILEY: Yes. It's Order MVCH No. 950 in  
11 1983, July, 1983, and that quotation in that case  
12 really brings to the fore the argument of the Applicant  
13 vis-a-vis the punitive protest here. There is not an  
14 interest that the Commission has jurisdiction to effect  
15 that's being raised by the IBU, and, in fact, we have a  
16 problem with who the real party and interest is as we  
17 review and evaluate the IBU's punitive protest.

18           The Staff's response sets forth all of the  
19 six issues that the IBU seeks to raise, and both the  
20 Applicant and the Staff have demonstrated why under  
21 statute rule and case law, none of those issues does  
22 the IBU have standing to raise. Ultimately, IBU's  
23 argument and articulation of issues it seeks to raise  
24 reveal the classic emperor-has-no-clothes position that  
25 they are in, and clearly, the Washington Supreme Court

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1 in Cole, cited in our motion to strike, and the Brown's  
2 Limousine Crew Case as well as the Rosario Utilities  
3 case show that ultimately, if the Commission has no  
4 jurisdiction to effect the actions complained of, the  
5 protestant has no standing to participate in the  
6 hearing.

7           Additionally, IBU appears to attempt to ride  
8 the coattails of a very unwilling principle here. In  
9 other words, the IBU's arguments are voiced through  
10 impacts which it claims to be deleterious on the  
11 Washington State Ferry system. But there has been no  
12 showing by the IBU that it has standing to represent  
13 any interest of the Washington State Ferry service in  
14 this proceeding, and that is the real problem with  
15 IBU's position here. In other words, it's seeking  
16 participation status based on arguments that are  
17 predicated on alleged negative impacts of this  
18 application on a principle that it does not represent.

19           The points raised in the Staff's and the  
20 Applicant's motion about the substantive issues that  
21 IBU seeks to proffer here, we don't need to reiterate  
22 in terms of why they individually and collectively lack  
23 any legal impact to establish standing, but I also  
24 wanted to mention this reference to the public  
25 importance doctrine that the IBU mentions in its

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1 response. That appears to be a sort of last gasp legal  
2 alternative argument that the IBU offers at the end of  
3 its reply if every other premise of its punitive  
4 standing is shot down.

5 Now, one of the problems again in it raising  
6 that argument, that fallback doctrine, is the real  
7 party in interest or the privy with the WSF, but even  
8 if that were put aside, the doctrine that they rely  
9 upon from a 1969 Washington Supreme Court case  
10 involving Washington Natural Gas and the PUD is  
11 distinguishable. First of all, it was two years before  
12 the Cole case was decided, so obviously, the Supreme  
13 Court must have been assumed to have that in mind when  
14 it ruled in the Cole case.

15 But second of all, that case was very  
16 different, because there, we had Washington Natural Gas  
17 seeking to intervene in a proceeding involving the sale  
18 of electrical utility service that was in direct  
19 competition with Washington Natural Gas's service. The  
20 court seemed to in that case reluctantly allow  
21 participation by Washington Natural Gas because what  
22 they found to be an impact of the decision on, quote, a  
23 substantial percentage of the population with immediate  
24 statewide impact on the operation of public utility  
25 districts and municipal corporations. Clearly that is

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1 distinguishable from the situation here.

2           While we would suggest we have an innovative  
3 service proposal which involves local transit agencies  
4 and recent legislative change coloring the proposal, we  
5 are not claiming that an application between Kingston  
6 and Seattle has a sweeping statewide impact that  
7 affects all public utility infrastructure such as was  
8 the case in the Washington Natural Gas case. We think  
9 this application will have a beneficial and incremental  
10 impact on public transit alternatives, but it is the  
11 first step, and it is clearly not one that affects most  
12 of or a large percentage of the citizens in the state.

13           So for all of the above reasons in terms of  
14 the issues raised by the IBU and for the arguments that  
15 we allude to in our written response, we ask that their  
16 participation in this proceeding be denied and that you  
17 find that in the public interest, their involvement  
18 would be contrary to the public interest and would  
19 protract and expand the record unnecessarily.

