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 No. _____ **PETITION FOR DECLARATORY ORDER**

I. INTRODUCTION

1. Pursuant to Wash. Rev. Code § 34.05.240 and Wash. Admin. Code §480-07-930, James and Clifford Courtney jointly file this Petition for a Declaratory Order as to the applicability of the certificate of public convenience and necessity requirement set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(2) to boat transportation service on Lake Chelan for customers or patrons of specific businesses or a group of businesses. The constitutionality of applying the certificate requirement and corresponding application process to such service is at issue in *Courtney v. Danner*, 2:11-cv-00401-TOR (E.D. Wash.),[1] which the federal courts have abstained from resolving until the Courtneys obtain a decision from the Washington Utilities and Transportation Commission (WUTC) or Washington state courts as to whether the certificate requirement, in fact, applies to such service.

II. *ENGLAND* RESERVATION

2. Pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Courtneys hereby:

[1] The case, originally captioned *Courtney v. Goltz*, is now captioned *Courtney v. Danner* by operation of the rule providing for automatic substitution of government officials set forth at Fed. R. Civ. P. 25(d), Fed. R. App. P. 43(c)(2), and Supreme Ct. R. 35.3. A true and correct copy of the complaint filed in the case is attached as Exhibit A to the Declarations of James and Clifford Courtney, filed herewith. *See* J. Courtney Decl. ¶ 2 and Ex. A; C. Courtney Decl. ¶ 2 and Ex. A.

(a) apprise the WUTC, including its chairman, commissioners, and executive director, of the pendency of *Courtney v. Danner*, over which the United States District Court for the Eastern District of Washington has exercised *Pullman* abstention and retained jurisdiction, *see Courtney v. Goltz*, 736 F.3d 1152, 1162-65 (9th Cir. 2013);[2] *Courtney v. Danner*, 2:11-cv-00401-LRS (E.D. Wash. Mar. 13, 2014) (order retaining jurisdiction over plaintiffs' second claim and staying case);[3] and

(b) state their intention, and reserve their right, to return to federal court to litigate the federal Privileges or Immunities Clause claim and any other federal issues in that case after resolution of state proceedings.

III. REPRESENTATION AND CONTACT INFORMATION

3. The Courtneys' full names and mailing addresses are:

James Courtney
P.O. Box 296
Stehekin, WA 98852

Clifford Courtney
Stehekin Valley Ranch, LLC
P.O. Box 36
Stehekin, WA 98852

4. The Courtneys are represented by:

Michael Bindas, WSBA 31590
INSTITUTE FOR JUSTICE
10500 N.E. 8th Street, Suite 1760
Bellevue, WA 98004
Telephone: (425) 646-9300

[2] A true and correct copy of this opinion is attached as Exhibit A to the Declaration of Michael Bindas, filed herewith. *See* Bindas Decl. ¶ 3 and Ex. A.

[3] A true and correct copy of this order is attached as Exhibit B to the Declaration of Michael Bindas, filed herewith. *See* Bindas Decl. ¶ 4 and Ex. B.

Facsimile: (425) 990-6500
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IV. BACKGROUND AND FACTS

A. Petitioners

5. Petitioner James (Jim) Courtney is a resident of Stehekin, Washington; a brother of Petitioner Clifford Courtney; and a plaintiff in *Courtney v. Danner*. *See Courtney*, 736 F.3d at 1154-55. Jim is a Stehekin-based contractor. He is the former owner of Stehekin Air Services and former part-owner of Chelan Airways, both float plane companies. For seventeen years, Jim has tried to provide boat transportation service on Lake Chelan, ranging from a ferry open to the general public to an on-call boat service. Because of the public convenience and necessity requirement, however, Jim has been, and continues to be, prevented from using the lake's navigable waters to provide such services. *See generally id.* at 1156-57.

6. Petitioner Clifford (Cliff) Courtney is a resident of Stehekin, Washington; a brother of Petitioner Jim Courtney; and a plaintiff in *Courtney v. Danner*. *See id.* at 1154-55. Cliff owns Stehekin Valley Ranch, a rustic ranch with cabins and a lodge house. *See id.* at 1155, 1156. Like Jim, Cliff has also tried to provide boat transportation services on Lake Chelan, including transportation of customers or patrons of his own and other Stehekin-based businesses. Because of the public convenience and necessity requirement, however, Cliff has been, and continues to be, prevented from using the lake's navigable waters to provide such services. *See generally id.* at 1156-57.

B. Lake Chelan

7. Lake Chelan is a narrow, 55-mile-long lake in the North Cascades. The city of Chelan lies at its southeast end; the unincorporated community of Stehekin, at its northwest end. *See id.* at 1155.

8. Stehekin is a popular summer destination that draws Washington residents and visitors from outside the state. *See id.*; WUTC, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan* 3-4 (Jan. 14, 2010) (hereafter "WUTC Report").[4]

9. Stehekin and much of the northwest end of the lake are part of the Lake Chelan National Recreation Area (LCNRA). *See Courtney*, 736 F.3d at 1155; 16 U.S.C. § 90a-1.

