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

2 JUDGE CAILLE: This is a prehearing  
3 conference in Docket No. TS-031996, the Application No.  
4 B-079240 of Pacific Cruises Northwest, Incorporated,  
5 doing business as Victoria San Juan Cruises.

6 The purpose of this prehearing conference is  
7 to address some issues regarding the exchange of  
8 information between the Applicant and the Protestant,  
9 and at this time, I will ask the parties to enter their  
10 appearances. Let's begin with the Applicant.

11 MR. WILEY: David W. Wiley, same address, and  
12 contact information as the last prehearing conference,  
13 and I'm appearing today on behalf of Applicant Pacific  
14 Cruises Northwest, Inc., and on the line as well is  
15 Drew Schmitt, the president of the Applicant company.

16 JUDGE CAILLE: Ms. McNeill?

17 MS. MCNEILL: Polly L. McNeill, Summit Law  
18 Group, same contact information and address and phone  
19 number, and I'm appearing today representing the  
20 Protestant, San Juan Island Shuttle Express.

21 JUDGE CAILLE: For Staff?

22 MR. THOMPSON: Jonathan Thompson, assistant  
23 attorney general, representing the Commission staff.

24 JUDGE CAILLE: Let the record reflect there  
25 are no other appearances. Mr. Wiley actually requested

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1 that we have this prehearing conference to perhaps  
2 evaluate the appropriateness of the requests for  
3 information that have been exchanged between the  
4 Applicant and the Protestant.

5 I actually have a couple of questions. If I  
6 could ask those first, then perhaps, Mr. Wiley, you can  
7 present your argument about the scope of the questions.  
8 Ms. McNeill, my question is about Section D, and the  
9 topic is Island Commuter Service. I didn't have a  
10 chance to go page by page through my book here, but  
11 could you tell me who Island Commuter Service is?

12 MS. MCNEILL: Island Commuter Service is a  
13 nonregulated, I believe, operation in Bellingham that  
14 Mr. Schmitt, I believe, has an ownership interest in,  
15 and again, on information, we believe that Island  
16 Commuter Service because of that shared ownership is an  
17 affiliated interest to the Applicant.

18 JUDGE CAILLE: Could you take that one more  
19 step further and tell me what the relevance of that  
20 would be?

21 MS. MCNEILL: Well, we think that there might  
22 be some kind of contract and arrangements that I have  
23 requested in these questions between Island Commuter  
24 Service and the Applicant which may ultimately lead to  
25 information related to whether the public convenience

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1 and necessity would be served by the granting of this  
2 certificate, and potentially, I suppose, the question  
3 of whether the Applicant's fitness to provide the  
4 service. Although, I know Mr. Wiley's opinion is that  
5 fitness is not relevant.

6 JUDGE CAILLE: Mr. Wiley, why don't you go  
7 ahead and tell me exactly the areas you have a problem  
8 with regarding Ms. McNeill's request for information.

9 MR. WILEY: If we could just step back -- I  
10 know you don't want to go one by one, and I can  
11 understand why because of the limited time frame. I've  
12 gone back over my letter to you of July 8th, and I do  
13 want to correct one statement that Ms. McNeill just  
14 made is that I don't think fitness is relevant.

15 I think fitness is relevant, but I think the  
16 way fitness is relevant, the process by which we get  
17 there, she and I disagree on in a boat hearing, and I  
18 know the Applicant has the affirmative burden to  
19 establish fitness, willingness, and ability even though  
20 the statute doesn't expressly state that, but I don't  
21 want it to be misapprehended that I don't feel we have  
22 to establish our fitness. We do, and we are prepared  
23 to do that. If you go back to my July 8th letter, I  
24 think -- do you have that with you, Your Honor?

25 JUDGE CAILLE: Yes.

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1                   MR. WILEY: I do think my point, that we  
2 start out with the point of what the statute requires  
3 in this industry in terms of what an applicant has to  
4 prove, and for that you go to 81.84.020 and  
5 WAC 480-51-030, and we have the affirmative burden, as  
6 you know, to prove we have sufficient assets on hand,  
7 to establish a pro forma that goes out over 12 months,  
8 to generally talk about what experience and what sort  
9 of financial support we have for the operation, and  
10 specifically, the types of matters that are referred to  
11 in the rule at 480-51-030.

12                   The concern here, and I allude to it in the  
13 letter that sort of back drops everything right now  
14 that I would say crystallizes my opposition to the type  
15 of information sought by Ms. McNeill in her July 7th  
16 letter is that we got a disconnect between our  
17 affirmative burden and negative inferences of  
18 unfitness, which apparently, the Protestant wishes to  
19 develop in this record.

