



(via bridge), Post Office Box 435, Kingston, Washington

23 98346.

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 TOREM: We'll be on the record in the  
3 matter of Aqua Express. This is Docket TS-070889, and  
4 this is administrative law judge, Adam Torem. I'm here  
5 in Olympia at the Washington Utilities and  
6 Transportation Commission in Room 108. This is our  
7 second prehearing conference in this matter. It's been  
8 previously labeled as a status conference, and I  
9 understand today we will be discussing much more in  
10 detail of proposed settlement. It's Wednesday, July  
11 18th, 2007. It's about 9:35 in the morning. Kathy  
12 Wilson is our court reporter today.

13 Our last session together was June 14th,  
14 2007, and at that time, the parties were considering a  
15 full settlement, and in the Prehearing Conference Order  
16 that was issued on June the 20th, 2007, I indicated  
17 that I had granted a petition for intervention filed by  
18 Kitsap Transit, and extended the deadline for further  
19 petitions for intervention to July the 6th because of  
20 an oversight in how the original notice was served and  
21 not sent to parties of interest.

22 On July the 10th, we received a letter from  
23 Kingston Express, Mr. Nels Sultan, confirming that his  
24 organization declined to seek intervention status.

25 That letter was dated July the 8th, 2007. Also in late  
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1 June, Aqua Express hired the services of attorney David  
2 Wiley from Williams, Kastner, and Gibbs. He filed his  
3 notice of appearance and also a petition for exception  
4 to the 12-month limitation on discontinuances of  
5 service in accordance with WAC 480-51-130. Late  
6 yesterday or early this morning, the parties filed a  
7 full settlement agreement and will further explain that  
8 today.

9 So let me ask for appearances first from  
10 Commission staff, who is present in the room, and for  
11 those who are on the bridge line, as you speak, would  
12 you please identify yourself for the court reporter,  
13 not only this first time for appearances but each time  
14 as you interject something into today's proceedings.  
15 Mr. Trotter?

16 MR. TROTTER: You are asking for appearances  
17 of the parties, because we do have a nonparty on the  
18 line who is welcome to listen.

19 JUDGE TOREM: I'll get to him shortly.

20 MR. TROTTER: I'm Donald T. Trotter. I'm an  
21 assistant attorney general. I represent Commission  
22 staff, and with me is one of the staff members assigned  
23 to the case, Mr. Danny Kermode.

24 JUDGE TOREM: For Aqua Express?

25 MR. WILEY: David W. Wiley, attorney for Aqua  
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1 Express, LLP, and with me today as well is John

2 Blackman, who is the managing partner of Aqua Express,  
3 LLP.

4 JUDGE TOREM: For Kitsap Transit?

5 MR. TEMPLETON: This is Ron Templeton. I'm  
6 the attorney for Kitsap Transit. With me is Richard  
7 Hayes, who is the executive director.

8 JUDGE TOREM: And I also understand that  
9 Mr. Nels Sultan is on the line from Kingston Express,  
10 and I indicated your letter earlier, sir. Are you here  
11 today just to listen about the settlement?

12 MR. SULTAN: Yes, that's right.

13 JUDGE TOREM: Please let me know if there is  
14 a question that you need clarified along the way, and  
15 although you are not a party and have declined to seek  
16 intervention, if something is a pressing matter that  
17 may cause a letter of objection or some such later to  
18 the Commission, I think the parties would all rather  
19 deal with that today. So let me know if you have a  
20 question once the parties have completed description of  
21 the Settlement Agreement.

22 MR. SULTAN: That's understood, and thank  
23 you.

24 MR. BRYAN: Your Honor, I don't know if  
25 you're finished with the introductions. This is

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1 Darrell Bryan with the Victoria Clipper, also a partner  
2 in Aqua Express. I also wanted to indicate that I'm on  
3 the line.

4 JUDGE TOREM: He's also one of your clients,

5 Mr. Wiley?

6 MR. WILEY: His company is one of the  
7 partners in Aqua Express. He's just in a different  
8 location today, Your Honor.

9 JUDGE TOREM: Sir, can you spell your name?

10 MR. BRYAN: First name is Darrell,  
11 D-a-r-r-e-l-l, middle initial, E, Bryan, B-r-y-a-n, and  
12 the company is Clipper Navigation, Inc., d/b/a Victoria  
13 Clipper.

14 JUDGE TOREM: Thank you, sir. My  
15 understanding today is having looked through the  
16 Settlement Agreement that the parties are ready to give  
17 their testimony, if any, or simply have their  
18 representatives give a complete description and submit  
19 that document to me for approval and an order doing so  
20 and recommending that to the Commission. Mr. Trotter,  
21 is that the parties' intention?

