

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Application of

BACKCOUNTRY TRAVELS LLC

For a Certificate of Public Convenience
and Necessity to Operate Vessels in
Furnishing Passenger Ferry Service

DOCKET TS-180677

ORDER 02

GRANTING MOTION IN PART,
DENYING MOTION IN PART, AND
MODIFYING PROCEDURAL
SCHEDULE

BACKGROUND

- 1 On August 10, 2018, Backcountry Travels LLC (Backcountry or Applicant) filed with the Washington Utilities and Transportation Commission (Commission) an Application for Commercial Ferry Certificate (Application) in accordance with RCW 81.84.
- 2 On October 8, 2018, Lake Chelan Recreation, Inc. (Lake Chelan Recreation or Protestant) filed a protest to the Application.¹ The Commission convened a prehearing conference on November 29, 2018.
- 3 On November 21, 2018, the Commission entered Order 01, Prehearing Conference Order; Notice of Hearing (Order 01), which established a procedural schedule including, among other things, a deadline for the Protestant and Commission staff (Staff) to file testimony and exhibits by January 14, 2019.
- 4 On January 3, 2019, Lake Chelan Recreation filed a motion to withdraw its protest (Motion). The Protestant clarified its Motion on January 4, 2019, as a motion to withdraw as a party and withdraw its protest, and also to modify the procedural schedule to allow Lake Chelan Recreation to file public comments by January 25 in lieu of filing testimony

¹ Persons who oppose an application for authority to operate in any industry, other than auto transportation, may file a protest. WAC 480-07-370(7); WAC 480-51-040. Such a protest, in the context of an application for a commercial ferry certificate, is an objection to the issuance of the certificate under RCW 81.84.020. *See* Chapter 81.84 RCW; WAC 480-07-370(7); WAC 480-51-040.

and exhibits by January 14, and to provide an opportunity for the Applicant to respond to any comments.

- 5 On January 7, 2019, the Commission issued a Notice of opportunity to Respond to Motion, requiring any responses to the procedural issues raised in the Motion to be filed by January 9, 2019.
- 6 On January 8, 2019, Staff filed a response addressing both the procedural issues raised in the Motion and Lake Chelan Recreation's motion to withdraw as a party and withdraw its protest.² Staff argues that the Commission should grant the motion to withdraw as a party and to withdraw protest because doing so will simplify the issues in this docket and because Lake Chelan is in the best position to decide how to protect its interests. Staff also argues that the Commission should grant the motion to modify the procedural schedule to allow Lake Chelan Recreation to file public comments by January 25, 2019, because, as the current certificate holder, Lake Chelan Recreation can offer a unique perspective on whether public convenience and necessity requires the proposed service. Last, Staff requests that the Commission modify the procedural schedule to allow Staff to file its testimony by February 1, 2019, and Backcountry to file rebuttal testimony by March 1, 2019.
- 7 On January 9, 2019, Backcountry filed a response addressing both the procedural issues raised in the Motion and Lake Chelan Recreation's motion to withdraw as a party and withdraw its protest. Backcountry argues that the Commission should grant Lake Chelan Recreation's motion to withdraw as a party and withdraw its protest, but should reject Lake Chelan Recreation's motion to modify the procedural schedule.
- 8 Backcountry argues that granting the motion to modify the procedural schedule would allow Lake Chelan Recreation to participate fully in this proceeding without the burden of expending additional resources to participate as a party. Backcountry argues that this outcome would unfairly prejudice it because Lake Chelan Recreation's protest caused Backcountry to incur the costs and expenses associated with this proceeding. Backcountry contends that if Lake Chelan Recreation wishes to continue to participate fully in this proceeding, it should have to bear the same burden of costs and expenses as Backcountry. Backcountry requests that the Commission terminate the current

² In formal proceedings such as this, the Commission's staff participates like any other party. To assure fairness, the presiding administrative law judge does not discuss the merits of an ongoing proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

proceeding, reissue the Notice of Application originally issued on September 14, 2018, and, essentially, restart the process of evaluating its Application. Backcountry argues that this will benefit the Commission's consideration of its Application because Commission Staff can evaluate whether the Application is sufficient and can be approved without a hearing, which would save both the Applicant and other parties' time and additional financial resources.