20           JUDGE RENDAHL: Thank you, Mr. Wiley,  
21 Mr. Iglitzin?

22           MR. IGLITZIN: Thank you. As an initial  
23 matter, I think it's important to address the  
24 procedural context of what has been entitled a motion  
25 to strike. As the IBU set forth in its brief, a motion

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1 which will completely end the participation of a party  
2 or be a complete determination of one or more issues is  
3 a dispositive motion or a motion for summary  
4 determination entitling the nonmoving party to 20 days  
5 to respond, and at a minimum, if one is looking at the  
6 WAC subsection entitled dismissal of intervenor, the  
7 intervenor has to be given notice any reasonable  
8 opportunity to be heard if the Commission determines at  
9 any time the intervenor has no substantial interest in  
10 the proceeding or that the public interest will not be  
11 served by the intervenor's continued participation.

12           It is IBU's position that that provision does  
13 not apply here because we have sought to intervene, but  
14 the dismissal of intervenor rule applies at a  
15 subsequent time if the Commission were to decide to  
16 dismiss the intervenor. What we are dealing with now  
17 is an effort to prevent the IBU from intervening at  
18 all. The significance of those procedural issues is  
19 twofold. First of all, the IBU has had no opportunity  
20 to respond to any of the arguments made by Commission  
21 staff, and the Commission staff in their brief raised  
22 completely different issues than are raised by the  
23 Applicant, and factual and evidentiary issues which we  
24 have had no opportunity at all to respond to either  
25 through written argument or through evidence.



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1           I guess I would direct your attention to the  
2 first argument made by Commission staff suggesting that  
3 there is no evidence in the record that the IBU is  
4 authorized to represent its members in a Commission  
5 proceeding of this nature. In terms of argument, I  
6 would suggest that the Commission staff's memorandum  
7 betrays a lack of understanding of labor relations in  
8 the nature of a relationship between a union and its  
9 members. The members of the IBU voluntarily joined the  
10 IBU, and that relationship is governed by the  
11 constitution and bylaws of the IBU which the members  
12 have voluntarily signed on to, and those documents give  
13 the IBU the authority to speak on behalf of their  
14 members not merely in an employee, employer  
15 relationship.

16           Prior to a ruling adverse to the IBU  
17 predicated on that Commission staff argument, we would  
18 make an offer of proof and be prepared to present  
19 evidence both documentary and testimonial that the  
20 members of the IBU, in fact, have specifically  
21 authorized the IBU to take precisely these types of  
22 actions in the interest of its members. In the  
23 judgment of the IBU, actions like this are appropriate.

24           The lack of 20-days notice is additionally  
25 significant with regard to the arguments made by the

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1 Applicant. So for example, the Applicant cites the  
2 Washington Natural Gas decision as being predicated in  
3 some way on the specific finding in that case that the  
4 decision at issue affected a substantial percentage of  
5 the population. Therefore, the case is one of  
6 statewide importance. The IBU had not had an  
7 opportunity to respond to that argument by showing  
8 evidence indicating the actual negative impact of this  
9 application if granted.

10 In other words, the actual number of workers  
11 who will lose their jobs, families who may lose their  
12 homes, and the kind of economic analysis that is used  
13 by economists looking at job loss that for every one  
14 job, certain other jobs are lost as a result of the  
15 lack of wages going into the retail stream and that  
16 type of thing. The IBU had no opportunity to respond  
17 if we are going to be talking about the public  
18 importance doctrine.

19 We have had no opportunity to present any  
20 evidence to explain why the effect of this application  
21 might actually meet the criteria that the Supreme Court  
22 would follow in applying the public importance  
23 doctrine. Obviously in our protest, we set forth what  
24 we believed to be the basis of our interest, but that  
25 was not an opportunity to present documentation and

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1 evidence without being put on notice that such was  
2 necessary to actually show if it is disputed why this  
3 is so important.

4 I'm not going to reargue what I've already  
5 put in writing, but I will address a couple of things  
6 Mr. Wiley just noted. One is the suggestion that what  
7 the IBU is doing is riding on the coattails of an  
8 unwilling principle, because I think that that really  
9 zeros in on the reason why intervention should be  
10 granted on the part of the IBU and the so-called motion  
11 to strike should be denied. Because the Washington  
12 State Ferry is a political entity, and it may and does  
13 have a whole range of political motivations for making  
14 the decisions it makes, and among those decisions is  
15 the decision to write the letter that is attached, I  
16 believe, to the Application saying, We don't have a  
17 problem. We are not taking a position on this  
18 application.