10. Stehekin and the LCNRA are accessible only by boat, plane, or foot. Lake Chelan thus provides a critical means of access to Stehekin and the LCNRA. *See Courtney*, 736 F.3d at 1155.

11. The lake is a navigable water of the United States and has been designated as such by the United States Army Corps of Engineers. *See id.*; U.S. Army Corps of Engineers, List of Navigable Waters, Seattle District, at 1 (1980).[5]

C. Ferry Regulation On Lake Chelan

12. Regulation of ferry service on Lake Chelan began in 1911, when Washington enacted a law addressing ferry safety issues and requiring reasonable fares. The law did not impose significant barriers to entry, and by the early 1920s, at least four ferries competed on the lake. *See* WUTC Report, *supra*, at 4.

13. In 1927, however, the legislature prohibited anyone from offering ferry service without first obtaining a certificate declaring that the "public convenience and necessity" (PCN) required it. *See id.* at 5.

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[4] A true and correct copy of the WUTC Report is attached as Exhibit C to the Declaration of Michael Bindas, filed herewith. *See* Bindas Decl. ¶ 5 and Ex. C.

[5] A true and correct copy of this list is attached as Exhibit D to the Declaration of Michael Bindas, filed herewith. *See* Bindas Decl. ¶ 6 and Ex. D.

14. Today, a PCN certificate is required to "operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state." Wash. Rev. Code § 81.84.010(1); *see also* Wash. Admin. Code § 480-51-025(2) ("No certificated commercial ferry shall provide service subject to the regulation of this commission without first having obtained from the commission a certificate declaring that public convenience and necessity require, or will require, that service.").

15. An applicant for a PCN certificate must prove, among other things, that its proposed service is required by the "public convenience and necessity," that it "has the financial resources to operate the proposed service for at least twelve months," and, if the territory is already served by a ferry, that the existing certificate holder: "has not objected to the issuance of the certificate as prayed for"; "has failed or refused to furnish reasonable and adequate service"; or "has failed to provide the service described in its certificate." Wash. Rev. Code § 81.84.010(1), .020(1)-(2).

16. The Washington Utilities and Transportation Commission ("WUTC") notifies the would-be ferry provider's competitors—that is, "all persons presently certificated to provide service"—of the application. Wash. Admin. Code § 480-51-040(1). These existing providers, in turn, may file a protest with the WUTC. *Id.*; *see also id.* § 480-07-370(1)(f).

17. The WUTC then conducts an adjudicative proceeding, in which any protesting ferry provider may participate as a party. *See id.* §§ 480-07-300(2)(c), -305(3)(g), -340(3).

18. The proceeding is akin to a civil lawsuit and involves discovery, motions, an evidentiary hearing, post-hearing briefing, and oral argument. *See generally* §§ 480-07-375 to -498.

19. The applicant bears the burden of proof on every element for a certificate.

D. Consequence Of The PCN Requirement

20. In October 1927, the year the PCN requirement was imposed, the state issued the first—and, to this day, only—certificate for ferry service on Lake Chelan. Since 1929, the certificate has been held by the Lake Chelan Boat Company. *See* WUTC Report, *supra*, at 6, 8.

21. At least four other applications have been made, but in each instance the Lake Chelan Boat Company protested and the applicant was denied a certificate. *See id.* at 6-9.

E. The Courtneys' Efforts To Provide An Alternative Service

22. Jim and Cliff Courtney are fourth-generation residents of Stehekin. They and their siblings have several businesses in the community, including Stehekin Valley Ranch, Stehekin Outfitters, Stehekin Pastry Company, and Stehekin Log Cabins. *See generally Courtney*, 736 F.3d at 1155.

23. Jim, Cliff, and their customers have experienced substantial problems with Lake Chelan's lone ferry.

24. Since 1997, Jim and Cliff have initiated four significant efforts to provide an alternative and more convenient service. *See id.* at 1156-57.

i. Application For A Certificate (1997-1998)

25. First, on July 3, 1997, Jim applied for a PCN certificate to provide a Stehekin-based ferry service between points on Lake Chelan. *See id*. at 1156; *In re* James Courtney d/b/a Stehekin Boat Service, Hearing No. B-78659, S.B.C. Order No. 549, at 2 (Aug. 3, 1998).[6]

26. The incumbent ferry provider, Lake Chelan Boat Company, protested Jim's application on July 28, 1997. *See Courtney*, 736 F.3d at 1156; *In re* James Courtney d/b/a Stehekin Boat Service, S.B.C. Order No. 549, at 2.

[6] A true and correct copy of this order is attached as Exhibit B to the Declaration of James Courtney, filed herewith. *See* J. Courtney Decl. ¶ 3 and Ex. B.