20                   The problem with that, particularly in this  
21 application case involving these certificate holders,  
22 is two-fold at least. First, this protestant has filed  
23 by, based on what I can gather in looking through  
24 archive files and Commission regulations, at least two  
25 separate complaints against Island Mariner, one in the

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1 late 1980's right after it received its authority,  
2 which appears to be an informal complaint, and then  
3 another formal complaint in 1998 against Island  
4 Mariner, which involved a lot of the information that  
5 they are seeking here. It's just they are carrying it  
6 forward after the end of December 1998 when the  
7 complaint was dismissed.

8           So we've already had complaints filed, both  
9 informal and formal, by this protestant against Island  
10 Mariner and the operations of Island Mariner in serving  
11 the points in its certificate which were involved with  
12 this reference to Island Commuter and to Mr. Schmitt in  
13 1998.

14           So we've had a complaint. Now we have an  
15 application case where Mr. Schmitt's company is seeking  
16 to serve two points in direct nonstop service, and we  
17 have the same kind of allegations made against Island  
18 Mariner and now, I guess, against Pacific Cruises and  
19 Island Commuter by virtue of discovery sought in an  
20 application case, and my concern with that is first of  
21 all, in a complaint case, Ms. McNeill would have the  
22 burden of proof. We don't have the burden of proof,  
23 and the kind of information she is seeking really  
24 relates to complaint allegations under the statute.

25           The procedural rules that I cite in the

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1 letter and that we talked about in the prehearing  
2 conference, as you know, do not call for data requests  
3 and formal discovery in transportation application  
4 cases. My concern, first of all, the discovery rule  
5 has not been triggered, and we oppose as such. Second  
6 of all, the kind of information that Ms. McNeill is  
7 seeking is very burdensome to collect. It's  
8 confidential, and certainly, protective orders are  
9 available, but her client is a former employee of my  
10 client, and while we have no concern that Ms. McNeill  
11 would not disclose information under a protective  
12 order, we certainly have concerns about third parties  
13 and clients telling third parties, and this is  
14 proprietary information, and it's going to protract and  
15 make this proceeding exceedingly expensive.

16 The other point I wanted to make, and it  
17 occurred to me as I went through archive documents, is  
18 that the focus on Island Mariner BC-95 and  
19 Ms. McNeill's argument that we have to adduce evidence  
20 about their operations or lack thereof is somewhat  
21 misguided to the extent that in reviewing BC-95, while  
22 it has the point that Bellingham and Friday Harbor  
23 contain in the permit, it is not the same type of route  
24 or service as the Applicant here is proposing.

25 In other words, while it might have some

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1 territory and district commonality, it is not an  
2 existing service provider on the route sought by the  
3 Applicant, because as the Commission staff found in  
4 1988, BC-95 requires flag stops, intermediate stops,  
5 anytime they are desired, and that's substantially  
6 different than the service that's sought by the  
7 Applicant here, and the Commission staff concluded in a  
8 June 15th, 1998, letter by Paul Curl that the service  
9 authorized in BC-95 is, quote, "not directly from  
10 Bellingham to Friday Harbor but must include the  
11 additional stops as named on the certificate or issued  
12 by the Commission," unquote.

13 So in addition to my concern about burden of  
14 proof, triggering the discovery rule, the cost, and  
15 protraction that that entails, I don't believe a focus  
16 on BC-95 is germane since it's not the same service  
17 that's sought by the Applicant.

18 JUDGE CAILLE: Mr. Wiley, could you please  
19 for the record, tell us what BC-95 is? Is that an  
20 application number or a certificate?

21 MR. WILEY: It's a permit number that issued  
22 to Island Mariner, Inc., against whom the complaint was  
23 filed by the current protestant in 1998.

24 MS. MCNEILL: Okay. Now, we only have until  
25 10:40 so --



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1                   JUDGE CAILLE: Can you limit your comments  
2 until 10:30?

3                   MS. MCNEILL: I don't even know if I will  
4 need that long. First of all, as Mr. Wiley knows, the  
5 nature and the burdens involved in a complaint action  
6 are far different from those involved in an  
7 application, and the question has to do with whether  
8 there is or there is not sufficient public convenience  
9 and necessity satisfied by the service sought, and I  
10 was not involved in the prior complaint actions. I  
11 actually, frankly, have heard Mr. Wiley refer to them  
12 but not read any of the papers in the complaint action,  
13 and I developed my information request without any  
14 knowledge of or reference to or awareness of the  
15 complaint action, and I thought that my questions went  
16 to issues that may or may not involve some relevant  
17 information about whether the public convenience and  
18 necessity standard has been met and whether the  
19 Applicant is fit to provide the service.

