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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 II
 Convenience and Necessity to) Pages 42 - 59
5 Provide Commercial Ferry Service.)

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7 A prehearing conference in the above matter
8 was held on June 8, 2004, at 1:30 p.m., at 1300 South
9 Evergreen Park Drive Southwest, Olympia, Washington,
10 before Administrative Law Judge ANN E. RENDAHL.

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 The parties were present as follows:

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

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

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

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23 KITSAP TRANSIT, by JAMES K. SELLS (via bridge
 line), Attorney at Law, Ryan, Sells, Uptegraft, 9657
 Levin Road Northwest, Suite 240, Silverdale, Washington
24 98383; telephone, (360) 307-8860.

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 Kathryn T. Wilson, CCR
 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, the administrative law
4 judge presiding over this proceeding. We are here
5 before the Commission, the Washington Utilities and
6 Transportation Commission, this afternoon, Tuesday,
7 June 8th, 2004, for a prehearing conference in
8 Docket No. TS-040650, Application No. B-079273, which
9 is captioned, In the matter of the application of Aqua
10 Express, LLC, for a certificate of public convenience
11 and necessity to operate commercial ferry service.

12 During the prehearing conference held on May
13 21st, the Commission established a schedule for the
14 proceeding, which is included in Attachment B to that
15 order, Order No. 1. Yesterday, the Commission granted
16 in part the Applicant's motion to strike the protest
17 filed by the Inlandboatmen's Union of the Pacific and
18 limit the protest of the IBU.

19 So the purpose of this prehearing, as I
20 mentioned when we were off the record, given the
21 Commission's decision, is to refine the procedural
22 schedule and begin preparing for hearing. Mr. Trotter
23 noted that he had a question concerning the
24 Commission's order, which I will entertain first after
25 we take appearances. Is there any other item we need

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1 to discuss this afternoon? Hearing nothing, let's take
2 appearances.

3 As most of you have made your appearances
4 during the prehearing conference, just your name and
5 the party you represent for the record, and Mr. Sells,
6 you will need to give a full appearance. So let's
7 begin with the Applicant, Mr. Wiley?

8 MR. WILEY: David W. Wiley, attorney for the
9 Applicant, Aqua Express, LLC.

10 JUDGE RENDAHL: For the Protestant, IBU?

11 MR. IGLITZIN: Dmitri Iglitzin, Schwerin,
12 Campbell, and Barnard, LLP.

13 JUDGE RENDAHL: And for staff?

14 MR. TROTTER: Donald T. Trotter, assistant
15 attorney general.

16 JUDGE RENDAHL: Mr. Sells?

17 MR. SELLS: If Your Honor please, James K.
18 Sells, attorney appearing on behalf of Intervenor
19 Kitsap Transit along with co-counsel, Ronald Templeton,
20 9657 Levin Road Northwest, Suite 240, Silverdale,
21 98383; telephone, (360) 307-8860; fax, (360) 307-8865;
22 e-mail, jimsells@rsulaw.com.

23 JUDGE RENDAHL: Thank you, very much. Also
24 on the bridge line are Mr. John Blackman and
25 Mr. Darrell Bryan for the Applicant, and here in the

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1 hearing room, Mr. Gene Eckhardt and Ms. Bonnie Allen
2 and Nicki Johnson and Penny Hansen for Commission
3 staff.

4 So the first thing we need to take up this
5 afternoon, are there any questions or clarifications
6 parties wish to make on the Commission's order? I'll
7 start with you, Mr. Trotter, as you raised the issue.

8 MR. TROTTER: Thank you, Your Honor.
9 Referring to Order No. 2 in this docket, the Commission
10 made clear in Paragraphs 33 and 34 that the statute,
11 RCW 81.84.020(4), obliges the Commission to address the
12 effect of its decisions on quote, "public agencies
13 operating, or eligible to operate, passenger-only
14 ferries," unquote.