22 MR. TROTTER: I believe so, Your Honor. Of  
23 course, I hope I speak for the parties when I say that  
24 we are here to satisfy Your Honor's needs in regard to  
25 information you need to properly evaluate this. It was

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1 filed late yesterday, I recognize, and you may not have  
2 seen it until this morning, so we are here to respond  
3 to your needs. I'm happy to give you an overview of  
4 the Settlement if that would help, and I'm sure the  
5 other parties will join in with any additional comments  
6 they have to make, but we are here to serve your  
7 interests in terms of understanding the Settlement and

8 getting to a point where you are comfortable in making  
9 a decision regarding it.

10 JUDGE TOREM: In that regard, Mr. Trotter and  
11 Mr. Wiley, my understanding is that to understand the  
12 Settlement, I simply need to see why it came out of  
13 open meeting and the concerns that were raised, see  
14 that all of those were addressed, and that as you've  
15 indicated, this is a full settlement under Commission  
16 rules, and then look at the legal criteria for how the  
17 Commission would have been able to grant this  
18 discontinuance in the first place and see if the  
19 Settlement Agreement recommending now a one-year  
20 discontinuance meets everything under the Revised Code  
21 of Washington, I think it's 81.84, and all other  
22 requirements in WAC 480-51.

23 MR. TROTTER: Yes, Your Honor. I'm prepared  
24 to make a short statement summarizing the Settlement  
25 and addressing those points, and then the other parties

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1 can chime in.

2 JUDGE TOREM: If it's not addressed during  
3 your statement, then maybe Mr. Wiley can address this.  
4 There was a petition for exception to WAC 480-51-130,  
5 and that was to seek out the 24-month discontinuance  
6 originally sought by Aqua Express, now reduced that to  
7 12. It would seem to me that that petition would be  
8 withdrawn either today, or perhaps more conservatively,  
9 only in the case of a recommendation for approval and  
10 ultimate approval by the Commission of the Settlement

11 Agreement and its 12-month discontinuance time period.  
12 So if you're going to tell me what the procedural  
13 recommendation with the petition is, I would appreciate  
14 that as well. I did not see it stated in the  
15 Agreement, but it was referenced, and I'm just guessing  
16 that that is the case.

17 MR. TROTTER: Yes, Your Honor, and on that  
18 point, perhaps Aqua Express can speak better for  
19 itself, but it's my understanding that they would agree  
20 that that petition would be withdrawn if the Settlement  
21 is approved. Certainly, Staff would have no problem if  
22 they want to withdraw it today, it would be without  
23 prejudice, and if the Settlement is not approved, they  
24 could refile that. Either way is fine with Staff, but  
25 why don't I give my brief presentation to you, and then

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1 Mr. Wiley can have a turn.

2 JUDGE TOREM: Folks, can you hear Mr. Trotter  
3 on the bridge line okay?

4 MR. WILEY: Yes.

5 JUDGE TOREM: Then I'm going to ask  
6 Mr. Trotter to proceed.

7 MR. TROTTER: As brief background, Your  
8 Honor, the Company filed a request for a two-year  
9 discontinuance of service. The current order  
10 permitting discontinuance of service approved that  
11 through June 4th of this year, and the Company filed a  
12 letter asking that two additional years be added or  
13 approved for discontinuance of service. Staff believed

14 that that letter was too cursory. The matter came  
15 before the Commission at an open meeting, and the  
16 Commission issued an order saying that there needed to  
17 be support for this request so the matter was set for  
18 hearing.

19 Interventions were taken. As you noted,  
20 parties were joined in the hearing, and we set about  
21 investigating more thoroughly the Company's request.  
22 The parties reached an agreement that a one-year  
23 discontinuance should be approved by the Commission  
24 from June 5th, 2007, through June 4th, 2008.

25 There is two critical conditions. One is

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1 that Aqua Express agrees it will not object to the  
2 Commission issuing a certificate under RCW 81.84 to any  
3 applicant seeking to serve between Kingston and  
4 Seattle, Washington commercial ferry service. So there  
5 is a basis under the statute then for the Commission to  
6 issue an additional certificate in the absence of an  
7 objection from an existing certificate holder, so that  
8 will protect the Commission's right to issue an  
9 additional certificate if one is filed before the date  
10 Aqua Express resumes service or June 4th, 2008,  
11 whichever comes first.

12 Aqua Express reserves the right to contest  
13 any other application for a ferry certificate, but of  
14 course, the agreement does not concede that they have  
15 such rights. That would have to be determined in such  
16 a case if it ever comes up. The other major condition



17 is that Aqua Express agrees to file a progress report  
18 describing in detail the progress that has been made  
19 toward resuming service and that they will file that  
20 report the first week of January, 2008.

21 Those are the primary conditions. The  
22 parties understand that the Company wanted a two-year  
23 discontinuance. We settled on one year, which is  
24 consistent with the Commission's rule, WAC 480-53-031,  
25 and the Company's goal in cooperation with Kitsap

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1 Transit is to find some way to provide additional  
2 public subsidies over this route, and that apparently  
3 involves legislation in order to do that. The Staff  
4 understands that this operation is not economically  
5 viable currently. On the other hand, getting  
6 legislation is somewhat of a risky and uncertain  
7 venture. So Staff was comfortable in agreeing to one  
8 year, but we'll take a hard look at it in a year.

