

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  
COMMISSION STAFF'S PETITION  
TO AMEND ORDER 04

**I. INTRODUCTION**

1           In May 2019, the Commission approved an application for a certificate to provide commercial public ferry service on Lake Chelan filed by Backcountry Travels LLC (Backcountry), with conditions. One of the conditions required the Commission's regulatory staff (Staff) to submit a study about the viability of multiple ferries providing service on the lake to the Commission within 30 months of Backcountry initiating operations. The Commission intended that 30-month deadline to allow Staff to study a representative sample of data from both Backcountry and the other carrier providing service.

2           Between the entry of the order approving the application and Backcountry's commencement of operations in the summer of 2020, the global SARS-CoV-2 (COVID-19) pandemic erupted. The virus, and the measures taken to limit its spread, have inflicted significant losses on travel related industries, including commercial public ferries, over the last year and a half. Accordingly, Staff seeks amendment of the condition imposed on the approval of the application to extend the deadline for submission of the report so that Staff may provide a report based on meaningful data.

3           Staff has conferred with Backcountry, the only other party to this docket, and the company has no objection to Staff's petition.

## II. RELIEF REQUESTED

4           Staff requests that the Commission amend Order 04 in this docket to require  
submission of Staff's report on the viability of multiple ferries serving Lake Chelan on  
January 1, 2024.

## III. STATEMENT OF FACTS

### A.     **Order 04**

5           In 2019, the Commission entered Order 04 in this docket to approve Backcountry's  
application for a certificate of convenience and public necessity authorizing it to provide  
service on Lake Chelan.<sup>1</sup>

6           Order 04's entry did not occur in a vacuum. The regulation of ferry services on Lake  
Chelan is an issue that has raised no small amount of interest and controversy in recent  
years. The legislature required the Commission to study the issue in 2010<sup>2</sup> and a lawsuit  
concerning the subject has traveled through several levels of the federal courts over the last  
decade.<sup>3</sup>

7           Order 04's approval of Backcountry's application contained a condition imposed by  
the presiding administrative law judge in light of that history. Specifically, Order 04  
required Staff to conduct a study of the viability of multiple ferries serving Lake Chelan and  
report its findings to the Commission, with that report due within 30 months of Backcountry

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<sup>1</sup> *In re Petition of Backcountry Travels*, Docket TS-180677, Order 04 (May 23, 2019) (Order 04).

<sup>2</sup> Order 04 at 9 ¶ 31.

<sup>3</sup> *E.g.*, *Courtney v. Danner*, 801 Fed.Appx. 558, 2020 WL 1873372 (9th Cir. 2020) *certiorari denied* by 592 U.S. \_\_\_, 141 S. Ct. 1054 (Jan. 11, 2021); *Courtney v. Goltz*, 736 F.3d 1152 (9th Cir. 2013) *certiorari denied* by 572 U.S. 1149 (June 2, 2014); *Courtney v. Danner*, 2019 WL 96227 (E.D. Wash. Jan 3, 2019) *aff'd* by *Danner*, 801 Fed.Appx. 558; *Courtney v. Goltz*, 868 F.Supp.2d 1143 (E.D. Wash. Apr. 17, 2012), *affirmed in part, vacated in part, and remanded by Goltz*, 736 F.3d at 1152).

commencing operations.<sup>4</sup> The 30-month period was intended to allow Staff to collect a representative sample of data to ensure a meaningful analysis.<sup>5</sup>

## **B. COVID-19**

8 Months after the entry of Order 04, in December 2019, authorities in China identified the first human case of COVID-19 in the city of Wuhan.<sup>6</sup> By March 2020, when the World Health Organization declared that the disease had become a pandemic, the first identified case in the United States had been found in Washington State,<sup>7</sup> and what were believed at the time to be the first known COVID-19 deaths in the United States had also occurred here.<sup>8</sup>

9 On February 29, 2020, Governor Inslee declared that COVID-19 had created a state of emergency in all counties of Washington.<sup>9</sup> By March, widespread community transmission of COVID-19 threatened to overwhelm the state’s medical infrastructure.<sup>10</sup> To slow the predicted explosion of COVID-19 cases, and thus limit the death toll from the disease, Governor Inslee issued a “Stay Home – Stay Healthy” order, which required that “[a]ll people in Washington State shall immediately cease leaving their home or place of residence except: (1) to conduct or participate in essential public activities, and/or (2) for employment in essential business services.”<sup>11</sup> The Governor extended the stay home order, which was originally set to lapse on April 6, 2020,<sup>12</sup> multiple times<sup>13</sup> before authorizing a

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<sup>4</sup> Order 04 at 15-16 ¶ 51.

<sup>5</sup> *Id.*

<sup>6</sup> Derrick Bryson Taylor, [A Timeline of the Coronavirus Pandemic](#), NEW YORK TIMES (Jan. 10, 2021).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Proclamation by Governor Jay Inslee, No. 20-05, at 2 (Feb. 29, 2020).

<sup>10</sup> Proclamation by Governor Jay Inslee, No. 20-25 “Stay Home – Stay Healthy,” at 1 (Mar. 23, 2020).