15 The key language there is "public agencies."
16 In Paragraph 42, the Order paragraph, one of them, the
17 Commission said that IBU may participate only on the
18 issue of the impact of the proposed service on the
19 state ferry system, the need for the service, and
20 financial fitness. I'm focusing on the impact of the
21 proposed service on the state ferry system.

22 As we noted in our response of May 20, 2004,
23 the ferry system is really a trade name. It's the name
24 the legislature authorizes the Department of
25 Transportation to use to refer to the state ferry

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1 system that the Department manages and operates. So
2 the question I had is should we interpret Paragraph 42
3 to be the impact of the proposed service on the
4 Department of Transportation because that is the public
5 agency, or did the Commission believe that the state
6 ferry system was the public agency.

7 So if you can answer that question, fine. If
8 you feel uncomfortable answering it, we would be happy
9 to seek either clarification from the Commission
10 formally or a petition for administrative review.

11 JUDGE RENDAHL: I think I can answer that on
12 the record. I guess my question is what the difference
13 truly is. If you are talking about the Washington
14 State ferries operated by the Department of
15 Transportation, if that is the intent, does it really
16 change the impact?

17 MR. TROTTER: I think it may. If you were
18 looking at the Department as a whole, that is the
19 agency, so the impact on the agency is what needs to be
20 evaluated rather than a part of the agency or an
21 operating division of the agency. So I think what the
22 statute is referring to is how is the agency impacted,
23 and that can differ depending on whether you are just
24 focusing on a division of the agency or the public
25 agency itself.

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1 For example, let's talk about an example of
2 the Commission. What's the impact of losing a pipeline
3 safety inspector? Well, the impact on the pipeline
4 safety division could be very critical, but the impact
5 on the agency overall may not be as critical from a
6 fiscal point of view or some other point of view.

7 So I wanted to focus on the statute, the
8 words of the statute, which the Commission, of course,
9 faithfully quoted, but I wanted to make sure the
10 Commission was focusing on the statutory terminology or
11 whether it was believing the ferry system itself was a
12 public agency and we should just isolate our concerns
13 to that portion of the department or the department
14 overall.

15 JUDGE RENDAHL: As the Commission noted in
16 the Order, in terms of the interpretation of Cole
17 versus Washington Utilities and Transportation
18 Commission, the Commission is limited to its statutory
19 authority, limited by that. So I believe it correctly
20 should reflect in Paragraph 42 that the IBU can
21 participate to address as it's addressed in the statute
22 the effect of the proposed service on public agencies
23 operating or eligible to operate passenger-only
24 ferries.

25 Now, it may now come up in the hearing, but I

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1 think that it's really an issue for argument maybe
2 following the hearing what the impact on the state
3 ferry system versus the public agency as a whole really
4 is, and so to avoid the time it may take to resolve
5 motions on that issue during the hearing, I would like
6 to make sure that given our limited hearing time that
7 we make the most efficient use of the hearing time, and
8 those issues can be addressed in brief. Mr. Wiley?

9 MR. WILEY: I want to join the request for
10 clarification on the record to the extent I think that
11 if it's a narrower perspective, i.e. the ferry system,
12 the questions put to the witnesses will be somewhat
13 bifurcated or different questions, frankly, and I'm
14 reading the Order in the strict statutory construction
15 standpoint and looking at Paragraph 33 and viewing the
16 ordering portion as intending to talk about the public
17 agency rather than the ferry system.

18 JUDGE RENDAHL: I believe that's what I just
19 ordered.

20 MR. WILEY: My concern is how that plays out
21 in practical consequences in terms of the questions
22 that I would pose to the witness, and I just wanted you
23 to understand that I will speak in a more global sense
24 about the public agency impact rather than trying to
25 get a more microcosm effect on the state ferry system

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1 in terms of financial impact, etcetera.