9 So that's the settlement before you with the  
10 major conditions outlined. There is also some standard  
11 settlement-type conditions, which we can discuss if you  
12 are interested, but those are pretty much standard.  
13 Mr. Kermode is here to answer any questions you may  
14 have about Staff's review of this matter, but I'll  
15 leave it there for now and let the other parties speak,  
16 and I'm also available to answer any questions you may  
17 have.

18 JUDGE TOREM: I'll hold my questions until I  
19 hear from Mr. Wiley and then from Mr. Templeton as to

20 their client's perceptions of this. Mr. Wiley, it's  
21 your client that originally filed the request, so let  
22 me hear from you first.

23 MR. WILEY: Yes, Your Honor, just briefly. I  
24 think Mr. Trotter has accurately distilled the essence  
25 of the Settlement Agreement. I wanted to first respond  
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1 as well to your question about the procedural status of  
2 the petition for exception. I think the latter option  
3 that you address in positing your question is where we  
4 wanted to be, which is we would rather not withdraw it  
5 and refile it. We would rather hold it in abeyance  
6 until the Commission acts on the Settlement. Obviously  
7 if the Commission approves the Settlement, we will  
8 formally withdraw, and it would moot the petition for  
9 exception to the rule.

10 I did want to point out as well that this was  
11 a compromised agreement. I think Mr. Trotter has  
12 highlighted some of the distilled version of where we  
13 got along the process. I think that process is fully  
14 embraced by the Commission's ADR rules and the rule at  
15 WAC 480-07-730 on settlements. It is a full  
16 settlement. We don't want there to be any doubt that  
17 we believe as the petitioner that we will be back in a  
18 year seeking a further extension because of the  
19 legislative condition. We understand the Commission  
20 staff does not want to agree to any continuance past  
21 the one year mentioned in the rule, but we think the  
22 Settlement Agreement does address the fact that we

23 expect to be back and why we expect to be back.

24 We also believe, and Footnote 1 of the  
25 Settlement narrative addresses the statutory provision

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1 that brings us ironically to this position, which under  
2 RCW 81.84.010, you have up to five years to initiate  
3 service once issued a certificate. It was that statute  
4 in mind that led us to believe that it was reasonable  
5 to ask for a two-year as opposed to a one-year because  
6 had we not, ironically, initiated service, we would  
7 have another year into 2009 anyway. But as the record  
8 reflects, we did initiate service, operated at a  
9 substantial loss for nine months, and are back trying  
10 to resuscitate the service, which we believe is a very  
11 valuable service not only for the ratepayers, but it's  
12 an important investment in time and money by Aqua  
13 Express that we don't want to see dissipated.

14 We are here supporting the Settlement. We  
15 acknowledge that it was the result of some pretty  
16 detailed negotiations with Staff. We think it has  
17 arrived at a fair place. We anticipate the Commission  
18 being faced with a subsequent one-year extension, but  
19 we will go with what we can negotiate at this point,  
20 which is a one-year extension, which we think is  
21 clearly consistent with the public interests as  
22 addressed by the rule.

23 JUDGE TOREM: Thank you, Mr. Wiley.

24 Mr. Templeton?

25 MR. TEMPLETON: Kitsap Transit appreciates

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1 the work Mr. Trotter has done, supports the Settlement,  
2 and we concur with the summary and statements that were  
3 provided by both Mr. Trotter and Mr. Wiley.

4 JUDGE TOREM: Let me ask the parties, as far  
5 this anticipation that 12 months in the end won't be  
6 sufficient to allow what you've characterized as  
7 legislative action to take place, Mr. Templeton, it  
8 appears you might be in the best position, given the  
9 narrative documents that I read, that Kitsap Transit  
10 really is as a public private partnership in this case  
11 as the public entity seeking to be the partner with a  
12 ferry company and get under the funding and otherwise  
13 arrangements for tax credits or whatever it might be  
14 out of Olympia. Can you describe to me why the 2008  
15 legislative session would not be able to accomplish  
16 this and perhaps would have to wait until 2009?

17 MR. TEMPLETON: In the 2008 legislative  
18 session, we are hoping that they make the change. What  
19 we are thinking then is if they make the required  
20 changes, then there is a number of steps that would  
21 have to be initiated to create a separate public  
22 transportation benefit area to initiate or to support  
23 passenger-only ferry service. It would not be Kitsap  
24 Transit, but it would be sort of a sister agency of  
25 Kitsap Transit, if you will, and to get that entity

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1 formed, there would have to be some local public  
2 hearing and proceedings, and once that entity is

3     formed, it would have to adopt a new passenger-only  
4     ferry investment plan, and then that would have to be  
5     submitted to both of the voters within the district  
6     that gets defined by that new PTBA. So we are thinking  
7     that's probably a total of a two-year process from now.