20                   I think they are directly relevant. As you  
21 know, we have a concern that the affiliated interests  
22 are sort of in cahoots, I guess, for lack of a better  
23 word, and we find it very odd that the BC-95 did not  
24 protest or make any statement in this, and we believe  
25 that it is because of the affiliation between the

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1 owners of the two companies, and if that is, in fact,  
2 the case, that doesn't necessarily preclude a finding  
3 of public convenience and necessity, but it does raise  
4 an issue that I think the Commission would want to be  
5 aware of in evaluating the merits of this application.

6 I guess I would also like to say that while I  
7 did not write a letter similar to Mr. Wiley's upon  
8 receipt of his information request because I became  
9 aware that we were going to have this prehearing  
10 conference, I would like to take an opportunity to say  
11 that, using the vernacular, this is like the pot  
12 calling the kettle black. If you look at the  
13 information request that we received from Mr. Wiley  
14 with regard to my client, first of all, we are a  
15 protestant. We have no burden of proof in this matter  
16 whatsoever, and Mr. Wiley's requests, I think, are  
17 almost intentionally to the establishing requests that  
18 are annoying and embarrassing and oppressing and  
19 unrelated to any element of proof in this matter.

20 I think for him to be asking the kinds of  
21 personal information and financial information about  
22 the individual owner and his wife is completely  
23 irrelevant and unacceptable, and I guess by comparison,  
24 at least my questions actually went to the merits of  
25 the application, not to some sort of personal vendetta.



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1 all, with respect to the review of the complaint file,  
2 I would urge Ms. McNeill to do that. I certainly have  
3 provided her with a copy of a letter dismissing the  
4 complaint. I have then taken an opportunity to gather  
5 the documents. I don't think the fact that she hasn't  
6 looked at the file has any bearing on the issues she is  
7 seeking to resolve here in the application now.

8 I do want to particularly respond to her  
9 statement, which I completely take issue with, that  
10 there is no burden of proof on a protestant in a  
11 commercial ferry case whatsoever. That is a complete  
12 misstatement of the law, as I understand it. I believe  
13 that the protestant must show a holding out to perform  
14 the service that it is protesting, and the issue of  
15 their fitness to operate and to provide service and  
16 their historic provision of service or lack thereof is  
17 completely relevant to the issue of whether the public  
18 convenience and necessity requires the grant of this  
19 application.

20 Another response on her reference to the  
21 burden of proof, typically, the kind of issues that  
22 she's seeking to elicit from shipper witnesses are  
23 listed through cross-examination as to need. The fact  
24 of operations by other carriers or to other points is  
25 only at best tangentially related to a public

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1 convenience and necessity, which traditionally comes  
2 through the people who support the service. First of  
3 all, my letter, I think, is very clear at the end that  
4 we would withdraw most, if not all, of our requests if  
5 her requests are disallowed. I don't need any of that  
6 information to go to hearing, and I would withdraw them  
7 if her requests are stricken.

8           As far as the discovery rule being invoked, I  
9 have once again gone to the regulation, Your Honor, and  
10 I've cited it in my letter, and these are not any of  
11 the circumstances that typically trigger the discovery  
12 rule. If she files a complaint case, and she's welcome  
13 to file a complaint against us right now, I would  
14 certainly think there would be an argument to be made  
15 that the discovery rule should be invoked. Although,  
16 even in Subsection 2 of that B-2, that is somewhat  
17 limited, but whether or not the discovery rule is  
18 invoked in this case doesn't resolve the nature of the  
19 request, the burdensome, voluminous, and irrelevant --  
20 largely that's the key issue. They are not relevant to  
21 our statutory showing.

22           So for all of those reasons, and particularly  
23 because I believe that a lot of this information is  
24 being sought to gather commercially competitive data on  
25 this applicant, I think they are improper, and finally,

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1 I would say the reason there were personal references  
2 to the shareholders of the Protestant in my data  
3 request are some of the obligations of the corporation  
4 were personally guaranteed by the shareholders, and  
5 that's why I sought that information. Again, I think  
6 all of these data requests in the aggregate are not  
7 relevant to the statutory showing we have to make.