2 JUDGE RENDAHL: As I just said, the
3 Commission's responsibility under the statute is to
4 address the effect of its decisions on public agencies
5 operating or eligible to operate passenger-only
6 Commission, so that is part of the focus of the
7 Commission's evaluation.

8 As I also said, to the extent parties wish to
9 argue the difference between the public agency versus
10 the state ferry system as a portion of that Department
11 of Transportation, that is an issue that will come up
12 during the hearing, but given the limited time we have,
13 I think those issues should primarily be argued in
14 brief, but it will shape how you address things during
15 the hearing, but I do think that last paragraph, the
16 ordering paragraph, does need to reflect the effect on
17 public agencies.

18 MR. WILEY: I think we understand then.

19 MR. TROTTER: Thank you, Your Honor.

20 JUDGE RENDAHL: Mr. Iglitzin, I haven't asked
21 for your input on that, but are there any other --

22 MR. IGLITZIN: I guess I'll just clarify the
23 IBU's positions. We are certainly not about to concede
24 that the state ferries do not fall within the
25 definition of "agency" itself as opposed to, and

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1 obviously, as a part of this public transportation.
2 I'm not bringing a motion unless it becomes important,
3 which I find unlikely.

4 As I understand, the objection to the
5 Commission's order, the Order in what I have as
6 Paragraph 39, talks about the issues of the impact of
7 the proposed service on the state ferry system, and
8 given that that's what the Commission ordered, that is
9 how the IBU understands the issues to have been set
10 forth, and that would be how we will address our
11 evidence that we present. We do not concede that the
12 use of the phrase "state ferry system" there is some
13 kind of misnomer because we don't concede the state
14 ferry system does not fall within the definition of a
15 public agency.

16 JUDGE RENDAHL: The reason for the language
17 in Paragraph 39 is based on the language in the protest
18 that the IBU filed. We understand that that is one of
19 the IBU's interests in this proceeding. However, given
20 the statutory language, the Commission has to consider
21 the effect on public agencies, and as I stated before,
22 I will leave up to all of you to argue to the
23 Commission whether the state ferry system isn't in and
24 of itself falls within that definition. I'm not going
25 to make that decision here today, and I'm not

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1 precluding you, Mr. Iglitzin, in representing the IBU
2 from stating your position in hearing on the effect on
3 the state ferry system.

4 MR. IGLITZIN: That's fine. Thank you.

5 JUDGE RENDAHL: Are there any other
6 questions? Mr. Sells, anything you wish to weigh in on
7 this?

8 MR. SELLS: No, Your Honor.

9 JUDGE RENDAHL: So let's move on now from the
10 issues concerning the Commission's order, and now we
11 need to talk about the hearing itself. We have now
12 scheduled all day on June 21st from 9:30 in the morning
13 until five p.m., or longer if we need to go, and then
14 the afternoon of June 22nd from 1:30 to five, and then
15 all day on July 1st, plus the evening for the public
16 hearing. Now, we can take a portion of the day on the
17 1st also to take any public comment from those that are
18 available during the day and set aside some time in the
19 evening.

20 MR. IGLITZIN: I want to make sure I got this
21 right. We are currently scheduled from 9:30 a.m.
22 until five p.m. on the 21st.

23 JUDGE RENDAHL: Correct.

24 MR. IGLITZIN: From 1:30 p.m. to when on June
25 22nd?

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1 JUDGE RENDAHL: Five p.m. or later if need
2 be.

3 MR. IGLITZIN: Thank you.

4 JUDGE RENDAHL: Generally, the Commission
5 prefers to end its hearings at five but given time
6 constraints has been known to go later. Not as late as
7 we used to, I'll note. There were a few marathon
8 sessions that went until ten or later, as I remember,
9 but we don't do that anymore.

10 Then on the 1st, we are still looking into a
11 location for the hearing. It will most likely be at a
12 middle school in Kingston, primarily so we can
13 accommodate members of the public in the evening. As
14 soon as I know the details on the location, I will let
15 you all know.