8             JUDGE TOREM: Mr. Trotter, do you have  
9     something else to add?

10            MR. TROTTER: Just two comments. First of  
11     all, in response to Mr. Wiley's statement, he referred  
12     to a five-year rule to initiate service. Actually, he  
13     is correct except in Puget Sound, which is what we are  
14     talking about here, 81.84.010, sub 2, which is service  
15     must initiate within 20 months. This company did  
16     initiate service, so that statute may figure in on a  
17     policy level, but that does not strictly apply.

18            Staff's perspective is a little different on  
19     the two-year situation that Mr. Templeton described.  
20     This is a settlement. It may be at some point in the  
21     future that it is in the public interest that this  
22     permit be canceled because it's just too speculative  
23     that service will ever be offered under it. Staff is  
24     willing to go with one year here, but we will take a  
25     hard look at the situation in a year. I don't doubt

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1     what Mr. Templeton is saying about procedurally what  
2     will need to occur and that's going to take a long  
3     time, but Staff has a little different view that there  
4     may come a time when a cancellation is appropriate.

5             As we note in the narrative, the first

6 condition I talked about today will permit the  
7 Commission to issue another certificate to a  
8 Kingston-Seattle passenger-only ferry run, but the  
9 Commission will not be able to issue a temporary  
10 certificate because the statute is worded differently.  
11 Just the existence of this certificate prevents a  
12 temporary.

13 I'm just suggesting that there are competing  
14 arguments and interests here, but we were able to  
15 bridge those differences for a settlement, and we are  
16 comfortable with that for the next year, but we will  
17 take another look at it in a year and see how the  
18 landscape has changed, if any, and we are not making  
19 any commitments other than to take a good, honest look  
20 at it again in one year.

21 JUDGE TOREM: Mr. Wiley, as to the  
22 legislative hurdles and other procedures, did you want  
23 to add anything on that?

24 MR. WILEY: A couple of things, Your Honor.  
25 In response to Mr. Trotter's point about the statute, I  
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1 certainly agree that it has the 20-month qualification,  
2 but the point that I was trying to make was that we  
3 fell within the five-year rule because we initiated  
4 service actually within six months. The certificate  
5 was issued in July of 2004, and we initiated service on  
6 or about January 18th, 2005, so we are well within the  
7 20 month or the five year, and we believe we would have  
8 the protection.

9                   As far as the legislation is concerned, I  
10 think Mr. Templeton has sketched just the exact type of  
11 contingency that concerns us about making any  
12 representation that we believe this can be done within  
13 the year period envisioned by the rule; that not only  
14 do we have to get legislation to redraw the boundaries  
15 of the PTBA, but there then have to be public hearings  
16 and a vote by the newly redrawn constituency, which we  
17 believe will support, if narrowed to the area around  
18 Kingston, that will directly and most immediately  
19 benefit.

20                   We believe that that's a very strong  
21 likelihood of approval, but as we've seen just in the  
22 past initiative process, that takes time, so  
23 considering the investment of the Company, which has  
24 been addressed in the settlement proceedings of about  
25 1.8 million to date, we think we certainly have made

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1 the investment that we want to see through, and we are  
2 hoping that in a year from now or from June, if what we  
3 anticipate happens happens and it's still either before  
4 the legislature or in the throws of being redrawn  
5 boundary or public hearing-wise, that the Staff will be  
6 receptive to a further continuance request, and we are  
7 limited as you know, Your Honor, by WAC 480-51-130 on  
8 that 12-month period. Unless that rule changes, it is  
9 kind of in this process.

10                   JUDGE TOREM: Let me ask then some further  
11 details as to the conditions set out. It would appear

12 to me that the first condition allowing the Commission  
13 to issue a competing commercial ferry certificate and  
14 that Aqua Express will not object speaks for itself.  
15 Mr. Trotter has clarified that it would have to be a  
16 full certificate, not a temporary certificate, and that  
17 may present a hurdle depending on the Applicant, but  
18 the Commission Staff is willing to live with that for  
19 one year, and I think that's an important distinction  
20 that may need to be addressed so that the commissioners  
21 can see that in the order I draft that this does still,  
22 perhaps, depending on one's perception, create a bar to  
23 competition or another competitor in the least, and  
24 again, with Mr. Sultan on the line, that may include  
25 his organization, coming forward in the next year and

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1 seeking a temporary certificate as opposed to a full  
2 certificate.

3 The condition that intrigues me is the second  
4 one, to file a progress report, and the choice of date  
5 being January, 2008, the first week of that month,  
6 which would be prior to the opening of any legislative  
7 session. So I'm wondering two things about that, and  
8 maybe Commission staff can tell me their understanding,  
9 and then the other parties, again, identifying  
10 yourselves by name when you speak so the court reporter  
11 can recognize your voice.