19 If, in fact, the IBU is correct that the  
20 effect of this application will be to have a  
21 substantial adverse effect on the Washington State  
22 Ferry that that has to be of significant, if not  
23 paramount significance, to the Commission, because I  
24 don't believe that it is disputed, and, in fact, it's  
25 in the statute that the Commission is supposed to

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1 consider and give substantial weight to the effect of  
2 its decisions on public agencies operating or eligible  
3 to operate passenger-only ferry service.

4           The statute RCW 81.84.020(4), does not say  
5 the Commission shall only consider and give substantial  
6 weight to this factor if the public agency asks the  
7 Commission to consider and give substantial weight to  
8 that decision or to that effect, and there is nothing  
9 in the statute, the regulation, or the case law which  
10 has been cited that takes away from the Commission  
11 either the right or the responsibility of asking the  
12 following question: What will be the effect of this  
13 application on Washington State ferries? Will that  
14 effect, in fact, be serious, negative, and detrimental?  
15 Will it have widespread social implications that affect  
16 the substantial majority of the population, or at least  
17 that population that has any interest or use of  
18 commercial ferries.

19           That is what distinguishes this case from  
20 the other authority cited by Mr. Wiley and the  
21 Applicant because it is precisely the IBU is to a large  
22 extent asserting a right that is derivative of the  
23 impact on the state ferry. The IBU is not contending  
24 that the impact on its members wholly separate from the  
25 impact on the Washington State Ferry would be

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1 sufficient, necessarily, to establish a right to  
2 intervene in this matter, but the IBU is the only  
3 entity that is, in fact, raising the issue which the  
4 Commission is supposed to place substantial weight on,  
5 the effect of this decision on the Washington State  
6 Ferry.

7           Which brings us back to what the IBU is the  
8 ultimate message of the Washington Natural Gas Company  
9 case, which is where a controversy of is serious public  
10 importance, it is appropriate and within the discretion  
11 of the Commission to permit a party to intervene. The  
12 interests of the IBU are clearly protected by  
13 Washington State law as part of the statutory framework  
14 that governs Washington State Ferry. They are not  
15 merely an incidental beneficiary of Washington State  
16 Ferry. We cite in the brief an entire RCW statutory  
17 chapter dealing with the relationship between the ferry  
18 and labor organizations representing Washington State  
19 Ferry workers.

20           The Commission also has the authority and has  
21 the discretion to permit the IBU to intervene and to  
22 deny the protest if the Commission believes that it  
23 will further the interest of the Commission. The  
24 bottom line of the part of the IBU is a ruling that  
25 permits the IBU to intervene and raise the issues that

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1 it has indicated it wishes to raise, the result and  
2 administrative law judge decision and the Commission  
3 decision adjudicating those issues, and let us suppose  
4 hypothetically that the adjudication is in favor of  
5 Applicant. At least we will all know and the public  
6 will know that the Commission addressed these issues,  
7 evaluated the weight and significance and validity of  
8 the issues raised by the IBU, made a ruling in favor to  
9 the Applicant, and then the Application moves forward  
10 and its legitimacy is essentially unchallengeable at  
11 that point, but if the Commission exercises its  
12 discretion to grant the so-called motion to strike,  
13 then it will be in a situation of potentially moving  
14 forward and granting an application when very  
15 fundamental and very serious issues of concern to large  
16 portions of the public will never be adjudicated, and  
17 there will never be review of those issues.

18 That latter approach is inconsistent with the  
19 approach that the Commission and the courts have  
20 preferred in the past, and in the case law, all the  
21 parties have referred you to the various other times  
22 when labor organizations have, in fact, been allowed to  
23 intervene in Commission proceedings where what you see  
24 is where it furthers the interest of the Commission and  
25 it assists the Commission. It further the goals of the

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1 statute to assist the Commission in making its  
2 decisions with regards to those entities which it does  
3 regulate that the better course of action in this case  
4 is to deny the motion to strike. Thank you.

5 JUDGE RENDAHL: Thank you, Mr. Iglitzin.  
6 Mr. Trotter?

7 MR. TROTTER: Just a few comments, Your  
8 Honor. Thank you. First of all, on behalf of  
9 Commission staff, we did make the argument, as  
10 Mr. Iglitzin notes, that the protest did not reflect  
11 that the IBU is authorized to represent its member in  
12 this context. It stated solely that it was their  
13 exclusive bargaining representative. Our raising of  
14 that issue did not reflect a lack of understanding how  
15 a union works but rather a full appreciation of what  
16 the protest said.