27. The WUTC held a two-day evidentiary hearing on the application on March 24 and 25, 1998. *See id.*

28. Following the evidentiary hearing, as well as post-hearing briefing, an administrative law judge ("ALJ") entered an initial order denying the application on June 22, 1998. *See id.*

29. Jim filed a petition for administrative review of the ALJ's initial order on July 13, 1998. *See id.*

30. On August 3, 1998, the WUTC issued an order affirming the ALJ's order and denying Jim a PCN certificate. *See id.* at 28; *Courtney*, 736 F.3d at 1156.

31. Jim incurred approximately $20,000 in expenses for the failed application process.

ii. Proposed On-Call Boat Service (2006-2009)

32. Second, in 2006, Jim pursued a Stehekin-based, on-call boat service that he believed fell within a "charter service" exemption to the PCN requirement. *See id.*

33. Because much of the northern end of Lake Chelan is in a national recreation area and many of the docking sites on the lake are federally-owned, Jim applied to the United States Forest Service in November 2006 for a special use permit to use the docking sites in conjunction with his planned on-call service. *See id.*

34. Before it would issue the permit, the Forest Service sought to confirm that Jim's proposed service was, in fact, exempt. *See id.*

35. WUTC staff initially opined that a PCN certificate would not be needed for the proposed on-call boat service but changed its mind after the Lake Chelan Boat Company objected to the proposal. *See id.*

36. Several months later, WUTC staff again reversed course, indicating that the proposed service would be exempt from the PCN requirement. *See id.*

37. The Forest Service's district ranger wrote to the WUTC's then-executive director, David Danner, to get his opinion. He took the step after receiving the conflicting guidance from WUTC staff and because "the current passenger ferry operation, [t]he Lake Chelan Boat Company, is concerned over a second ferry service on the Lake."[7]

38. Mr. Danner, however, declined to provide an opinion and Jim was unable to launch the service. *See Courtney*, 736 F.3d at 1156.

iii. Proposed Service For Patrons Of Courtney-Family And Other Businesses (2008-2009)

39. Third, in 2008, while Jim was trying to launch an on-call service, Cliff wrote to then-director Danner, describing certain other services he might offer and asking whether they would require a certificate. *See Courtney v. Goltz*, 868 F. Supp. 2d 1143, 1146 (E.D. Wash. 2012),[8] *aff'd in part and vacated in part*, 736 F.3d 1152; *Courtney*, 736 F.3d at 1156-57.

40. Specifically, Cliff sent a letter to Mr. Danner on September 9, 2008, presenting "several scenarios" and asking for "help . . . to understand what leeway we have without applying for another certificate."[9]

41. The first scenario Cliff described was one in which "I have chartered . . . [a] vessel for my guests"—for example, persons who "want[] to stay at the ranch [and] go river

[7] A true and correct copy of this letter is attached as Exhibit C to the Declaration of James Courtney, filed herewith. *See* J. Courtney Decl. ¶ 4 and Ex. C; *see also* 736 F.3d at 1156; J. Courtney Decl. ¶ 5 and Ex. D (letter from Robert Sheehan to David Danner (Sept. 14, 2009)).

[8] A true and correct copy of this opinion is attached as Exhibit E to the Declaration of Michael Bindas, filed herewith. *See* Bindas Decl. ¶ 7 and Ex. E.

[9] A true and correct copy of the text of this letter is attached as Exhibit B to the Declaration of Clifford Courtney, filed herewith. *See* C. Courtney Decl. ¶ 3 and Ex. B.

rafting"—and offer a package with transportation on the chartered boat as one of the guests' options. *See* C. Courtney Decl. ¶ 3 and Ex. B; *see also Courtney*, 736 F.3d at 1156.

42. The second scenario Cliff proposed was one in which "I buy the . . . boat and carry my own clients . . . [who] are booked on to one of my packages or in to one of the facilities I manage." *See* C. Courtney Decl. ¶ 3 and Ex. B; *see also Courtney*, 736 F.3d at 1156.

43. Mr. Danner responded by letter on November 7, 2008, opining that the services Cliff described would require a certificate and that "the Commission would provide you a certificate to operate a commercial ferry service on Lake Chelan (assuming you provide appropriate financial and other information) *only* if it determined that Lake Chelan Boat Company was not providing reasonable or adequate service, or if Lake Chelan Boat Company did not object to you operating a competing service. Whether Lake Chelan Boat Company's Service is not 'reasonable and adequate' would be a factual determination for the commission based on an evidentiary record developed in accordance with the Administrative Procedures Act."[10]

44. Cliff sent a follow-up letter to Mr. Danner on November 19, 2008, clarifying and emphasizing that his proposed boat transportation service "will be incidental to a former and much larger engagement of services with our companies." Explaining that "a vessel is a substantial investment"; that "I would like to nail down how you will rule if a complaint is issued against me when I start service"; and that "I will not be able to obtain dock permits until agencies

[10] A true and correct copy of this letter is attached as Exhibit C to the Declaration of Clifford Courtney, filed herewith. *See* C. Courtney Decl. ¶ 4 and Ex. C.