12 First, what will be in that progress report,  
13 and second, is there any other requirement for a  
14 filing, such as an annual report that an operating



15 ferry service would have that would also come in not  
16 necessarily as a result of this settlement but just in  
17 the normal course of the certificate being  
18 discontinued. I'm not clear on that looking at the  
19 statute, but annual reports seem to be a big deal here  
20 at the Commission, and if one is not filed, penalties  
21 or cancellations follow. It may be that a  
22 discontinuance removes that obligation, and I just  
23 wanted to clarify that today. Is the progress report  
24 in addition to other filings or as a substitute under  
25 this agreement; Mr. Trotter?

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1 MR. TROTTER: First of all, the progress  
2 report is a separate requirement. I'm assuming that  
3 the Company is filing annual reports with zeros on it,  
4 that they understand they still have all the reporting  
5 requirements.

6 JUDGE TOREM: Mr. Kermode is nodding yes,  
7 they are.

8 MR. TROTTER: But this is a separate and  
9 distinct report. January 8th was picked because it was  
10 a little past midway in the 12-month discontinuance.  
11 It was before the session would start, but I think as  
12 we all know, if bills are not well-managed and  
13 presented well before the session, and this is a short  
14 session coming up, that they simply will have no chance  
15 of going anywhere, so we thought that that would be a  
16 reasonable time, and that any information garnered from  
17 the legislature itself will be known to the Commission

18 because this would be a bill they would be interested  
19 in and would also be the subject of the next petition  
20 that would be filed in advance of June 4th, 2008. So  
21 the Company would likely be filing that in early May,  
22 which would be right after the session, and the  
23 Commission would be updated then. So we didn't see any  
24 real benefit in having a report after the session. We  
25 thought before the session, we could at least have a

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1 good indication of the efforts that have been made.

2           One brief comment on the temporary permit or  
3 certificate situation, this company, I don't recall  
4 whether they had a temporary or not, but the fact of  
5 the matter is they didn't start operations until well  
6 after the permanent certificate was offered. I think  
7 as a practical matter, it's going to be difficult for a  
8 company to start before a certificate hearing can take  
9 place anyway, and the Commission can run a permanent  
10 application case through relatively efficiently,  
11 particularly if there are no protests. It's a factor,  
12 but we didn't think it was a real weighty one, so I  
13 thought I would add that for your consideration.

14           MR. TEMPLETON: Your Honor, Ron Templeton for  
15 Kitsap Transit. By the way, Mr. Trotter, were you  
16 done?

17           MR. TROTTER: I am.

18           MR. TEMPLETON: Let me give you what we think  
19 is the proper time for knowing where we really are. We  
20 currently have a legislative liaison. We are working

21 on some proposed legislation. We are also working with  
22 other transit agencies to make sure there aren't any  
23 pitfalls that create some unintended consequences, so  
24 other transit agencies are looking at our proposal.

25 By the 8th of January, there is no way we  
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1 will be able to really monitor where we are. It would  
2 be more like the 8th of March. By then, you will see  
3 whether there is traction for the proposal with enough  
4 legislators to get it out of committee and onto the  
5 floor for a full vote. I really think we aren't going  
6 to know anything on the 8th of January.

7 MR. HAYES: We can provide you the language.  
8 We might be able to indicate -- although legislators  
9 are a bit coy about this, and this is from our  
10 experience. We have been working with them for 20  
11 years every session. They are a bit coy early on about  
12 signing on. We've had good contact with the Chair of  
13 the senate transportation committee, but we haven't  
14 asked her to be the prime sponsor yet. We think she  
15 will be, but things stay formative for at least the  
16 first month, even if you have solid language.

17 JUDGE TOREM: Mr. Hayes, I appreciate that  
18 having some legislative experience myself, and that's  
19 why I questioned the date, but I do understand also the  
20 Commission will be through its executive director and  
21 executive secretary thoroughly monitoring what goes on  
22 in the session, and it may not be productive to have a  
23 subset of reports coming in under this docket, and

24 perhaps that makes sense.

25 I was rolling over in my mind whether it made

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1 sense to have an additional status report come in, but  
2 as Mr. Trotter has indicated, and please, Mr. Wiley,  
3 correct me if I'm wrong, the next so-called status  
4 report I would require would essentially come in in  
5 late April or early May in the form of another request  
6 for a discontinuance for some period of time, and with  
7 that would be essentially the contents of a status  
8 report justifying the length of extension, whether it's  
9 an additional 12 months or some shorter period, and  
10 that as soon as we set that matter with a new docket  
11 that we would give a petition to intervene from Kitsap  
12 Transit and any other interested parties and perhaps  
13 any protestants, perhaps from Mr. Sultan or somebody  
14 else, who has their own status report for their own  
15 intents to set up a competing ferry service.