8 JUDGE CAILLE: Okay. Commission staff?

9 MR. THOMPSON: I just have one observation.  
10 That is, whether or not the discovery rule is invoked,  
11 it seems to me that these issues are going to have to  
12 be teed up at some point, and if not through the data  
13 request process, then I would assume that Ms. McNeill,  
14 maybe Mr. Wiley too, would ask for this stuff through  
15 subpoenas, and at some point, the argument is going to  
16 have to be made that this is not reasonably calculated  
17 to lead to the discovery of admissible evidence, these  
18 kinds of arguments, and the ALJ is just going to have  
19 to go through and we are going to have to have  
20 arguments about each one of them.

21 As I think about it, it doesn't seem to me  
22 that necessarily invoking the discovery rule and  
23 getting this stuff figured out prior to the hearing is  
24 going to necessarily result in any additional cost to  
25 the parties in producing information because the

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1 subpoena allows you to ask for the information to be  
2 brought to the hearing in any case, and the inevitable  
3 arguments about whether the information should be  
4 produced are going to have to be made at some point  
5 anyway. So I think the Commission does have the  
6 authority to invoke the discovery rule in this case.

7 I don't have the rule language in front of  
8 me, but there is sort of a catch-all at the end, as I  
9 recall. It says, any case where the needs of the case  
10 justify it, the Commission can do it. I frankly think  
11 it would be a more orderly way of dealing with the  
12 information in the case to go ahead and invoke it and  
13 try to get some of this stuff resolved well ahead of  
14 the hearing.

15 JUDGE CAILLE: Is there anything further from  
16 anyone in response to what Mr. Thompson said?

17 MR. WILEY: Your Honor, I would just add that  
18 if the discovery rule were to be invoked by you, we  
19 would still, as I think Mr. Thompson alluded to, have  
20 the dispute about the relevance of the data requests  
21 that are set forth informally in her July 7th letter.  
22 They will have to be resolved probably one by one.

23 MS. MCNEILL: I think that's right; although,  
24 I would say that if Mr. Wiley has already acknowledged  
25 he doesn't need any of the information he requested

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1 from us, I'm not sure what the support would be for why  
2 it should be --

3 MR. WILEY: Only if you don't get it from us,  
4 Ms. McNeill. That was conditional, as the letter said.

5 JUDGE CAILLE: Even though we are doing this  
6 on the phone, please address your comments to me and  
7 not to one another. Actually, Mr. Thompson is correct.  
8 There is a section that says that the Commission has  
9 the discretion to invoke the discovery rule.

10 MS. MCNEILL: It's Subsection 2(b)(4).

11 JUDGE CAILLE: I think, perhaps, that just  
12 from listening to you folks argue, I think that it  
13 would probably be a good idea for us to exercise that  
14 discretion and order the discovery rule be invoked.  
15 Then that will allow me to perhaps see if you folks  
16 could use the discovery conference process that's in  
17 480-07-415, and again, that is informal. That is not  
18 with a court reporter or myself. In fact, it would  
19 just be with the parties, and if you wanted a  
20 facilitator, we would have to get somebody other than  
21 myself. Do you think that that process would work in  
22 this situation?

23 MS. MCNEILL: I think it may help. I don't  
24 know that it will resolve all of the issues but it may  
25 help, certainly, because some of the questions that I



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1 have raised, I think, just having a discussion with the  
2 Applicant about some of those would be able to narrow  
3 down and probably alleviate the burdensomeness that  
4 Mr. Wiley has alleged.

5 JUDGE CAILLE: Is everyone familiar with what  
6 I am speaking of? It's 480-07-415, discovery  
7 conference?

8 MR. WILEY: Yes. I think a facilitator would  
9 be necessary, Your Honor, at that conference. I think  
10 it might help. I agree with Ms. McNeill, but right  
11 now, I think we have arguments with almost every single  
12 request by her, and it sounds like she has arguments  
13 with a lot of my requests.

14 JUDGE CAILLE: So in other words, I view that  
15 discovery conference as a way of avoiding written data  
16 requests and exchanging information.

17 MR. WILEY: Right.

18 JUDGE CAILLE: Are you saying that you don't  
19 think that that will be the result?

20 MR. WILEY: No, Your Honor. I'm saying that  
21 I think it would help, and that's probably preferable  
22 than having us do formal data requests at this point  
23 because we each know what each was seeking by virtue of  
24 our letters.

25 JUDGE CAILLE: Now, you understand that

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1 anything that is exchanged at that conference cannot  
2 come before me unless it's agreed to.