are satisfied I am complying with WUTC regulations or [am] exempt from them," Cliff requested "a timely response."[11]

45. Mr. Danner responded by letter on February 2, 2009. He reiterated his earlier conclusion that the services Cliff described would require a certificate, stating that it "does not matter whether the transportation you would provide is 'incidental to'" other businesses because the service would still be "for the public use for hire." Mr. Danner explained that WUTC staff interprets the term "for the public use for hire" to include "all boat transportation that is offered to the public—even if use of the service is limited to guests of a particular hotel or resort, or even if the transportation is offered as part of a package of services that includes lodging, a tour, or other services that may constitute the primary business of the entity providing the transportation as an adjunct to its primary business."[12] *See Courtney*, 736 F.3d at 1156-57.

46. Mr. Danner indicated that the conclusions in his letter reflected "the Commission staff's opinion" and that a "formal determination by the commissioners could only follow either a petition for a declaratory ruling (in which the existing certificate holder would have to agree to participate) or a 'classification proceeding' . . . , which [WUTC] staff could ask the Commission to initiate if you were to initiate service without first applying for a certificate." *See* C. Courtney Decl. ¶ 6 and Ex. E.

47. Around the time of this correspondence, Cliff also contacted WUTC staff by telephone to discuss several additional scenarios, including an association or club that would

[11] A true and correct copy of the text of this letter is attached as Exhibit D to the Declaration of Clifford Courtney, filed herewith. *See* C. Courtney Decl. ¶ 5 and Ex. D.

[12] A true and correct copy of this letter is attached as Exhibit E to the Declaration of Clifford Courtney, filed herewith. *See* C. Courtney Decl. ¶ 6 and Ex. E.

provide boat service for its own members. In each instance, Cliff was advised that the scenarios he proposed would require a certificate. *See generally Courtney*, 736 F.3d at 1157.

48. Consequently, Cliff never undertook any of the services described in the scenarios he proposed.

iv. Pursuit Of A Legislative Relaxing Of The PCN Requirement (2009-2010)

49. Finally, on February 14, 2009, Cliff sent a letter to Governor Gregoire and to Jim and Cliff's state legislators—Senator Linda Evans Parlette, Representative Mike Armstrong, and Representative Cary Condotta—urging them to eliminate or relax the PCN requirement. *See generally id.*

50. That spring, the legislature passed, and Governor Gregoire signed into law, Engrossed Senate Bill 5894, which, among other things, directed the WUTC to conduct a study and report on the appropriateness of the regulations governing commercial ferry service on Lake Chelan. *See* 2009 Wash. Legis. Serv. ch. 557, § 6 (S.B. 5894) (West); *see also Courtney*, 736 F.3d at 1157.

51. The WUTC published its report in January 2010 and recommended that there be no "changes to the state laws dealing with commercial ferry regulation as it pertains to Lake Chelan." *See* WUTC Report, *supra*, at 31.

52. The report noted that the WUTC could conceivably "allow some limited competition" on Lake Chelan under the existing regulatory framework "by declining to require a certificate for certain types of boat transportation services that are arguably private rather than for public use"—for example, "a hotel or resort providing transportation services for the exclusive use of its guests, either with its own vehicles or by arranging a 'private charter.'" *Id.* at 12, 14.

53. But the report added that any such interpretation would have to be shown to not "significantly threaten the regulated carrier's ridership, revenue and ability to provide reliable and affordable service." *Id.* at 15.

54. The report concluded that it is "unlikely" that such an interpretation "could be relied upon to authorize competing services on Lake Chelan." *Id.* at 12.

F. The Courtneys' Challenge To The Certificate Requirement And The District Court's Dismissal

55. On October 19, 2011, Jim and Cliff filed a federal civil rights lawsuit in the United States District Court for the Eastern District of Washington seeking declaratory and injunctive relief against the commissioners and executive director of the WUTC, in their official capacities. *Courtney*, 868 F. Supp. 2d at 1147.

56. The Courtneys' complaint, brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-2202, asserted two claims concerning Washington's PCN requirement: that (1) as applied to the provision of boat transportation service on Lake Chelan that is open to the general public and (2) as applied to the provision of boat transportation service on Lake Chelan for customers or patrons of specific businesses or a group of businesses, the PCN requirement and corresponding application process abridge the "right to use the navigable waters of the United States" that the Supreme Court recognized in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873). *See Courtney*, 736 F.3d at 1155, 1162.

57. The WUTC moved to dismiss the complaint, and the district court granted the motion on April 17, 2012. *See Courtney*, 868 F. Supp. 2d 1143.

58. Regarding the Courtneys' first claim (concerning boat transportation service on Lake Chelan that is open to the general public), the district court held that if the right to use the navigable waters of the United States is protected by the Privileges or Immunities Clause, it does

not encompass the right "to operate a commercial ferry service open to the public on Lake Chelan." *Id.* at 1151.