16 So as I understood from our discussions on
17 the 21st is that we would go through the financial
18 fitness witnesses and the issues of the effect on
19 public agencies on the 21st and 22nd and use the time
20 on the 1st to address the need for the service as well
21 as public comment, but now that we are where we are, do
22 we need to change how we are doing that, and I also
23 need to get a sense of how many witnesses you all have,
24 etcetera. So why don't we go off the record to discuss
25 these, and then we will go back on the record and put

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1 whatever final arrangements we have back on the record.

2 (Discussion off the record.)

3 JUDGE RENDAHL: While we were off the record,
4 we went through the possibilities, all the witnesses
5 and timing and did some further scheduling. The
6 Applicant has identified Mr. Darrell Bryan as an
7 operational witness and estimates approximately 45
8 minutes of direct testimony; Mr. Tougas, spelled
9 T-o-u-g-a-s, as a financial witness with direct
10 testimony of approximately one hour, and then possibly
11 one or two reserve financial witnesses, depending on
12 the cross-examination of Mr. Tougas.

13 Mr. Wiley also plans on calling Mr. Richard
14 Hayes, or Dick Hayes, from Kitsap Transit to address
15 the issue of the effect on public agencies and
16 estimates 45 minutes to an hour for direct examination,
17 and then two witnesses from the Washington State
18 Department of Transportation, approximately half an
19 hour each for their direct testimony.

20 On the 22nd, Mr. Wiley requests that we
21 allow, if need be, a public comment period to allow
22 certain legislators who wish to make comments on that
23 day. Mr. Iglitzin, the IBU has stated that they plan
24 on presenting no more than two witnesses and plan no
25 more than about two hours of direct testimony time.

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1 Did I get that right, Mr. Iglitzin?

2 MR. IGLITZIN: Yeah. As I said, I really
3 haven't had a chance to figure out who I will be
4 calling because the Commission's order was just
5 yesterday. I guess I would like to say no more than
6 three witnesses and no more than three hours of direct
7 testimony.

8 JUDGE RENDAHL: That may bring us over into
9 the first. So no more than three witnesses and no more
10 than three hours. Then Mr. Trotter identified that
11 staff will probably present one witness concerning
12 fitness issues of approximately 30 minutes direct time,
13 and Mr. Sells representing Kitsap Transit indicated
14 that they planned on calling Mr. Richard Hayes as well,
15 and depending on what's addressed in the Applicant's
16 testimony, they may not need his testimony, but
17 estimated about a half an hour of direct.

18 So given that we will probably use the entire
19 time set forth for June 21st from 9:30 until five and
20 the time on June 22nd from 1:30 to five, and if need
21 be, we can go later or spill that over to July 1st and
22 use time on that day to finish off the direct and
23 cross-examination of these witnesses.

24 In terms of scheduling, the procedural
25 schedule identifies on Wednesday, June 16th, that

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1 parties need to submit prehearing briefs no longer than
2 five pages stating the overall issues in the case,
3 mainly as a way to orient the Commissioners as to what
4 the issues are in the proceeding that they need to be
5 attuned to and also identification of the witnesses and
6 a summary statement of the witnesses.

7 I understand in some cases it may depend, as
8 in Staff's statement, that it may depend on what is
9 said in the Applicant's case and also Mr. Wiley's
10 concern depending on what happens in cross, but if you
11 can identify those witnesses, that would greatly help,
12 and then any proposed exhibits you plan on submitting,
13 I would like those to be submitted not only to the
14 Commission. We will need five copies of exhibits
15 submitted to the Commission on the 16th as well as five
16 copies of the prehearing briefs and the summary
17 statements of witnesses so that all parties and the
18 Commissioners will have those copies. Mr. Trotter?