17 Now, if Mr. Iglitzin is correct that the IBU  
18 is, in fact, authorized to raise the issues on behalf  
19 of its members that it seeks to raise here, so be it,  
20 and if you wish to allow it to amend its protest to  
21 include or whether you wish to allow they have to rise  
22 or fall by the protest they filed, either way, is that  
23 satisfactory to us.

24 Also, we are sensitive to the fact that  
25 Mr. Iglitzin did not get our pleading until mid

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1 afternoon yesterday, and if you wish to allow him  
2 reasonable opportunity to respond in writing, we will  
3 not object to that. I'm not sure we really added too  
4 many issues that they are incapable of responding to,  
5 which in fact they did respond to, so I think they've  
6 been given a fair hearing on it, but my prior comment  
7 stands.

8           We have to read the protest for what it says,  
9 and several of the issues on their list talk about the  
10 impact on the union members, and we cited you the Puget  
11 Sound Power and Light case, which said, quote, "The  
12 Commission will not consider issues of wages, benefits,  
13 or job protection for union members," unquote, so those  
14 issues are out. The air and water quality issues they  
15 raise, there is no statutory authority for the  
16 Commission to hear those issues. There is no  
17 allegation there is a violation of any law or rule  
18 related to air quality, even if the Commission could  
19 consider those issues, so we think those issues are  
20 out. That leaves impact on the state ferry system.

21           Now, one statute we think is particularly  
22 pertinent here is RCW 47.60.120. That statute, which  
23 is therefore the protection of the ferry system,  
24 states, essentially, that if a private ferry crossing  
25 is within ten miles of an existing state crossing, it



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1 cannot be allowed to proceed unless there is a waiver  
2 of that ten-mile rule, and in granting a waiver, the  
3 Commission has authority, or maybe it says "shall  
4 consider," impact on the ferry system as a whole and  
5 air quality improvement.

6 Now, there, to us, the legislature is saying  
7 the ten-mile rule is our law protecting the state ferry  
8 system, and that is where the legislature has directed  
9 the Commission to deal with that issue. The ten-mile  
10 rule doesn't apply here for the reasons addressed in  
11 our memo, and secondly, the statute very clearly states  
12 that passenger-only ferry services are exempt. To us,  
13 that's a very significant statement by the legislature  
14 that it does not wish the Commission to delve into  
15 those issues in cases where the ten-mile rule does not  
16 apply.

17 Mr. Iglitzin has focused on another statute,  
18 81.84.020(4), and I believe you quoted or paraphrased  
19 it correctly. That refers broadly to public agencies.  
20 We think the specific statute here controls, and that's  
21 47.60.120. Therefore, in this particular context, we  
22 think the legislature in reconciling these two  
23 sections, the only logical conclusion is that for  
24 passenger-only ferries that do not meet the ten-mile  
25 rule, that is not an issue for the Commission to

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1 resolve. But even if it was, we have attached to our  
2 memo the letter from the Department of Transportation,  
3 who is the Washington State Ferry -- that is simply the  
4 name used by the Department of Transportation doing  
5 that activity -- and they have said that they are not  
6 opposing this application on any basis and they  
7 reviewed it and don't oppose it.

8           Now, the public-interest doctrine does permit  
9 liberal standing in certain circumstances, and we cited  
10 in our second to last footnote the general rule for  
11 third-party standing, and we do not believe the IBU  
12 qualifies, but the one point regarding the  
13 public-interest doctrine is that the court applies that  
14 liberal standing policy when there is really no one  
15 else to bring the issue to the court, so the court can  
16 resolve issues of public importance where there might  
17 not be someone withstanding to assert the harm.

18           Well, here we have a party who is fully  
19 capable of protecting its own interests, and that is  
20 the Washington State Ferry system itself, and they have  
21 elected not to contest that issue, so we do have  
22 someone here in the state to raise these issues, and  
23 they have affirmatively elected not to, so we don't  
24 believe the public-interest doctrine applies in that  
25 context.

