

**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 RCW 81.84.010(1) and
WAC 480-51-025(2)

Docket No. TS-143612

STATEMENT OF FACTS AND LAW ON
BEHALF OF ARROW LAUNCH
SERVICES, INC, BC-97

I. PRELIMINARY STATEMENT

1 On or about October 2, 2014, James and Clifford Courtney (“Petitioners”) jointly filed
with the WUTC a Petition for Declaratory Order as to the Applicability of the Certificate of
Public Convenience and Necessity Requirement in RCW 81.84.010(1) and WAC 480-51-025(2)
to boat transportation service on Lake Chelan “for customers or patrons of specific businesses or
group of businesses.”

2 On October 3, 2014, Commission issued a Notice of Receipt of the Petition and requested
that all interested parties present a Statement of Facts and Law on the issues raised in the Petition
by October 20, 2014 which date has been extended to Arrow Launch Service to 5 p.m.,
Wednesday, October 22, 2014 under a letter from the Secretary of the Commission dated
October 17, 2014, and now subsequently by request of the Attorney General’s Office, until
November 7, 2014.

3 Arrow Launch Service, Inc, (“Arrow”/“ALS”), by virtue of its longstanding commercial
ferry vessel launch service operating under Commission jurisdiction on Washington waterways,
is an interested party and submits the following in response to the Commission’s request:

II. ARROW’S STATEMENT OF UNDERLYING FACTS SURROUNDING PETITION

4 The factual backdrop as generally set forth in Petitioners’ Petition at ¶¶ 25-30, ¶¶ 32-38,
and ¶¶ 39-47 are well-known to the Commission and reflected in the various hearing records
and files surrounding the Petitioners’ prior putative attempts to either obtain a certificate of

STATEMENT OF FACTS AND LAW
ON BEHALF OF ARROW LAUNCH SERVICES, INC. BC-97

public convenience and necessity to serve Lake Chelan or a formal or informal Commission or Staff ruling that would exempt certain evolving service proposals on Lake Chelan by the Petitioners.

5 Following at least temporary disposition of these attempts in 2009, in 2011, James and Clifford Courtney filed a federal rights lawsuit in the United States District Court for Eastern Washington seeking declaratory and injunctive relief against the Commission and asking that the Court find the requirement of RCW 81.84.010(1) as applied to the Courtneys, violates their constitutional rights. As noted at Page 13 of the Petitioners' filing here, the Courtneys subsequently appealed a dismissal of their action to the United States Circuit Court of Appeals for the Ninth Circuit.

6 Arrow was an Amicus Curiae on behalf of the respondent Commission in that action and filed its brief on October 15, 2012, which, for the Commission's reference, is attached hereto as Exhibit 1, setting forth its various arguments and positions on the Courtney appeal. As noted at page 14 of Petitioners' pleading, the Courtneys, following the Ninth Circuit decision, requested and were subsequently denied certiorari by the United States Supreme Court in June, 2014. The United States District Court for Eastern Washington on partial remand retains jurisdiction over the second claim of the Courtneys and the Courtneys have now duly filed a Petition for Declaratory Order under RCW 34.05.240, positing whether the featured service requires a certificate of public convenience and necessity.

7 At the outset of this Statement, Arrow would acknowledge that it does not hold a certificate from the Commission to serve any points on Lake Chelan. As such, it is not an "overlapping service provider" or a contemporaneous applicant for such service which would enable a protest under WAC 480-51-040 were this to be converted into an adjudication. However, by virtue of its Certificate BC-97, attached hereto for reference as Exhibit 2, it is a longstanding commercial ferry certificate holder who would seek to intervene in any subsequent adjudicative process pursuant to WAC 480-07-340(3)(f) and WAC 480-07-355.

8 The dispositive issue rather inartfully framed by the Petitioners has also been described in a lengthy formal study by the Commission pursuant to legislative mandate and which is entitled, “Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan, (January 14, 2010, “The Ferry Report”). As the Commission is well aware, that document exhaustively analyzed operating conditions on Lake Chelan, the viability of a single regulated service provider and discussed alternative scenarios such as that generally alluded to by the Petitioners here under which the Commission would or could find, under certain facts, a specific proposal exempt from Public Convenience and Necessity regulation.

III. DISCUSSION OF FACTS AND LAW UNDERPINNING THE QUESTION POSED BY THE PETITION FOR DECLARATORY ORDER

9 According to the Courtneys, the question to be resolved by their Petition is “whether a PCN certificate is necessary to provide boat transportation service on Lake Chelan for customers or patrons of specific businesses or a group of businesses,”¹ Indeed, the Courtneys expressly argue that “[t]he WUTC should issue a Declaratory Order explaining the PCN certificate is not necessary to provide boat transportation service on Lake Chelan for customers or patrons of specific businesses or a group of businesses.”²

10 In Arrow’s view, this rather stark question simply cannot and should not be resolved on the basis of a Petition for Declaratory Order without any subsequent hearing. While the Petitioner argues, under RCW 34.05.240(1)(d), that the importance and resolution of the question for the Petitioners outweighs any adverse effects likely to arise on others or the general public, Arrow Launch Service, in its existing certificate-holder circumstance, strongly disagrees with such sentiment.