16 So it may be that this status report in  
17 January and the normal course of preparation for the  
18 expiration of the June 4th, 2008, time frame as set up  
19 may answer the mail under the next docket number, which  
20 would be just as appropriate. Mr. Wiley?

21 MR. WILEY: Yes, Your Honor. I want to  
22 respond to a couple of things, and I will take your  
23 question first, and that is I don't want there to be a  
24 misunderstanding on your part or Mr. Trotter's or  
25 anyone else's part about what we anticipate will be

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1 happening a year from now if, as we project, we are  
2 requesting an extension of our continuance. We are  
3 hoping to avoid the protracted or formal nature of what  
4 we are in presently by trying to address what we  
5 anticipate the factors will be that will require us to  
6 file a subsequent request next spring.

7           That's not to say that the Staff has agreed  
8 not to oppose or not to ask this be set for hearing.  
9 We are just hoping to avoid this by kind of charting  
10 the landscape right now, and one part of doing that is  
11 to respond to the progress report, annual report issue,  
12 and the progress report, we are not so troubled by the  
13 timing because progress reports in the 81.84 area that  
14 I'm familiar with are quite informal and can address  
15 what happened, what could be projected to happen, and  
16 basically is an update.

17           I don't think the Commission has a procedure  
18 in place other than the Staff to review that report and  
19 call the certificate holder with questions or follow-up  
20 requests, which we anticipate cooperating with if they  
21 are forthcoming in January. The fact that I think your  
22 point about the legislation not really being hashed out  
23 by then is a good one; although, the progress report  
24 would probably address what proposed bill is  
25 anticipated. There might be a bill already dropped. I

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1 don't know, but I don't think we are daunted by having  
2 to address that stage in whatever stage it is, and I  
3 don't think the Staff has insisted that a bill be

4 dropped by that point when we report in January anyway,  
5 but we will tie it up together in a letter and explain  
6 where we are with input from Kitsap Transit.

7           We will also be filing, as we have, as  
8 Mr. Trotter suggested, an annual report by spring. It  
9 will probably show zero revenues, I would expect, but  
10 we would do that out of course to comply with  
11 Commission regulations about reporting to show that we  
12 consider it a valuable property right whether there is  
13 revenues generated under it at that point or not in the  
14 past year.

15           With respect to the temporary certificate  
16 issue, I certainly am aware of this issue because I  
17 think I was around in 1993 when I believe the  
18 Commission had agency request legislation to address  
19 the fact there wasn't even a statutory acknowledgment  
20 of a temporary certificate. Mr. Trotter is correct  
21 that this field, and I was in some cases that weren't  
22 passenger ferry but launch ferry, where that was an  
23 issue. I agree with Mr. Trotter that I can't envision  
24 a circumstance in the passenger-only or commercial  
25 ferry field where temporary would really be very

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1 practical because the statute is so specific about  
2 moorage arrangement, projected passenger counts. Most  
3 of those would still apply on a temporary, and it's  
4 really difficult in this particular regulated  
5 transportation arena to get it to stop and start with a  
6 temporary because so much infrastructure is required to

7 initiate regulated service.

8               So while I can't say that would never happen,  
9 I don't think it's a real hurdle, because as  
10 Mr. Trotter said, it's really unlikely under the  
11 circumstances of regulated commercial ferry service  
12 where the counties and ports are very heavily involved.  
13 You don't start this on a shoestring and a prayer  
14 because public safety is involved as well.

15               So I'm not seeing that as a huge hurdle.  
16 Clearly, there is a statutory provision, but I think  
17 we've addressed it in the Settlement, and the progress  
18 reports, just to conclude, we are prepared to comply  
19 with, and we anticipate working with Staff to  
20 anticipate any issues that they have that they would  
21 like to see addressed in that report.

22               JUDGE TOREM: Mr. Trotter or Mr. Templeton,  
23 anything further?

24               MR. TROTTER: The point of the progress  
25 report is so that we don't have a situation where the

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1 Company is doing nothing. So we want to put their feet  
2 to the fire to ask them to resume service, so we want  
3 to hear from them about the steps that are being taken,  
4 and that will speak for itself. The timing might not  
5 be ideal because we are on a June 4th time frame, but  
6 it's better than nothing, and it will help the  
7 Commission see what progress is being made.

8               JUDGE TOREM: Mr. Templeton?

9               MR. TEMPLETON: Nothing further, Your Honor.

10 JUDGE TOREM: Mr. Templeton or Mr. Hayes, was  
11 there anything in this Kitsap Transit passenger-only  
12 ferry investment plan that you wanted to highlight and  
13 submit as a supporting exhibit to the Settlement  
14 Agreement, and admittedly, I've seen the cover page  
15 this morning but not delved further into it.