59. The district court likewise dismissed the Courtneys' second claim (concerning boat transportation service on Lake Chelan for customers or patrons of specific businesses or a group of businesses), concluding that the Courtneys lacked standing to bring the claim, that the claim was unripe, and that, in any event, abstention over the claim under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), was warranted. *Courtney*, 868 F. Supp. 2d at 1151-53.

G. The Ninth Circuit's Decision

60. The Courtneys appealed the district court's order to the Ninth Circuit, which issued its opinion on December 2, 2013. *See Courtney*, 736 F.3d 1152.

61. The Ninth Circuit affirmed the dismissal of the Courtneys' first claim, concluding that "the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan." *Id.* at 1162.

62. Regarding the Courtneys' second claim, the Ninth Circuit held that: (1) the Courtneys have standing to litigate the claim; (2) *Pullman* abstention was nevertheless warranted; but (3) the district court erred in dismissing, rather than retaining jurisdiction over, the claim. *Id.* at 1162-65 & n.6.

63. The Ninth Circuit accordingly remanded the case to the district court with instructions to retain jurisdiction over the Courtneys' second claim. *See id.* at 1156.

H. Petition for Certiorari

64. On March 3, 2014, the Courtneys petitioned the United States Supreme Court for certiorari with respect to the Ninth Circuit's disposition of their first claim only. *See* Pet. Cert., *Courtney v. Danner*, No. 13-1064 (U.S. Mar. 3, 2014), 2014 WL 890887.[13]

65. On March 26, 2014, the Supreme Court requested a response to the petition from the WUTC.

66. On June 2, 2014, the Supreme Court denied certiorari. *See Courtney v. Danner*, 134 S. Ct. 2697 (June 2, 2014).[14]

I. Post-Petition Proceedings

67. On March 13, 2014, while the Courtneys' petition for certiorari was pending, the district court issued an order "retain[ing] jurisdiction over [the Courtneys'] second constitutional claim pending an authoritative construction of the phrase 'for the public use for hire' by the WUTC or the Washington state courts." *Courtney v. Danner*, 2:11-cv-00401-LRS (E.D. Wash. Mar. 13, 2014) (order retaining jurisdiction over plaintiffs' second claim and staying case).

68. On July 1, 2014, the Courtneys apprised the district court that, "no later than September 30, 2014, the Courtneys will petition the Washington Utilities and Transportation Commission (WUTC) for a declaratory order as to whether the service at issue in their second claim requires a certificate of public convenience and necessity." *See* Statement Outlining Pls.' Intention Regarding Pursuit of Second Claim, *Courtney v. Danner*, 2:11-cv-00401-LRS, at *4 (E.D. Wash. July 1, 2014), ECF Doc. No. 41.[15]

[13] A true and correct copy of this petition is attached as Exhibit F to the Declaration of Michael Bindas, filed herewith. *See* Bindas Decl. ¶ 8 and Ex. F.

[14] A true and correct copy of this order is attached as Exhibit G to the Declaration of Michael Bindas, filed herewith. *See* Bindas Decl. ¶ 9 and Ex. G.

[15] A true and correct copy of this statement is attached as Exhibit H to the Declaration of Michael Bindas, filed herewith. *See* Bindas Decl. ¶ 10 and Ex. H.

69. This petition for declaratory order now follows.

V. ISSUANCE OF A DECLARATORY ORDER IS APPROPRIATE

70. Issuance of a declaratory order is appropriate because the criteria for an order's issuance are satisfied.

71. Under Wash. Rev. Code § 34.05.240(1), the WUTC may enter a declaratory order upon a showing:

(a) That uncertainty necessitating resolution exists;

(b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;

(c) That the uncertainty adversely affects the petitioner;

(d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and

(e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.[16]

Here, each criterion is satisfied.

A. Uncertainty Necessitating Resolution Exists

72. The uncertainty to be resolved in this 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—that is, to provide the service at issue in the second claim in *Courtney v. Danner*. In that case, the district court abstained from resolving whether application of the PCN requirement to such a service violates the Privileges or Immunities

[16] The WUTC has not established additional requirements under Wash. Rev. Code § 34.05.240(1)(e).

Clause because the court concluded that whether the PCN requirement applies to such service "remains an open question," an "unsettled question of state law." *Courtney*, 868 F. Supp. 2d at 1153. The Ninth Circuit agreed, concluding that "it is not clear whether the PCN requirement applies" to the service at issue in the Courtneys' second claim. *Courtney*, 736 F.3d at 1163.