DISCUSSION AND DECISION

- 9 We grant Lake Chelan Recreation's Motion to withdraw, but deny its motion to modify the procedural schedule. Because we find that Lake Chelan Recreation's withdrawal will significantly alter the scope of this proceeding, we conclude that the procedural schedule should be modified consistent with Staff's recommendation regarding the deadlines for remaining parties. We address each of these issues in turn, below.
- 10 **Motion to Withdraw.** Under Washington Administrative Code (WAC) 480-07-380(3)(a), a party must receive permission from the Commission to withdraw from a proceeding once the Commission has noticed a hearing. Pursuant to WAC 480-07-380(3)(b), the Commission will grant a party's motion to withdraw a petition if doing so is in the public interest.
- 11 The dispute in this docket concerns whether the Commission should grant Backcountry's Application for a commercial ferry certificate to operate on Lake Chelan. State law permits any existing certificate holder who operates in the same territory in which an applicant proposes to operate to protest an application for a commercial ferry certificate.³ Lake Chelan Recreation, an existing certificate holder on Lake Chelan, filed its protest objecting to the Application on October 8, 2018.
- 12 To determine whether a commercial ferry certificate should be granted, the Commission considers whether: (1) public convenience and necessity require the service,⁴ and (2) the applicant has met all requirements contained in statute and Commission rules, including financial and fitness requirements.⁵ When a protest is made by an existing certificate holder, the Commission may only grant the certificate if: (3) the existing certificate

³ RCW 81.84.020; WAC 480-51-040.

⁴ RCW 81.84.010; RCW 81.84.020.

⁵ Chapter 81.84 RCW; Chapter 480-51 WAC.

holder has failed or refused to furnish reasonable and adequate service or has failed to provide the service described in its certificate or tariffs after the time allowed to initiate service has elapsed.⁶

13 We agree with Staff that granting Lake Chelan Recreation's motion to withdraw as a party and withdraw its protest will simplify the issues in this case. Currently, the Commission must consider each of the issues identified above. Lake Chelan Recreation's withdrawal of its protest removes complex issues from consideration.

14 Additionally, whether to protest an application is the existing certificate holder's decision, not the Commission's. If Lake Chelan Recreation asserts that its interests are adequately protected by withdrawing its protest, relinquishing its party status, and participating in the same manner as any other member of the public, the Commission is reticent to compel the Protestant to maintain its protest.

15 Finally, neither Staff nor Backcountry object to Lake Chelan Recreation's motion to withdraw its protest of October 8, 2018, withdraw as a party, and allow the withdrawal of its legal counsel.

16 For the reasons set out above, the Commission finds it in the public interest to permit Lake Chelan Recreation to withdraw its protest of October 8, 2018, withdraw as a party, and allow its legal counsel to withdraw from representation in this case.

17 **Motion to Modify Procedural Schedule.** Under WAC 480-07-375(1)(b), parties may file procedural motions to request that the Commission establish or modify the process or the procedural schedule in a proceeding. Any party that opposes a procedural motion, other than a motion for continuance, may file a response.⁷ Both Staff and Backcountry filed a response to the procedural aspects of Lake Chelan Recreation's Motion.

18 As an initial matter, we reject Backcountry's request to bar Lake Chelan Recreation from submitting comments as an interested member of the public because taking such action would conflict with Commission rules.⁸ Backcountry argues that permitting Lake Chelan Recreation to submit public comments will prejudice Backcountry because it would allow Lake Chelan Recreation to participate fully in this proceeding absent the financial

⁶ RCW 81.84.020.

⁷ WAC 480-07-375(4).

⁸ See WAC 480-07-498.

burden of litigation. We disagree. Participating in an adjudication as a party is substantially different than participating as an interested member of the public. While parties to a case may, among other things, engage in discovery, file testimony, present evidence, and conduct cross-examination, members of the public are limited to filing written comments expressing their concerns or support. Such comments from nonparties are treated as illustrative, expressing public sentiment concerning the pending proceeding.⁹ Allowing Lake Chelan Recreation to submit public comments in this proceeding does not prejudice Backcountry any more than allowing other member of the public to file comments. The Commission will treat comments submitted by Lake Chelan Recreation as it treats all other comments submitted by the public.¹⁰

- 19 Second, we decline to require Lake Chelan Recreation to file public comments by January 25, 2019. Because Lake Chelan Recreation's request to withdraw as a party and withdraw its protest in this matter is granted, its status going forward is the same as any other nonparty member of the public and it is relieved of the obligation to file testimony and exhibits on January 14, 2019. The remaining parties, Backcountry and Staff, may respond to Lake Chelan Recreation's public comments if either so chooses, just as the parties may respond to or otherwise address any other public comments filed in this docket.
- 20 Third, we reject Backcountry's assertion that the burden and costs associated with this proceeding, including that of securing legal representation, are improperly a direct result of Lake Chelan Recreation's protest. Every party that appears before the Commission has the option to retain legal counsel, but doing so is not required. Parties may participate in proceedings at the Commission without legal representation.
- 21 In addition, RCW 81.84.020 requires that the Commission offer the opportunity for a hearing on any application for a commercial ferry certificate. Commission rules and statute also grant an existing commercial ferry certificate holder the legal right to protest an application.¹¹ The exercise of such a legal right does not prejudice an applicant, nor does a later decision by the existing certificate holder to decline to exercise that legal right and withdraw its protest result in any inequity. Quite the opposite, in fact, as such a

⁹ WAC 480-07-498(1).