16 MR. TEMPLETON: Do you have any further  
17 questions?

18 JUDGE TOREM: I don't even have the basis for  
19 any questions, Mr. Templeton, but if your client,  
20 Mr. Hayes, who I understand is more than familiar with  
21 this wants to be sworn in and at least tell me by  
22 highlights which sections here might be factually  
23 relevant and need to be referenced in any order  
24 regarding the Settlement Agreement, that would be most  
25 welcome. If he's not prepared to do that, I certainly

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1 do intend to at least skim through the entire report,  
2 but I may ask Mr. Kermode if he has anything, but I  
3 wanted to start with presumably the author, at least  
4 agency-wise, of this report.

5 MR. TROTTER: Just to point out, the report  
6 is referred to in the narrative on Paragraphs 22 and  
7 23. It's part of Kitsap Transit's statement, but  
8 certainly, we recognize it's a large document that we  
9 put in there. The pertinence of it is suggested in  
10 those two paragraphs. If Mr. Hayes wants to expand on  
11 that to be useful to you, we have no objection to that  
12 at all.



13 JUDGE TOREM: Again, I recognize this is an  
14 investment plan, and the paragraphs that Kitsap Transit  
15 included in its statement of support for the Settlement  
16 Agreement is the nature of operating subsidies.  
17 Mr. Hayes or Mr. Templeton, do you want to point to  
18 those, and please, who is speaking?

19 MR. TEMPLETON: We don't have the plan in  
20 front of us today, but our supporting statement gives  
21 us a succinct summary that a private operator simply  
22 isn't going to survive in the passenger-only ferry  
23 service without public operating subsidies, and we've  
24 proven that now with the operation of the Aqua Express  
25 service between Kingston and Seattle. We've proven it

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1 with the KFC operation between Bremerton and Seattle.  
2 It's been the same experience in almost every  
3 jurisdiction throughout the country that provides  
4 passenger-only ferry service, including the Bay area  
5 and New York and down in North Carolina. So we think  
6 that the succinct statement stands on its own, and  
7 Mr. Hayes, do you want to add anything else?

8 MR. HAYES: I think the capital subsidy plus  
9 the operating subsidy is at 30 to 40 percent -- would  
10 be a part of our decision.

11 JUDGE TOREM: Mr. Wiley, do you or your  
12 client have any pages that you think would be helpful  
13 for me to look at?

14 MR. WILEY: I'm getting a hand raised by  
15 Mr. Blackman who wants to say something on this issue,

16 Your Honor. This is John Blackman.

17 JUDGE TOREM: Do I need to swear Mr. Blackman  
18 in for testimony, or is he just going to direct me to  
19 some pages here?

20 MR. WILEY: I wouldn't call it testimony. I  
21 think it's responsive to your question. I'm not sure  
22 what he's going to say.

23 JUDGE TOREM: All right. Mr. Blackman, go  
24 ahead.

25 MR. BLACKMAN: Judge Torem, thank you. I've

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1 listened to this conference with interest, and I want  
2 to make it perfectly clear in preference that we have  
3 agreed to assume an agreement as indicated. Having  
4 said that, however, I can't help but say to you, Judge  
5 Torem, that I can't possibly see where the public  
6 interest is served by limiting our request to one year  
7 versus the two-year period. We have clearly indicated  
8 that we would not object if somebody else wanted to  
9 start service. There are no opponents to our  
10 application for two years, and it would just seem to me  
11 that the public would be better served by not having to  
12 go through additional tax-payer expense for a hearing  
13 at the end of the year.

14 MR. WILEY: Your Honor, I don't want that to  
15 be interpreted as a retraction of the Settlement at  
16 all. What I think Mr. Blackman is saying is that  
17 underscoring my point that a year from now, we hope to  
18 avoid a protracted docket proceeding on the request and

19 that we believe that the conditions that support a  
20 subsequent one-year continuance will also be present  
21 then, and we are anticipating addressing those briefly  
22 in a correspondence to the Commission.

23 JUDGE TOREM: And I understand Mr. Blackman's  
24 wish for greater efficiency for the Commission to deal  
25 with this and the public, and that perhaps the concerns

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1 that were raised this time around that resulted in this  
2 being referred to hearing and out of the open meeting  
3 docket, Mr. Wiley, you are anticipating that when this  
4 period comes up and the letter for extension is  
5 submitted next year, you will be able to correspond or  
6 present to the Commission in the open meeting  
7 sufficient information and have worked with Staff in  
8 advance and perhaps any potential other objectors to  
9 avoid a docket, and it will simply be approved on the  
10 open meeting course; is that correct?

11 MR. WILEY: Yes, it is, Your Honor, and  
12 that's how most commercial ferry requests under this  
13 rule are traditionally handled.