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1           So that is why we are supporting the motion.  
2    There is an issue as to whether it's a motion to strike  
3    or a motion involving intervention. I did not read the  
4    reply of IBU to demand 20 days to respond, and it does  
5    seem to me it's more in the disposition of a motion to  
6    intervene than it is a dispositive motion, because  
7    right now, there is no participation, so it really is  
8    the allowing parties into the case aspect of the case,  
9    and that is more analogous to the intervention of  
10   rules, so we think that applies, but as I said at the  
11   outset, if they desire a period of time to effectively  
12   respond to our memo, we are not going to object to  
13   that.

14           But overall, we simply don't think their own  
15   protest as filed and as defended survives legal  
16   scrutiny, and the Commission should exercise whatever  
17   discretion it has to deny it or as a matter of law to  
18   deny it. Thank you.

19           JUDGE RENDAHL: Thank you, Mr. Trotter.  
20   Anything further, Mr. Wiley?

21           MR. WILEY: Just briefly, Your Honor. In  
22   hearing Mr. Iglitzin's rationale for standing to raise  
23   the issues that he grappled with articulating in his  
24   comments and his response, I was struck again by the  
25   appropriateness of the quotation from the Washington

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1 Supreme Court in the St. Joseph's case, which is cited  
2 at Page 3 of our brief and is quoted, and I think, Your  
3 Honor, if you revisit that language on Page 3 that is  
4 quoted, it's clear that the kind of interest that  
5 Mr. Iglitzin is trying to articulate is the type of  
6 amorphoused interest that the courts in reviewing  
7 standing issues have said are not within the purview of  
8 an injury-in-fact jurisdiction by this Commission, and  
9 I think the Commission certainly is given broad  
10 discretion to rule on standing, but those rulings and  
11 those actions have always been consistent with a  
12 statutory mandate in terms of regulating public service  
13 companies, and here, we clearly have that type of  
14 disconnect between the type of interest, the  
15 amorphoused broad interest that anyone can claim an  
16 entry application might hold for their interest group  
17 and what the statute specifically directs.

18           The statute in this case, RCW 81.84, is very  
19 specific in setting forth the road map as to what  
20 issues must be considered by this commission after  
21 hearing before it grants or denies an application. All  
22 of those statutory issues, which have also been  
23 implemented by rule by this Commission, are before us  
24 and must be addressed by the Applicant in this  
25 proceeding. The role of the IBU in addressing those is

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1 not going to extinguish the fact that we must make  
2 affirmative showings on fitness, willingness, ability,  
3 ridership, all sorts of financial showings. So again,  
4 Your Honor, I think that the reason there is disconnect  
5 is because the group that Mr. Iglitzin is seeking to  
6 represent in this proceeding simply lacks any role in a  
7 proceeding of this type.

8 JUDGE RENDAHL: Thank you, all of you, for  
9 your presentations and arguments.

10 MR. IGLITZIN: I did just want to clarify  
11 that I am requesting the 20-day period to respond in  
12 writing to the motion to strike and to the Commission  
13 staff's memorandum on that issue.

14 JUDGE RENDAHL: Thank you. I'll take that  
15 under consideration.

16 MR. IGLITZIN: Thank you.

17 JUDGE RENDAHL: Mr. Wiley, just to further  
18 clarify the Brown's Limousine case that you cited, Was  
19 that an administrative law judge decision or a  
20 Commission decision?

21 MR. WILEY: It's a final Commission decision  
22 at 1983 Washington UTC Lexus 41.

23 JUDGE RENDAHL: And Mr. Trotter, the letter  
24 from the state ferry system, I attempted to locate that  
25 on our docket system. It doesn't appear to be posted

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1 yet.

2 MR. TROTTER: We had an e-mail copy of that  
3 letter, but we have not received it through the mail,  
4 so I asked yesterday for the Department to fax it  
5 because the e-mail version was not on letterhead or  
6 signed, so they faxed it, so what is attached there, I  
7 can't explain why it wasn't delivered in the mail yet,  
8 but I will follow through on that and make sure it is,  
9 but they did fax me the signed copy, and I was sure  
10 that that was the official letter of the Department,  
11 but I can't tell you why it has yet to come in the  
12 mail. I will pursue that and find out.