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.*

<sup>13</sup> Proclamation by Governor Jay Inslee, No. 20-25.3 “Adjusting and Extending Stay Home – Stay Healthy,” at 3 ((May 4, 2020); Proclamation by Governor Jay Inslee, No. 20-25.2 “Adjusting Stay Home – Stay Healthy,” at 2 (Apr. 27, 2020).

phased reopening of the state and its economy in the late spring of 2020.<sup>14</sup> Unfortunately, surges of COVID-19 cases later necessitated rollbacks of this reopening,<sup>15</sup> although widespread vaccination efforts allowed the state to move forward with reopening in the spring of 2021.<sup>16</sup>

10           The pandemic has devastated travel-related industries,<sup>17</sup> and Washington’s commercial public ferries have not been immune. As the Commission has recognized, “[d]ue to the COVID-19 outbreak, commercial ferry companies have experienced a significant decrease in ridership, which further declined following the Governor’s proclamation restricting travel.”<sup>18</sup>

### C.     **Backcountry’s Commencement of Operations**

11           Despite the COVID outbreak, Backcountry began service in 2020.<sup>19</sup> The company operated for approximately ten months before maintenance issues required it to cease operations.<sup>20</sup> Backcountry has recently alerted Staff that it will resume operating again in June 2021.<sup>21</sup>

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<sup>14</sup> *E.g.*, Proclamation by Governor Jay Inslee, No 20-25.9 “Transition From ‘Stay Home – Stay Healthy’ to ‘Safe Start – Stay Healthy’ County-by-County Phased Reopening,” at 3-5 (Dec. 30, 2020); Proclamation by Governor Jay Inslee, No 20-25.10 “Transition From ‘Stay Home – Stay Healthy’ to ‘Safe Start – Stay Healthy’ County-by-County Phased Reopening,” at 3-5 (Dec. 21, 2020); Proclamation by Governor Jay Inslee, No 20-25.9 “Transition From ‘Stay Home – Stay Healthy’ to ‘Safe Start – Stay Healthy’ County-by-County Phased Reopening,” at 3-5 (Dec. 10, 2020); Proclamation by Governor Jay Inslee, No 20-25.8 “Transition From ‘Stay Home – Stay Healthy’ to ‘Safe Start – Stay Healthy’ County-by-County Phased Reopening,” at 1-5 (May 31, 2020).

<sup>15</sup> *E.g.*, Proclamation by Governor Jay Inslee, No. 20-25.8 “‘Stay Safe – Stay Healthy’ Rollback of County-by-County Phased Reopening Responding to a COVID-19 Outbreak Surge,” at 3-5 (Nov. 15, 2020).

<sup>16</sup> Proclamation by Governor Jay Inslee, No. 20-25.13 “Healthy Washington – Roadmap to Recovery,” at 2 (May 21, 2021).

<sup>17</sup> U.S. Travel Ass’n, COVID-19 Travel Industry Research, *available at* <https://www.ustravel.org/toolkit/covid-19-travel-industry-research> (last visited Jan. 19, 2021) (noting that the pandemic has caused over \$500 billion in losses for travel industries).

<sup>18</sup> *In re Annual Reports to be Filed by Commercial Public Ferry Companies*, Docket TS-200317, Order 01, 2 ¶ 4 (Apr. 23, 2020).

<sup>19</sup> Declaration of Mike Young at ¶ 5.

<sup>20</sup> *Id.* at ¶ 6.

<sup>21</sup> *Id.* at ¶ 7.

#### IV. STATEMENT OF ISSUES

12           Should the Commission amend Order 04 to require the submission of Staff’s report by January 1, 2024?

#### V. ARGUMENT

13           Backcountry has commenced operations, triggering the 30-month clock on Staff’s report. But the COVID-19 pandemic has thwarted the Commission’s intent that Staff study meaningful data, at least on the timetable set out in Order 04. Staff thus seeks an extension of the deadline for the report to give effect to the Commission’s intent.

14           The public service laws authorize the Commission to, “at any time, upon notice to the public service company affected, alter or amend any order or rule made, issued, or promulgated by it.”<sup>22</sup> Any order so altering, amending, or rescinding another is effective upon service to the relevant public service company.<sup>23</sup>

15           Under the Commission’s procedural rules, a person may petition the Commission for alteration, amendment, or rescission of an order.<sup>24</sup> Such a petition must comply with the substantive requirements for a petition for rehearing,<sup>25</sup> meaning that the petition must “set forth sufficient grounds for [altering, amending, or rescinding] the commission order and must include substantial evidence or an offer of proof in support of the requested relief.”<sup>26</sup> “[S]ufficient grounds” for a petition include “[c]hanged conditions since the commission entered the order.”<sup>27</sup>

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<sup>22</sup> RCW 81.04.210.

<sup>23</sup> *Id.*

<sup>24</sup> WAC 480-07-875(1); *cf.* WAC 480-07-370(3) (defining a petition).

<sup>25</sup> WAC 480-07-875(1).

<sup>26</sup> WAC 480-07-870(1).

<sup>27</sup> WAC 480-07-870(1)(a).

16 Changed conditions warrant an amendment to Order 04. Since the Commission entered Order 04, the COVID-19 pandemic has raged across the globe, and Washington, like many states, has restricted travel and economic activity to limit the spread of the disease. The pandemic and those restrictions have significantly depressed ferry ridership, rendering any data from the last 15 months anomalous.

17 A sufficient evidentiary basis supports amendment of Order 04. The Commission may take official notice of the Governor’s proclamations restricting travel and business activity in response to the COVID-19 pandemic.<sup>28</sup> The Commission may also take official notice of its own orders recognizing the effects the pandemic has had, and continues to have, on the common carriers it regulates.<sup>29</sup> That evidence provides proof of the changed circumstances discussed above.

18 Moving the deadline for Staff’s report to January 1 2024, will allow Staff to collect data for a period of two years after widespread vaccination efforts should end the pandemic and allow Washingtonians, and others, to travel across Lake Chelan again in numbers. The Commission should approve the amendment.

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<sup>28</sup> WAC 480-07-495(2)(a)(i)(A).

<sup>29</sup> *Id.*

## VI. CONCLUSION

19 Commission Staff requests that the Commission extend the deadline for the due date of the report required by the conditions imposed in Order 04 to January 1, 2024.

DATED this 16th day of June 2021.

Respectfully submitted,

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