14 JUDGE TOREM: I understand this one was  
15 different for a couple of reasons, and as to  
16 Mr. Blackman's comments, as to the two-year item, as  
17 evidenced by your petition for the exception to the  
18 administrative code, that last sentence of WAC  
19 480-51-130 I'm certain had a reason when it was  
20 drafted, and it's proven to be a bit of a thorn in the  
21 side of Aqua Express given its situation. It may be

22 that's a separate track to take up, whether that  
23 sentence should be stricken in a rules revision that  
24 might be requested by the ferry community, but the rule  
25 is what it is, and without the petition for exception

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1 now being held in abeyance, I won't necessarily deal  
2 with that in the substance of my order, but it may be  
3 something I address in a footnote from which all the  
4 parties can run with it to the Commission if there is a  
5 future change overall in the system versus just this  
6 one case.

7 MR. WILEY: Fair enough.

8 JUDGE TOREM: I'm seeing Mr. Kermode may have  
9 some page numbers in the report to set out, so for  
10 those of you who do have the Kitsap Transit investment  
11 plan in front of you, I'm going to let Mr. Kermode  
12 point out what he thinks might be relevant to those  
13 paragraphs in the narrative of the Settlement  
14 Agreement.

15 MR. KERMODE: What I actually wanted to  
16 discuss was basically Staff's review of the plan, why  
17 we think it was relevant. Staff's review of the plan  
18 supported the Company and Kitsap's position that they  
19 had a strategy to support the passenger-only ferry  
20 service from Kingston to Seattle. That was a critical  
21 item that was actually lacking in the Company's  
22 original application and probably the pivot point that  
23 removed it from the open meeting and where the hearing  
24 process started.

25                   The capital plan or the investment plan

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1    that's provided with the Settlement indicates the  
2    method that Kitsap Transit would subsidize the ferry  
3    service, and just looking right now on Page 14 of the  
4    plan, it shows the capital plan where they would  
5    provide dock facilities, smaller vessels, possibly, and  
6    also in the plan, it talks about the sales tax approach  
7    that had failed, but it indicates that they have a plan  
8    to subsidize and the financing mechanism to subsidize.  
9    That gives Staff a little of what was lacking in the  
10   original application, and that's why it's provided in  
11   the Settlement.

12                   JUDGE TOREM:   So if I understand,  
13   Mr. Kermode, the capital plan described in two phases  
14   on Pages 14 and 15 as well as some other discussion  
15   within this plan as to the failed attempt to fund ferry  
16   service with sales taxes, those are existing now allows  
17   Staff to support the Settlement Agreement and the  
18   one-year discontinuance.   Not having had this level of  
19   detail at the open meeting was another reason for the  
20   recommendation that it go to hearing to better develop  
21   the record and the rational.

22                   MR. KERMODE:   That is correct.

23                   JUDGE TOREM:   Mr. Templeton or Mr. Wiley, any  
24   questions or comments on that input from Staff?

25                   MR. WILEY:   No, Your Honor.

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1                   MR. TEMPLETON:   No, Your Honor.   We

2 appreciate the explanation that Mr. Kermode provided.

3 MR. WILEY: I was going to add that I think  
4 that that will serve as helpful future reference if we  
5 are back again next year in terms of what we'll address  
6 in the request.

7 JUDGE TOREM: I would suggest that the  
8 progress report from the petitioner here, Aqua Express,  
9 may be supplemented with a document from Kitsap  
10 Transit, call it a progress report of their own, that  
11 would come in as an attachment to Aqua Express's, given  
12 the supporting detail that Staff needed to begin with  
13 to demonstrate the private public partnership that's  
14 been sought out here, and that will perhaps answer in  
15 advance questions that will come up next May or June's  
16 open meeting when any further discontinuance is  
17 initially presented and discussed to the three  
18 commissioners. So that way, you can see them and not  
19 see me again.

20 I think that I have what I need to explore  
21 the factual basis and the legal basis to review and  
22 issue an order in the next couple of weeks about this  
23 settlement agreement and make a recommendation on its  
24 approval, rejection, or other modification to the  
25 commissioners. Do the parties have anything else then

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1 to highlight for me this morning; Commission staff?

2 MR. TROTTER: No, Your Honor.

3 JUDGE TOREM: Aqua Express?

4 MR. WILEY: No, Your Honor.

5 JUDGE TOREM: Kitsap Transit?

6 MR. TEMPLETON: No, Your Honor.

7 JUDGE TOREM: While I note Mr. Sultan is not  
8 on the phone as an intervenor, Mr. Sultan, on behalf of  
9 the Kingston Express, was there a question you wanted  
10 aired out today, or did you get to hear everything you  
11 needed to hear?

12 MR. SULTAN: No questions or comments. Thank  
13 you.

14 JUDGE TOREM: I wanted to give you the  
15 opportunity. I said that I would. Is there anyone  
16 else on the line that felt you needed further input  
17 today? Hearing none, Mr. Trotter, any reason we  
18 shouldn't adjourn?

19 MR. TROTTER: No, Your Honor.

20 JUDGE TOREM: So with that, we are adjourned  
21 now at 10:25.

22 (Prehearing conference adjourned at 10:25 a.m.)

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