B. There Is An Actual Controversy Arising From The Uncertainty Such That A Declaratory Order Will Not Be Merely An Advisory Opinion

73. There is an actual controversy arising from this uncertainty such that a declaratory order will not be merely an advisory opinion. Specifically, a declaratory order from the WUTC will enable the Courtneys to either: (1) provide the service at issue in their second federal constitutional claim, thus obviating the need for adjudication of that claim, *see Courtney*, 736 F.3d at 1163 ("A decision by the WUTC that the Courtneys do *not* need a PCN certificate to operate their proposed services would obviate the need for this constitutional challenge."); or (2) return to federal court to litigate whether application of the PCN requirement to the service violates the federal constitution. Until the applicability of the PCN certificate requirement is resolved, the Courtneys can do neither.

C. The Uncertainty Adversely Affects The Courtneys

74. Moreover, the uncertainty concerning the applicability of the PCN requirement adversely affects the Courtneys. In fact, the Ninth Circuit concluded that the Courtneys have standing to litigate their second federal constitutional claim precisely because of the injury they have suffered—and will continue to suffer—because of the uncertainty over whether a PCN certificate is necessary for the service. As the court explained, "the economic loss the Courtneys have already suffered" and "the threat of a classification proceeding" should they provide the service without a PCN certificate are "sufficiently actual [injury] to confer standing." *Courtney*, 736 F.3d at 1162 n.6.

D. The Adverse Effect Of Uncertainty On The Courtneys Outweighs Any Adverse Effects On Others Or On The General Public That May Likely Arise From The Order Requested

75. Resolution of the question raised in this petition will not result in any adverse effects on others or on the general public. Rather, the Courtneys, the general public, and any interested stakeholders would benefit from clarification of the applicability of the PCN requirement and from an interpretation of that requirement that avoids federal constitutional problems.

VI. ARGUMENT

76. The WUTC 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.

77. First, the plain language of the relevant statute does not require a PCN certificate for such service. Rather, a PCN certificate is only required to operate a vessel "*for the public use for hire* between fixed termini or over a regular route upon the waters within this state." Wash. Rev. Code § 81.84.010(1) (emphasis added). Providing boat transportation service *solely* for customers or patrons of specific businesses or a group of businesses is not operating that boat "for the public use for hire."

78. Second, history and case law make clear that such boat transportation service is neither a public ferry nor a common carrier. Historically, a public ferry was one that was "open to all," had an "established" and "[r]egular fare," and, as a "common carrier," was "bound to take over all who c[a]me." *Futch v. Bohannon*, 67 S.E. 814, 814 (Ga. 1910) (internal quotation marks omitted). Transportation for one's self, goods, employees, and customers, on the other hand, if a ferry at all, was a *private* ferry and did not require a franchise from the state. *See id.*; *Meisner v.*

Detroit, Belle, Isle & Windsor Ferry Co., 118 N.W. 14, 15 (Mich. 1908) (holding operation of boat transportation to and from private resort was not operation of a common carrier: "The ride upon the boat and the use of the grounds are part of the same scheme for pleasure furnished by the defendant to those whom it may choose to carry."); *Self v. Dunn & Brown*, 42 Ga. 528, 531 (1871) (holding boat transportation for mill customers "was not even a chartered ferry, but a simple accommodation of the mill-owner to his customers"). Private ferries, moreover, were permitted to charge for passage, so long as they were not open to the public at large. *See United Truck Lines v. United States*, 216 F.2d 396, 398 (9th Cir. 1954); *Futch*, 67 S.E. at 814; *Meisner*, 118 N.W. at 15. Thus, even if PCN requirements are appropriate for public ferries and other common carriers, they may not be used "as an instrument of oppression against a private carrier, even though the business operated by the private carrier might prove to be ruinous to a public carrier operating over the same routes and between the same termini." *Hissem v. Guran*, 146 N.E. 808, 810 (Ohio 1925).

79. Third, the WUTC does not regulate similar transportation services in the non-waterborne context. For example, it does not regulate, as passenger transportation operations:

- "Persons owning, operating, controlling, or managing . . . hotel buses";
- "Private carriers who, in their own vehicles, transport passengers as an incidental adjunct to some other established private business owned or operated by them in good faith"; and
- "Transporting transient air flight crew or in-transit airline passengers between an airport and temporary hotel accommodations under an arrangement between the airline carrier and the passenger transportation company."

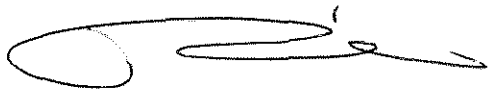
Wash. Admin. Code § 480-30-011(g), (i), (j).

80. Given the plain language of Wash. Rev. Code § 81.84.010(1), the history and case law concerning private boat transportation services, and the WUTC's exemption of similar private transportation services from regulation, the WUTC should not require a PCN certificate for the provision of boat transportation service on Lake Chelan for customers or patrons of specific businesses or a group of businesses.[17]

VII. RELIEF REQUESTED

81. The Courtneys respectfully request that the WUTC enter an order declaring that a certificate of public convenience and necessity is not required to provide boat transportation service on Lake Chelan for customers or patrons of specific businesses or a group of businesses.