¹⁰ See WAC 480-07-498.

¹¹ See RCW 81.84.010; RCW 81.84.020; RCW 34.05.413(2); WAC 480-51-040.

withdrawal reduces the number and complexity of requirements that an applicant must meet to support its application.¹²

- 22 Finally, we reject Backcountry's request to terminate this proceeding and issue a new Notice of Application. Backcountry argues that doing so would save it time and money, allow any objections to be properly filed, and allow the Commission to determine whether an adjudicative proceeding is necessary. We disagree. Re-noticing the Application would permit Lake Chelan Recreation to reconsider its position and renew its protest, or potentially require Staff, whose position is unknown, to file a Notice of Intent to Deny the Application. Either event would trigger the commencement of an adjudicative proceeding and require the Commission to retrace the steps it has already taken, which would be an inefficient use of the Commission's and the parties' resources. We find that the most efficient and expeditious way to resolve Backcountry's Application is to proceed with our evaluation in this Docket. Doing so will permit Staff to file its testimony and exhibits setting forth its position on whether the certificate should be issued. It will also permit Backcountry the opportunity to respond to any issues raised by Staff's testimony and exhibits.
- 23 **Procedural Schedule.** Lake Chelan Recreation's withdrawal significantly modifies the posture of this proceeding because it alters the scope of the issues that Staff and Backcountry must address. In light of those circumstances, we agree with Staff that it is appropriate to modify the procedural deadlines for the filing of testimony and exhibits. Accordingly, we modify the filing deadline for Staff's responsive testimony and exhibits to February 1, 2019, and the filing deadline for Backcountry's rebuttal testimony and exhibits to March 1, 2019. These modifications to the procedural schedule are reflected in Appendix A to this Order.
- 24 We decline to make any other change to the procedural schedule at this time. No other motion to modify the procedural schedule is before the Commission and we do not find sufficient reason at this time to modify the procedural schedule on the Commission's own motion.

¹² See supra Discussion and Decision regarding Motion to Withdraw.

ORDER

THE COMMISSION ORDERS:

- 25 (1) Lake Chelan Recreation, Inc.'s motion to withdraw its protest of October 8, 2018,
withdraw as a party, and to allow the withdrawal of its legal counsel is granted.
- 26 (2) Lake Chelan Recreation, Inc.'s motion to modify the procedural schedule to
require its filing of public comments by January 25, 2019, and require responses
from the parties to its comments is denied. The Commission does not deny Lake
Chelan Recreation, Inc. the opportunity to submit public comments, consistent
with WAC 480-07-498, and relieves Lake Chelan Recreation, Inc., as a nonparty,
of the obligation to file testimony by January 14, 2019.
- 27 (3) The procedural schedule in Docket TS-180677, established by Order 01 in this
docket, is modified to require Commission Staff's Response Testimony and
Exhibits be filed by February 1, 2019, and to require Backcountry Travels LLC's
Rebuttal Testimony and Exhibits be filed by March 1, 2019, as reflected in
Appendix A to this Order.

DATED at Olympia, Washington, and effective January 10, 2019.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANDREW J. O'CONNELL
Administrative Law Judge

APPENDIX A
MODIFIED PROCEDURAL SCHEDULE
DOCKET TS-180677

EVENT	DATE
Prehearing Conference	November 19, 2018
Prehearing Conference Order (Order 01) ¹³	November 21, 2018
Applicant's Direct Testimony and Exhibits	December 17, 2018
Staff's Response Testimony and Exhibits	February 1, 2019
Applicant's Rebuttal Testimony and Exhibits	March 1, 2019
Cross-Examination Exhibits, Witness Lists, and Time Estimates	April 5, 2019
Evidentiary Hearing	April 22-23, 2019
Simultaneous Post-Hearing Briefs	May 27, 2019

¹³ Response time to data requests will be as provided in WAC 480-07-405.