13 JUDGE RENDAHL: That's okay. I had also not  
14 received the Inlandboatmen's Union response through our  
15 docket system and it was not yet posted, so it may be a  
16 backup in our record's center, which may simply be the  
17 issue, and I have not had time to inquire, so I simply  
18 wanted to know if it has been filed with the  
19 Commission, and if you don't know, that's fine.

20 MR. TROTTER: I don't know. I did note that  
21 the IBU's response, I think, did get logged on a couple  
22 of hours ago.

23 JUDGE RENDAHL: Thank you. Because of the  
24 short notice of this prehearing conference and then the  
25 necessity for the Applicant to quickly file its motion,

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1 and I do appreciate the very rapid responses by the  
2 other parties in this proceeding, but I do believe that  
3 in order to provide due process to, in particular, the  
4 Protestant in this matter that I'm going to allow an  
5 opportunity to respond in writing, and in reviewing the  
6 rules that you have referenced, Mr. Iglitzin, in  
7 particular, WAC 480-07-375, which addresses motions,  
8 and is WAC 480-07-380, which addresses dispositive  
9 motions, while I agree that those rules establish a  
10 20-day period or a five-day period, they also do allow  
11 the Commission to set a separate date if it's  
12 appropriate, and given the need to resolve this issue  
13 in rather short notice, I don't believe a 20-day period  
14 is appropriate. Given that an initial response to the  
15 Applicant has already been provided, I'm going to try  
16 to establish a different date and to accommodate the  
17 need to respond to both the arguments made today and  
18 those in the written responses by Staff and Aqua  
19 Express.

20 This also ties into the need to establish the  
21 procedural schedule. I'm not going to rule on the  
22 motion today because I would like to hear in writing  
23 from the Inlandboatmen's Union and give them an  
24 opportunity to respond. I would like to resolve this  
25 rather quickly. We are now Friday the 21st of May.

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1 Mr. Iglitzin, is it possible for you to file by noon  
2 next Friday on the 28th?

3 MR. IGLITZIN: Yes.

4 JUDGE RENDAHL: Mr. Wiley and Mr. Trotter, do  
5 you have any reason to file a response to what  
6 Mr. Iglitzin provides?

7 MR. WILEY: As I understand, the IBU has had  
8 an opportunity to respond to our motion to strike.  
9 It's the Staff's reply to our motion to strike that  
10 they seek to respond to; is that correct?

11 JUDGE RENDAHL: Yes. The timing has been  
12 very, very short, and I would allow the IBU to provide  
13 supplemental response to your motion given the short  
14 response period that they had to submit something to  
15 the Commission.

16 MR. WILEY: I would like to reserve since we  
17 have the burden on a motion to strike to show the lack  
18 of standing, as I understand the rules, to be able to  
19 reply briefly if we need to by the following Wednesday.

20 JUDGE RENDAHL: So what I would do is allow  
21 the Inlandboatmen's Union to provide a supplemental  
22 response to the Applicant and a response to Staff's  
23 arguments by noon on Friday the 28th of May. To  
24 expedite, the parties can file or can submit the  
25 response electronically to the Commission and then



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1 follow it up on Monday with a paper copy so that we  
2 will receive it electronically by noon on Friday, and  
3 then Mr. Wiley, if you can provide any reply you might  
4 have by noon on Wednesday, June 2nd, that would be  
5 helpful to allow the Commission to try to resolve this  
6 by Monday the 7th of June at the very latest.

7 MR. TROTTER: Your Honor, I would note that  
8 that Monday is a state and federal holiday. I don't  
9 know if that affects the timing or not.

10 JUDGE RENDAHL: I leave that up to Mr. Wiley.

11 MR. WILEY: I'm going out of town that  
12 Wednesday, Your Honor, so I have to have it finished by  
13 then. I appreciate Mr. Trotter noting that, but it  
14 doesn't help me.

15 JUDGE RENDAHL: Mr. Iglitzin?

16 MR. IGLITZIN: Thank you. I don't know  
17 whether it would be possible to get a transcript of  
18 today's argument in a timely fashion, because  
19 obviously, a number of arguments have been raised today  
20 that are not in the Applicant's -- especially in the  
21 Applicant's motion to strike.

22 JUDGE RENDAHL: You can order an expedited  
23 transcript of the proceeding from the court reporter.  
24 Let's go off the record.

25 (Discussion off the record.)