Respectfully submitted this 30th day of September, 2014,



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[17] The Courtneys contend that application of the PCN requirement to such service would violate Article I, sections 3 and 12, and Article XII, section 22, of the Washington Constitution and hereby preserve that argument for appellate review. *But see Kitsap Cnty. Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n.*, 176 Wash. 486 (1934). The Courtneys are not, however, making any *federal* constitutional claim or argument in these proceedings; rather, they are reserving, under *England*, all federal constitutional issues for eventual federal court resolution.

VERIFICATION

I, James Courtney, hereby declare and state:

I am a resident of Stehekin in Chelan County, Washington. I am over the age of 18. I have read the foregoing Petition for Declaratory Order and I know its contents to be true and correct to the best of my knowledge and belief.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed in Stehekin, Washington this 30th day of September, 2014

James Courtney

JAMES COURTNEY

VERIFICATION

I, Clifford Courtney, hereby declare and state:

I am a resident of Stehekin in Chelan County, Washington. I am over the age of 18. I have read the foregoing Petition for Declaratory Order and I know its contents to be true and correct to the best of my knowledge and belief.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed in Stehekin, Washington this 29th day of September, 2014

Clifford Courtney

CLIFFORD COURTNEY

DECLARATIONS

IN SUPPORT OF

PETITION FOR

DECLARATORY ORDER

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 No. _____ **DECLARATION OF JAMES COURTNEY**

STATE OF WASHINGTON)
COUNTY OF KING) ss

I, James Courtney, hereby declare and state:

1. I am a resident of Stehekin in Chelan County, Washington. I am over the age of 18 and make this declaration based on my personal knowledge of the facts set forth below.

2. Attached as Exhibit A to this declaration is a true and correct copy of the Complaint that my brother Clifford Courtney and I filed, through our attorneys at the Institute for Justice, in *Courtney v. Danner* (formerly *Courtney v. Goltz*), No. 2:11-cv-00401-TOR, on October 19, 2011 in the United States District Court for the Eastern District of Washington. I have personal knowledge of the statements concerning: Lake Chelan, set forth at paragraphs 13-20 of the Complaint; the public convenience and necessity requirement and process, set forth at paragraphs 25-41 of the Complaint; the consequences of the public convenience and necessity requirement, set forth at paragraphs 42-49 of the Complaint; my brother Clifford's and my attempts to provide an alternative boat transportation service on Lake Chelan, set forth at paragraphs 50-96 of the Complaint; and the harm that my brother Clifford and I have suffered because of the public convenience and necessity requirement, set forth at paragraphs 97-107 of the Complaint. With one exception, these statements are true and correct to the best of my knowledge and belief. The exception is the reference to Stehekin Outfitters in paragraphs 51 and 107; Clifford recently sold his interest in that business, but the business remains in the Courtney family.

3. Attached as Exhibit B to this declaration is a true and correct copy of the Washington Utilities and Transportation Commission's (WUTC's) order in *In re* James Courtney d/b/a Stehekin Boat Service, Hearing No. B-78659, S.B.C. Order No. 549, at 2 (Aug. 3, 1998), which I received from the WUTC after it denied my application for a certificate of public convenience and necessity in that matter.

4. Attached as Exhibit C to this declaration is a true and correct copy of an August 25, 2009 letter from Robert Sheehan, the district ranger for the Chelan Ranger District of the United States Forest Service, to David Danner, then-executive director and now chairman

of the WUTC, concerning an on-call boat transportation service that I sought to provide on Lake Chelan. I received the letter as a courtesy copy from Mr. Sheehan.

5. Attached as Exhibit D to this declaration is a true and correct copy of a September 14, 2009 letter from Mr. Sheehan to Mr. Danner concerning an on-call boat transportation service that I sought to provide on Lake Chelan. I received the letter as a courtesy copy from Mr. Sheehan

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed in Steketin, Washington this 30th day of September, 2014

JAMES COURTNEY

EXHIBIT A

FOR

DECLARATION

OF

JAMES COURTNEY

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* *Pro hac vice* motion to be filed

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES COURTNEY and CLIFFORD COURTNEY,

Plaintiffs,

v.

JEFFREY GOLTZ, chairman and commissioner; PATRICK OSHIE, commissioner; and PHILIP JONES, commissioner, in their official capacities as officers and members of the Washington Utilities and Transportation Commission; and DAVID DANNER, in his official capacity as executive director of the Washington Utilities and Transportation Commission,

Defendants.

No. CV-11-401-LRS

CIVIL RIGHTS COMPLAINT OF PLAINTIFFS JAMES AND CLIFFORD COURTNEY FOR DECLARATORY AND INJUNCTIVE RELIEF

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INTRODUCTION

1. This case is a challenge to Washington statutes and regulations requiring a certificate of "public convenience and necessity" to operate a ferry on Lake Chelan. For fourteen years, Jim and Cliff Courtney have tried to launch a boat transportation service to bring economic opportunity to their remote community of Stehekin, located at the northwest end of the lake. Their boat would be insured, inspected, and certified, and their crew members would be licensed with extensive safety training. But Jim and Cliff's efforts have been repeatedly blocked by the public convenience and necessity requirement—a nearly century-old state law designed to protect existing ferry providers from competition. In fact, since the requirement was imposed in 1927, the state has issued only *one* certificate for ferry service on Lake Chelan. Thus, one company has the exclusive right to provide service on the lake. Washington's public convenience and necessity requirement violates the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution because it prevents Jim and Cliff Courtney from using Lake Chelan—a navigable water of the United States—to provide boat transportation services.

