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July 17, 2015

Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P.O. Box 47250
Olympia, Washington 98504-7250

RE: *In the Matter of the Petition of James and Clifford Courtney for a Declaratory Order
on the Applicability of Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code §
480-51-025(2)*
Docket TS-151359

Dear Mr. King:

Enclosed for filing in the above-referenced docket are the original and three copies of
Commission Staff's Statement of Fact and Law in Response to Petition for Declaratory
Order, and Certificate of Service.

Sincerely,

JULIAN BEATTIE
Assistant Attorney General

JB/emd
Enclosure
cc: Parties w/enc.



BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In the Matter of the Petition of

JAMES AND CLIFFORD COURTNEY

For a Declaratory Order on the Applicability
of Wash. Rev. Code § 81.84.010(1) and
Wash. Admin. Code § 480-51-025(2)

DOCKET TS-151359

COMMISSION STAFF'S
STATEMENT OF FACT AND LAW
IN RESPONSE TO PETITION FOR
DECLARATORY ORDER

I. INTRODUCTION

1 On July 1, 2015, James and Clifford Courtney filed a petition for declaratory
order (Petition) asking the Utilities and Transportation Commission to decide whether
each of five proposed boat transportation services would require a certificate of
convenience and necessity under RCW 81.84.010(1). Commission Staff analyzed each
scenario and has concluded that all proposed services would require such a certificate.

II. BACKGROUND

2 The Courtneys own and operate tourism businesses in Stehekin, a small
community located at the north end of Lake Chelan. The lake has long been served by a
single, certificated commercial ferry, known as Lake Chelan Boat Company.

3 In 1997, James Courtney applied for certificate authority to operate a commercial
ferry on Lake Chelan. The Commission found that Lake Chelan Boat Company provided
reasonable and adequate service and, for that reason, denied the application. The
Courtneys filed no further applications.

4 In 2011, the Courtneys asked a federal district court to invalidate the
Commission's certificate requirement as applied to the provision of Lake Chelan boat

transportation services for customers of specific businesses. Petition ¶ 56; *see Courtney v. Goltz*, 868 F. Supp. 2d 1143 (E.D. Wash. 2012), *aff'd in part, vacated in part, & remanded*, 736 F.3d 1152 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2697, 189 L. Ed. 2d 740 (2014). The district court ruled that the Commission and/or the Washington state courts should determine, in the first instance, whether the certificate requirement applies to the provision of boat transportation services for customers of specific businesses as described in Claim II of the Courtneys' complaint. 868 F. Supp. 2d at 1153.

5 The Courtneys elected to bring the issue before the Commission through a declaratory order petition. The Commission dismissed the initial petition because it contained insufficient detail (see Docket TS-143612). The Courtneys' second attempt, which is now before the Commission, contains sufficient information to allow a reasoned decision under RCW 34.05.240(1) and WAC 480-07-930.

III. ARGUMENT

6 The question before the Commission is whether each of five scenarios proposed by the Courtneys constitutes operation of "any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state." RCW 81.84.010(1). If any proposed service meets the standard, then the service will require a Commission-issued certificate of convenience and necessity (following reasonable notice and an opportunity to be heard). *See* RCW 81.84.020(2).

7 **"Any vessel or ferry . . . upon the waters within this state."** Clearly, all scenarios involve operation of a "vessel or ferry . . . upon the waters within this state." *See* RCW 81.04.010(12) and WAC 480-51-020(4) (defining "vessel"); *see also* Petition ¶¶ 82, 92, 102, 112, 122 (describing proposed Courtney-owned vessel).

8 **“Between fixed termini or over a regular route.”** Also clear is the fact that all scenarios involve operation of a vessel “between fixed termini or over a regular route.”

9 Scenarios one and two plainly involve both “fixed termini” and a “regular route.” Under both scenarios, the ferry would transport customers directly between Stehekin and either Fields Point Landing or Manson Bay Marina. Petition ¶¶ 79 and 89.

10 Scenarios three, four, and five involve “intermediate stops” or “standalone trips” for customers who have reserved transportation to “other parts of the lake” in connection with hiking or camping trips. Petition ¶¶ 99, 109, 119. Notwithstanding any deviation from the primary route, these scenarios likewise involve transportation between “fixed termini.” In each scenario, the ferry would carry passengers between a named starting point (either Stehekin or Fields Point Landing/Manson Bay Marina) and a predefined terminus (established in advance by the customer’s “reservation” or “package”).

11 **“For the public use for hire.”** The key question, then, is whether each proposed scenario involves operation “for the public use for hire” within the meaning of RCW 81.84.010(1). Under WAC 480-51-020, the term “for hire” denotes “transportation offered to the general public for compensation.” Although no judicial authority has applied this definition to the statutory phrase “for the public use for hire,” Staff contends the definition is apt. Staff thus construes the phrase “for the public use for hire,” as used in RCW 81.84.010(1), to denote service that is held out for sale to the general public. As discussed below, Staff concludes that all proposed services meet this standard.