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1           JUDGE RENDAHL: While we were off the record,  
2 we discussed the availability of the transcript. The  
3 court reporter indicated that the standard turnaround  
4 time for the transcript would be June 7th but that any  
5 party could choose to expedite the transcript if they  
6 so choose, but it's an extra cost, and Mr. Iglitzin, I  
7 understand you to say that you would choose to have the  
8 transcript on the 7th and have a response on the 9th,  
9 and Mr. Wiley and Mr. Trotter were about to weigh in,  
10 so I'll turn first to Mr. Wiley.

11           MR. WILEY: Thank you. I would object to an  
12 extension and protraction of this issue and the ruling  
13 thereon to the 9th. As you know, the Commission has  
14 invoked an expedited proceeding to have the prehearing  
15 conference. We certainly want the hearing to be  
16 scheduled in a timely fashion, and extending it past  
17 that date simply to accommodate the lack of requesting  
18 an overnight or expedited transcript is not certainly  
19 consistent with our interest in this proceeding, so we  
20 would object.

21           JUDGE RENDAHL: Mr. Trotter?

22           MR. TROTTER: I did not hear Mr. Iglitzin say  
23 he was not going to seek an expedited transcript, so  
24 until he does, I guess I can't comment further. I  
25 think we can still do it on the schedule we have if the

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1 IBU is going to get an expedited transcript. It  
2 shouldn't be a very lengthy one.

3 JUDGE RENDAHL: Mr. Iglitzin, your need for  
4 the expedited transcript you said was based on the  
5 citations made by Mr. Wiley, I believe?

6 MR. IGLITZIN: In part based on the  
7 citations. I believe that Mr. Wiley only cited one  
8 decision that is not in his brief. That's the Brown'S  
9 Limousine Crew Car decision. If I could confirm that,  
10 that would be one bit of useful information.

11 MR. WILEY: That's correct, and I will  
12 provide it to you by mail by Monday.

13 MR. IGLITZIN: That would be great, but  
14 because the oral argument made at this prehearing  
15 conference is going to be part of the record and is  
16 going to be available to be reviewed by both the  
17 administrative law judge and the Commission if this  
18 goes up to interlocutory review, it basically is the  
19 same as written pleading, and the IBU very much wants  
20 the opportunity to be able to review those arguments.  
21 I took notes while Mr. Wiley was talking, but I did not  
22 take a verbatim transcript of his comments.

23 I am not in a position to know whether the  
24 IBU can afford or is willing to pay for an expedited  
25 transcript. Perhaps if we go off the record and the

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1 court reporter can give us an idea of what we are  
2 talking about, that might put me in a position to make  
3 that decision.

4 JUDGE RENDAHL: Let's be off the record for a  
5 moment.

6 (Discussion off the record.)

7 JUDGE RENDAHL: We do need to talk  
8 scheduling, and the reason we do is that in reading  
9 this statute or my reading of the statute is that in  
10 order to resolve this application, the statute requires  
11 a hearing. Now, the nature of the hearing is the  
12 question. If we have a protested application, then I  
13 think we need more of a full evidentiary hearing.  
14 Although, how we structure that, there is variations,  
15 and if there is no protested application, then the  
16 nature of the hearing is different.

17 So I will also inform you all that given the  
18 Commission's schedule in the month of June and during  
19 the summer, I understand that the Applicant has a  
20 temporary permit that expires in September; is that  
21 correct?

22 MR. WILEY: You are confusing us with a  
23 another recent applicant. We have no temporary.

24 JUDGE RENDAHL: But the Applicant does wish  
25 to initiate service in September?

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1 MR. WILEY: Correct.

2 JUDGE RENDAHL: In order to give the  
3 Commission time to hold a hearing and evaluate and  
4 issue an order and allow for any time for appeals that  
5 might occur to allow service to begin in September,  
6 it's important to try to schedule this hearing before  
7 the end of June, and looking at the Commission  
8 schedule, the two available days the Commission has are  
9 Monday and Tuesday, June the 21st and 22nd, because the  
10 4th of July holiday week is a not a good option, and  
11 the commissioners are also gone the week of the 12th  
12 and the 14th, and for other reasons, the week of the  
13 28th is not a good one, so we are kind of between a  
14 rock and a hard place here.