11 First of all, ALS itself “has not experienced uncertainty about its understanding” of when a certificate is required. Here, asking the Commission, as the Petitioners do, to broadly interpret the public convenience and necessity requirement without a formative adjudicative record or

¹ Petition for Declaratory Order ¶ 72 at page 15.

² Petition for Declaratory ¶ 76, page 17.

simply on the basis of colorable claims and arguments raised by Petitioners is not what either RCW 34.05.240 portends or to which RCW 81.84.010 is directed. Unquestionably an interested stakeholder whose underlying certificate rights could be broadly affected by the construction of the statute in a factual vacuum, Arrow believes simply issuing a Declaratory Order now, even if the Commission somehow agrees with Petitioners' argument, would be detrimental to all commercial ferry certificate holders operating in the state.

12 Because a broad declaratory request that no certificate is required for customers or patrons of "specific business or group of businesses" is also a vague inquiry, Petitioners' efforts here suggest they are in effect seeking to obtain an advisory opinion from the agency asking it to sanction unspecified service to an almost unlimited segment of the traveling or shipping public which might singularly, or by group, request for-hire services from a vessel operator. While the Ninth Circuit Opinion noted in a footnote that the "...services proposed by the Courtneys would be pertinent to their Stehekin-based businesses and presumably be operated solely for patrons of those businesses," 736 F. 3d 1152, 1164, 9th Cir, (2014), the Petitioners have not so limited their Petition here and at ¶ 76 of their Petition and have instead boldly argued that the Commission should issue a Declaratory Order "explaining that a PCN certificate is not necessary to provide boat transportation service on Lake Chelan for customers or patrons of specific businesses or a group of businesses."

13 Arrow Launch Service currently provides daily regulated commercial ferry services to "customers or groups of patrons of specific businesses or a group of businesses." Broadly exempting a certificate requirement for such service from RCW 81.84.010 would be entirely contrary to Arrow's understanding of the laws and rules of this Commission and to the public interest. Indeed, "customers or patrons of specific businesses or a group of businesses" could constitute largely Arrow's entire existing customer base which is comprised of shipping agents, oil and grain companies, provisioners, suppliers, et al. which would appear to qualify as "customers...of specific businesses or a group of businesses."

14 Removing such conventional intrastate commercial ferry service from a requirement to obtain a certificate to transport passengers and freight for hire between fixed termini, including ships at anchor in ports, again, would remove the heart of Arrow Launch Service's operations from Commission jurisdiction. It would also simultaneously jeopardize almost three decades of infrastructure and personnel investment to serve the shipping public in various ports named in its certificate and potentially eviscerate or otherwise eliminate recognized Arrow's common carrier obligation to serve the shipping public in various Puget Sound ports, 24 hours a day, 365 days a year. Additionally, it would put at risk the company's ability and viability to staff smaller ports and termini while opening up the overall marketplace to any provider who simply wished to operate a vessel in service at whim, for whatever interval that provider wanted, to customers of "any business or group of businesses."

15 Such a sweeping threshold exemption from the certificate requirement for an entity which seeks to serve "customers or patrons of specific businesses or a group of businesses" would also, for instance, neutralize the applicability of any requirements of WAC 480-51-075 and WAC 480-51-070 which proscribe vessel safety certification requirements and liability and insurance limits for all regulated operators.

16 The broad, formal declaratory ruling construing the applicable statute and regulations Petitioners here seek would thus deprive Arrow Launch Service and other commercial companies not only of their referenced certificated property rights and dilute infrastructure investments in service to the public, but would also enable a loosely-framed, unspecific and hypothetical service premise to effectively trump past orders of this Commission under Title 81.84 RCW. In so doing, it would invite a statutory pronouncement in a factual vacuum while also depriving interested parties of substantive due process by precluding their right to be thoroughly heard on a fully developed adjudicative record which would test and evaluate the service proposal and any and all factual and legal assumptions accompanying it.

17 The Petitioners’ attempt to distinguish the admittedly vague service proposal featured in their Declaratory Order Petition also appears to rely on definitions of “private ferry service” from other jurisdictions (i.e. the Michigan case they cite and the 1871 Georgia case they rely upon).³ There appears to be no similar exemption for private carriage in RCW 81.84 nor do the Washington commercial ferry statutes contain the broader type of “private carrier” exemption such as found in other Title 81 RCW provisions, i.e., the auto transportation statute cited by the Petitioner or, for instance, the exemptions in RCW 81.77 for solid waste transportation private carriage set forth at RCW 81.77.010(5), which speaks of transportation “...purely as an incidental adjunct to some other established private business owned or operated by the person in good faith.” While the Courtneys clearly seek to engraft such an analogous definition onto RCW 81.84 here, there is again, no such express exception nor would transportation to a “customer or patrons of specific businesses or a group of businesses” necessarily qualify as “private carriage” under any existing statutory scenario.