12 In scenarios one through four, customers would book packages using an online application (“webervations.com”), or by calling or emailing “Stehekin Reservations.” Petition ¶¶ 77, 87, 97, 107. In scenario five, customers would book packages (presumably

online or over the phone) through a “Stehekin-based travel company.” Petition ¶ 115. In all scenarios, anybody, anywhere in the world, can book a package. The services would operate “for the public use” because they would be held out for sale to the general public.

13 In a strict sense, the customer base would be limited to the subset of the general public that is willing and able to purchase boat transportation *and* a Stehekin-based tourist activity (e.g., lodging, kayaking, or breakfast at the Stehekin Pastry Company). The Courtneys claim that this limitation renders the ferry “private.” Petition ¶ 131. In Staff’s view, however, the limitation is not particularly significant.

14 Instructive is *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 36 S. Ct. 583, 60 L. Ed. 984 (1916). In that case, a taxi company with exclusive rights to serve certain District of Columbia hotels unsuccessfully argued that its operations fell outside the district’s authority to regulate common carriers, defined by statute as “every corporation . . . controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire.” *Terminal Taxicab Co.*, 241 U.S. at 253 (ellipsis in original). Service was limited to hotel guests—strictly speaking, a subset of the general population. That limitation, however, did not strip the operation of its “public character.” *Id.* at 255. The Court explained:

No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand. We certainly may assume that in its own interest it does not attempt to do so. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. *The public does not mean everybody all the time.*

Id. (citations omitted) (emphasis added).

15 The same principles apply here. Under all proposed scenarios, the public is free to visit Stehekin “if it can afford to.” *Id.* Not everyone will have the means (or desire) to do so, but that limitation fails to negate the ferry’s essential public character. As stated by another court, the ferry is open to all who desire its use, “[w]ithin the limits of its functions.” *Surface Transp. Corp. v. Reservoir Bus Lines*, 271 A.D. 556, 560, 67 N.Y.S.2d 135 (N.Y. App. Div. 1946) (applying the reasoning in *Terminal Taxicab Co.* to hold that a bus company operated “for the use and convenience of the public” even though it exclusively served residents of particular apartments).

16 The Courtneys observe that certain auto transportation carriers, like hotel buses, are exempt from Commission regulation because their operations are merely an “incidental adjunct” to an established business. Petition ¶ 133; *see* WAC 480-30-011(1). The “incidental adjunct” exemption has no application here, and the Courtneys offer no legal theory allowing the Commission to import it or to apply it by analogy.

17 Even if the Commission construed “for the public use” to create an exemption for incidental operations, Staff contends that the ferry operations proposed by the Courtneys should not be considered “incidental” to established Stehekin tourism businesses. In all scenarios, the proposed ferry service and the associated tourism business would be legally distinct, with no parent company. And in all scenarios, the customer would pay the ferry service a defined fare that is wholly separate from the charge for the associated tourist activity. The ferry service under these circumstances would not be an “incidental adjunct” to an established business, because the economic interests of underlying entities would be insufficiently united. (Compare a hotel bus that is exempt from regulation under

RCW 81.68.015 and WAC 480-30-011(1): Typically, a single entity owns both the bus service and the hotel, and the customer pays a single rate for transportation and lodging.)

18 Staff lastly notes that although the Courtneys describe scenario five as a “charter,” that portrayal cannot alter the service’s fundamentally public nature. Under WAC 480-51-020(14), the term “charter” denotes “the hiring of a vessel, with captain and crew, by a person or group for carriage or conveyance of persons or property.” Depending on the circumstances, a legitimate charter may fall outside the scope of RCW 81.84.010(1)’s certificate requirement. But in scenario five, because unrelated customers would have the ability to book individual fares, the service would not operate as a true charter.


IV. CONCLUSION

19 All proposed scenarios involve ferry services held out for sale to the general public. The customer base, though limited in a strict sense to individuals who have the means (and desire) to purchase Stehekin travel packages, represents “so considerable a fraction of the public” that the proposed ferry services would necessarily operate for the public use for hire. *Terminal Taxicab Co.*, 241 U.S. at 255. For these reasons, Staff concludes that all proposed services would require a Commission-issued certificate of convenience and necessity under RCW 81.84.010(1).

Dated this 17th day of July, 2015.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General

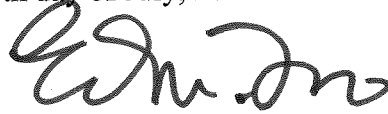


JULIAN H. BEATTIE
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Counsel for Commission Staff

Dockets TS-151359
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached Statement of Fact and Law in Response to Petition for Declaratory Order upon the persons and entities listed below by email and by depositing a copy of said document in the United States mail, addressed as shown on the Service List, with first class postage prepaid.

DATED at Olympia, Washington this 17th day of July, 2015.



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