3 MR. WILEY: In other words, are you saying  
4 that the discussions or the substantive developments at  
5 that?

6 JUDGE CAILLE: Yes.

7 MS. MCNEILL: But as I understand it, what we  
8 would be able to do is at least reach an agreement on  
9 what kind of information we could provide to each  
10 other, and we wouldn't have waived our opportunity to  
11 bring before you disputes about any other information  
12 that we still continue to believe is necessary. Is  
13 that correct?

14 JUDGE CAILLE: Are you asking me?

15 MS. MCNEILL: Yes, because I'm addressing all  
16 my comments to you.

17 JUDGE CAILLE: Yes, that's correct. So if  
18 this were to be an effort -- but I don't want to waste  
19 everyone's time either.

20 MS. MCNEILL: I agree with Mr. Wiley's  
21 observation that some sort of facilitator might be  
22 necessary, but I would anticipate that to a certain  
23 extent anyway, Mr. Thompson and Staff might be able to  
24 perform that function. I have regard for their ability  
25 to be objective, more objective perhaps than either the

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1 Applicant or the Protestant about the relevancy of the  
2 information that's being sought.

3 JUDGE CAILLE: In that case, we could not  
4 call Mr. Thompson really a facilitator, because I think  
5 the rule says no one connected to the case can be a  
6 facilitator. Perhaps what we should do is I should,  
7 seeing that the time is ticking by, get an e-mail out  
8 to folks and see when you would be available for such a  
9 conference and where you would want it, and then I  
10 would put that into a prehearing conference order that  
11 would discuss what we have discussed today.

12 MR. WILEY: Your Honor, addressing comments  
13 to you again, I've discussed both with my client  
14 separately and Ms. McNeill the fact that if this  
15 controversy continues, it's going to push out the  
16 hearing date and the other deadlines, and I think the  
17 three of us accept and understand that.

18 MS. MCNEILL: Yes, I concur with that. We  
19 have discussed that, and I have no opposition to  
20 adjusting the schedule to the extent it's warranted to  
21 find time to resolve these discovery matters.

22 JUDGE CAILLE: All right. So this is what I  
23 propose. I propose that unless -- well, maybe we could  
24 select a date right now, and I guess the other issue is  
25 a place. Do you want to do this at the Commission?

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1     Actually, I guess if there is going to need to be a  
2     facilitator, I'm going to need to check in with the  
3     head ALJ and see who would be available, so let me do  
4     that and do it through an e-mail.

5                 MR. WILEY:  Your Honor, recognizing that both  
6     clients are in Bellingham, if there is any way for the  
7     facilitator to come to Seattle to either mine or  
8     Ms. McNeill's office possibly, that would be great so  
9     they could participate as well and not have a five-hour  
10    drive.

11                MS. MCNEILL:  I concur with that suggestion.  
12    That makes sense.

13                JUDGE CAILLE:  So we need a facilitator that  
14    can go to Seattle.

15                MR. WILEY:  And, Your Honor, could we also  
16    have a little bit of extra time in light of your ruling  
17    about invoking the discovery rule to make sure all of  
18    the items we want included in that facilitation  
19    conference in terms of specific requests are before  
20    them?  In other words, if she wants to request  
21    additional things and I want to request additional  
22    things, can we get a little bit of lead time to do  
23    that?

24                JUDGE CAILLE:  Yes.  So what are you thinking  
25    of, Mr. Wiley?

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1                   MR. WILEY: The first two weeks in August  
2 are, as Ms. McNeill knows, bad for me, and I believe  
3 she has a hearing.

4                   MS. MCNEILL: I have a hearing the second two  
5 weeks in August.

6                   MR. WILEY: So this isn't great. I have the  
7 9th and the 10th open right now, and I also have the  
8 3rd in the morning open.

9                   MS. MCNEILL: And the 3rd would not work for  
10 me, but the 10th is available.

11                   JUDGE CAILLE: Did you say the 10th all day  
12 is okay?

13                   MR. WILEY: Yes, but I don't think it's going  
14 to take all day, and the morning of Thursday the 5th is  
15 open for me as well I see.

16                   JUDGE CAILLE: Let me try the 10th. Staff?

17                   MR. THOMPSON: Are we talking about the 10th  
18 of August?

19                   MR. WILEY: Yes.

20                   MR. THOMPSON: That would work.

21                   JUDGE CAILLE: Let me work on the 10th. I'll  
22 send an e-mail out, and I understand the procedural  
23 schedule is going to need to be adjusted and we will do  
24 that. I will mention that in my prehearing conference  
25 order as well.



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1 (Prehearing conference concluded at 10:40 a.m.)

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