15 MR. WILEY: Does the Commission have the week  
16 of July 5th open?

17 JUDGE RENDAHL: They do, but I will not be  
18 here.

19 MR. IGLITZIN: I will not be available that  
20 week either.

21 JUDGE RENDAHL: Is the 21st and 22nd a  
22 possibility for the parties?

23 MR. WILEY: Can we go off the record?

24 JUDGE RENDAHL: Let's go off the record for a  
25 moment.

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1 (Discussion off the record.)

2 (Recess.)

3 JUDGE RENDAHL: While we were off the record,  
4 we tried to do some planning of scheduling a hearing  
5 and the type of hearing we might have and the timing  
6 that we would need, so this is what we came up with,  
7 and please chime in if I have not gotten it correct.

8 The Applicant is requesting a day of hearing  
9 here in Olympia with a day of hearing in Kingston. We  
10 are reserving the date of June 21st for a hearing here  
11 in Olympia that would address financial witnesses and  
12 operation witnesses, and then July 1st in Kingston, and  
13 the Applicant and Intervenor Kitsap Transit will be  
14 looking into whether there is a public room we can use  
15 for that hearing. The Commission would need a PA  
16 system, but I'm assuming any sort of a public  
17 auditorium would have that, and probably no need of a  
18 conference bridge. All parties will be participating.

19 The time estimates for witnesses and  
20 testimony varied greatly depending on whether the IBU's  
21 protest is dismissed or not, so I'm not going to go  
22 into great detail there at this point. The timing for  
23 the protest motion response is on Friday the 28th of  
24 May. The IBU will file its supplemental response to  
25 the Applicant's motion as well as a response to the

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1 Staff's response to the motion, and then on Wednesday,  
2 the 2nd of June, the Applicant will file a reply to the  
3 IBU's response.

4 The Commission will endeavor to have an order  
5 out by June 7th resolving the issue of the protest, and  
6 then a prehearing conference will be scheduled at 1:30  
7 on the following day, June 8th, at which parties can  
8 participate via the phone as opposed to attending in  
9 person so we can finalize details depending on whether  
10 the motion is granted or not.

11 The parties have agreed to exchange summary  
12 statements of witness testimony and evidence by the  
13 16th at noon in advance of the hearing on the 21st, and  
14 the order that will address the motion will also  
15 address the issue of the commissioners' request for a  
16 prehearing briefing and whether, in fact, that is  
17 needed, and if so, the nature of that briefing and the  
18 timing. Have I missed something?

19 MR. TROTTER: The summary of evidence to be  
20 filed would also include proposed exhibits.

21 JUDGE RENDAHL: Thank you. Mr. Wiley?

22 MR. WILEY: The only thing I see that you  
23 missed is the contingency that if the application is  
24 unprotested, we are reserving a half day in the  
25 afternoon on the 22nd. Is that correct?

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1                   JUDGE RENDAHL: That is correct, and I didn't  
2 state it. If not, we will reserve the afternoon on the  
3 22nd to address any financial and operational testimony  
4 that didn't get addressed on the 21st to allow us to  
5 proceed solely on the 1st with shipper need and a  
6 public hearing, and I'm not sure if I stated, but the  
7 Commission would like to have a public hearing on the  
8 1st, and we will determine whether it's appropriate to  
9 do that during the day or in the evening, and we can  
10 also address that further on the 8th at the next  
11 prehearing?

12                   Is there anything else we need to discuss  
13 this afternoon? If you haven't already, if you could  
14 please let the court reporter know if you need a copy  
15 of the transcript. I know Mr. Iglitzin will be  
16 communicating with Ms. Wilson in terms of obtaining an  
17 expedited transcript.

18                   MR. IGLITZIN: I take it the court reporter  
19 is there right now. If I could communicate at this  
20 point that we would like an expedited transcript, and  
21 if it's possible to only request the substantive  
22 argument portion.

23                   JUDGE RENDAHL: I'll let you two communicate  
24 with one another on that. Is there any other party  
25 that wishes to obtain a copy of the transcript?



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1 Hearing nothing, is there anything else we need to  
2 address? Hearing nothing on that, this conference  
3 stands adjourned, and I will be entering a prehearing  
4 conference order on the definitive issues that we have  
5 discussed today within the week. Thank you very much.  
6 We will be off the record.

7 (Prehearing conference concluded at 3:30 p.m.)

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