18 Additionally, based on their Petition, Petitioners hold an unspecified but presumably narrow concept of “public use for hire,” which, if accepted, would also appear to contravene the broad outlines and understandings of the common carrier obligation which is the hallmark of a public service company under RCW 81.04, RCW 81.84 and RCW 81.28.010, and which also proscribes a regulated service provider from unilaterally discriminating amongst customers or classes of customers at will.

19 Finally, taken as a whole, the Courtneys’ Petition appears to ALS to be asking the Commission to construe the constitutionality of the law it administers, RCW 81.84.010, as applied to the rather esoteric, broadly-outlined service proposal they describe on Lake Chelan. As the Commission has previously noted in other cases, a challenge to the constitutionality of a state statute governing an administrative agency’s actions may not be determined by the agency.⁴

³ Petition for Declaratory Order ¶ 78, page 18.

⁴ See i.e., Order M. V. G. No 1402, *In re: RST Disposal Company, Inc. d/b/a Tri-Star Disposal Company*, GA-845, *Seattle Disposal Company d/b/a Rabanco Companies*, GA-851 (July 1989).

Such questions are solely within the province of the Court. *Bare v. Gorton*, 84 Wn 2d 380, 526 P 2d 379 (1974).

20 While the Petitioners have attempted to couch their Petition in a fashion which seeks to qualify their action as a Petition for Declaratory Order, the construction of the question they formulate as framed here would appear to involve the weighing of constitutional theories on the underlying premise of the commercial ferry PCN statute.

21 Ultimately then, Petitioners may in fact be seeking an advisory opinion on a hypothetical factual scenario implicating constitutional arguments on the application of the statute in question to proposed/precatory actions contemplated by them. Ironically then, the uncertainty that exists most prominently here is that surrounding what the Petitioners precisely propose, whom they will specifically serve, under what route or operational conditions and truly the entirety of the scope of the proposed service. Such questions are undoubtedly best addressed in an adjudicative proceeding with the right to cross-examine proponent and opponent witnesses and to test statutory and regulatory theories against specific facts adduced on such record.

IV. PRAYER FOR RELIEF

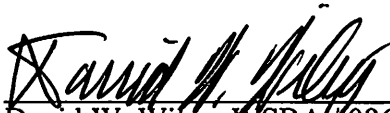
22 The Courtneys have failed ultimately to establish the conditions under RCW 34.05.240(1), meriting the issuance of a Declaratory Order.⁵ For all of the above reasons then, Arrow Launch Service, Inc. asks that the Petition for Declaratory Order either be dismissed, or alternatively, be set for hearing pursuant to RCW 34.05.240 and WAC 480-07-930(5)(d), to allow the necessary and indispensable development of a record so that the fundamental questions raised under law and rule can be examined, and ultimately, a reasoned decision on the issues raised by Petitioners be fairly and comprehensively resolved.

⁵ Arrow also believes the Petition for Declaratory Order is legally deficient under RCW 34.05.240(7), to the extent that the existing certificate holder on Lake Chelan, as Petitioners themselves anticipated in federal court, has not consented in writing to the determination of the matter by a declaratory order proceeding. As also noted, due to the potential breadth of the application of the declaratory order as premised, it would also impact other commercial ferry certificate holders who would ostensibly need to consent in writing as well.

DATED this 22nd day of October, 2014.

Respectfully Submitted,

WILLIAMS, KASTNER & GIBBS PLLC

By 
David W. Wiley, WSBA #08614
dwiley@williamskastner.com
Attorneys for Waste Control, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2014, I caused to be served the original and twelve copies of the foregoing document to the following address via first class mail, postage prepaid to:

Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
Attention: Records Center
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250
records@utc.wa.gov


I certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to:
records@utc.wa.gov

and an electronic copy via email and first class mail, postage prepaid, to:

Michael Bindas
Institute for Justice
10500 NE 8th Street, Suite 1760
Bellevue, WA 98004
Phone: (425) 646-9300
E-mail: mbindas@ij.org

Julian Beattie, WSBA #45586
Assistant Attorney General
Counsel for Staff of the Washington
Utilities and Transportation Commission
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
Phone: # (360) 664-1125
Email: jbeattie@utc.wa.gov

Signed at Seattle, Washington this 22nd day of October, 2014.


Maggi Gruber, Legal Assistant
For David W. Wiley
Williams Kastner & Gibbs PLLC
Attorneys for Arrow Launch Service, Inc.