19 MR. TROTTER: Is the brief separate from the
20 summary statement of witnesses?

21 JUDGE RENDAHL: Yes. We did set a date of
22 June 28th for the Applicant to identify the shipper
23 support witnesses they plan to call on the 1st, which
24 will allow us to determine the amount of time we will
25 need in hearing on the 1st. So if you can do that

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1 electronically as well as in paper, that would help.

2 Mr. Wiley?

3 MR. WILEY: Do you want a letter, Your Honor?

4 I'm not going to summarize their testimony because it's
5 very repetitive.

6 JUDGE RENDAHL: If you can identify the
7 witnesses in a letter or an attachment to a letter,
8 that's sufficient.

9 MR. WILEY: Okay.

10 JUDGE RENDAHL: Then we identified the time
11 for the public hearing. We will allow a time at 1:30
12 on the 1st as well as from six to nine p.m. for public
13 comment on the 1st, and then we identified times for
14 posthearing briefs, initial briefs. Simultaneous
15 initial briefs are due on July 16th and simultaneous
16 responsive briefs will be due on the 23rd; that is,
17 after the hearing, all the parties agree that it's
18 still necessary. I think that's what we covered.

19 Mr. Sells indicated that he may be late on
20 the first day, but I think we can accommodate that.
21 The only other item I need to let you all know is that
22 on the number of copies you need to file with the
23 Commission, I noted that the Commissioners were not
24 included on that list, and since they are sitting on
25 this case, they do need to see copies of things, so you

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1 will need to file an original and 13 copies of anything
2 you submit.

3 Now, in terms of the briefs, etcetera, five
4 of those will be needed for the Commissioners and the
5 formal record and for myself, but I think if you file
6 the original and 13, that would work.

7 MR. WILEY: Your Honor, so you are revising
8 the initial prehearing conference order that said
9 original and nine.

10 JUDGE RENDAHL: Yes. Is there anything else
11 we need to discuss this afternoon? Any other
12 questions, issues?

13 MR. TROTTER: Yes, Your Honor, Don Trotter.
14 You are not setting the hearing time for July 1st? You
15 are going to remain flexible depending on the needs of
16 the parties to be determined later.

17 JUDGE RENDAHL: Right. I will have a
18 location, but based on what we know at the end of the
19 day on the 22nd, and then again, if we have spillover,
20 I think we should take the entire day.

21 MR. TROTTER: You will be setting six to nine
22 p.m. and some time at 1:30 for the public.

23 JUDGE RENDAHL: Yes, that's the plan, because
24 we will need the time in the afternoon for the need
25 witnesses anyway, the shipper support and need

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1 testimony. So I think we will definitely need the
2 afternoon and the evening. The question is whether we
3 will need the time in the morning to finish up the
4 other witnesses, and we will know that at the end of
5 the day on the 22nd, and then again, Mr. Wiley, if you
6 have more than we can do in an afternoon, then we will
7 need to do it in the morning as well.

8 MR. WILEY: Right.

9 MR. TROTTER: Just one caution about this.
10 If the public understands that they can appear at 1:30
11 to testify, persons that would otherwise be able to
12 testify at six might come in at that time and overwhelm
13 us for the full afternoon. I don't know, but I suggest
14 that's a possibility. So perhaps the notice can say
15 something about that.

16 JUDGE RENDAHL: That we will allow some time
17 between, say, 1:30 and two.

18 MR. TROTTER: Something like that so that
19 that doesn't happen.

20 JUDGE RENDAHL: And that we would like most
21 people to show up in the evening, but if it's
22 impossible for them to do that... My experience is
23 that you don't get very many people during the day but
24 one or two, and they do appreciate the opportunity to
25 speak.

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1 MR. TROTTER: Thank you.

2 JUDGE RENDAHL: Does anyone wish to order a
3 copy of the transcript of this afternoon's prehearing
4 conference? If there is nothing else, I think we can
5 adjourn. So thank you all for attending, and we will
6 see you on the 21st.

7 (Prehearing conference adjourned at 2:20 p.m.)

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