JURISDICTION AND VENUE

2. Plaintiffs—brothers Jim and Cliff Courtney—bring this civil rights

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lawsuit pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgments Act, 28 U.S.C. §§ 2201–2202, for violations of the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution.

3. Plaintiffs seek declaratory and injunctive relief against Washington's "certificate of public convenience and necessity" requirement as it applies to boat transportation services on Lake Chelan, and against the provisions governing the application process for a certificate of public convenience and necessity as they apply on Lake Chelan.

4. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), (4).

5. Pursuant to 28 U.S.C. § 1391(b)(2), venue is proper in this District because a substantial part of the events giving rise to Plaintiffs' claims occurred in this District.

PARTIES

6. Plaintiff James (Jim) Courtney is a resident of Stehekin, Washington, and a brother of Plaintiff Cliff Courtney. For nearly fifteen years, Jim has tried to provide boat transportation service on Lake Chelan, ranging from a ferry open to the general public to an on-call boat service. Because of the public convenience

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and necessity regulations at issue in this case, however, Jim has been, and continues to be, prevented from using the lake's navigable waters to provide such services.

7. Plaintiff Clifford (Cliff) Courtney is a resident of Stehekin, Washington, and a brother of Plaintiff Jim Courtney. Like Jim, Cliff has also tried to provide boat transportation services on Lake Chelan, including transportation of customers or patrons of his own and other Stehekin-based businesses. Because of the public convenience and necessity regulations at issue in this case, however, Cliff has been, and continues to be, prevented from using the lake's navigable waters to provide such services.

8. Defendant Jeffrey Goltz is a commissioner and chairman of the Washington Utilities and Transportation Commission (WUTC). The WUTC is an agency of the State of Washington, created and empowered under Wash. Rev. Code §§ 80.01.010 and .040, and headquartered in Olympia, Washington. It is charged with, among other things, regulating commercial ferry operations. Commissioner Goltz is sued in his official capacity.

9. Defendant Patrick Oshie is a commissioner of the WUTC. Commissioner Oshie is sued in his official capacity.

10. Defendant Philip Jones is a commissioner of the WUTC.

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Commissioner Jones is sued in his official capacity.

11. Defendant David Danner is executive director and secretary of the WUTC. Mr. Danner is sued in his official capacity.

12. Defendants have direct authority over WUTC personnel and the responsibility and practical ability to ensure that the WUTC's regulations, policies, and powers are implemented in accordance with the United States Constitution.

STATEMENT OF FACTS

LAKE CHELAN

13. Lake Chelan is a narrow, roughly 55-mile long lake nestled in the North Cascade Mountain Range in Chelan County, Washington.

14. The city of Chelan is located at the southeast end of the lake.

15. The small, unincorporated community of Stehekin is located at Lake Chelan's northwest end. Stehekin has long been a popular summer destination, albeit one with no road access. The community is accessible only by boat, plane, or foot. Its year-round population is roughly 75.

16. Stehekin and much of the northwest end of the lake are located in the Lake Chelan National Recreation Area, which is managed by the United States National Park Service as part of the North Cascades National Park Service Complex.

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17. Lake Chelan is a navigable water of the United States and has been designated as such by the United States Army Corps of Engineers.

18. Lake Chelan provides a continuously navigable waterway between Chelan, Washington, and the Lake Chelan National Recreation Area, a federal enclave.

19. Lake Chelan is presently, has been in the past, and may in the future be used for purposes of interstate commerce.

20. Lake Chelan is the source of the Chelan River, which, in turn, is a tributary of the Columbia River. The Columbia River flows through Canada and Washington and borders Oregon on its way to the Pacific Ocean.

HISTORY OF FERRY REGULATION ON LAKE CHELAN

21. Regulation of passenger and freight ferry service on Lake Chelan began in 1911, when the Washington legislature enacted a law addressing certain safety issues related to ferries and requiring that fares be reasonable. The law did not impose significant barriers to entry and, by the early 1920s, there were at least four competing ferry companies operating on the lake.

22. In 1927, however, the Washington legislature effectively eliminated competition on the lake by passing a law prohibiting ferry companies from offering ferry service without first obtaining a certificate declaring that "public

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convenience and necessity" required the ferry.

23. On or about October 4, 1927, the Department of Public Works—a predecessor of the WUTC—issued a certificate of public convenience and necessity for passenger/freight ferry service on Lake Chelan. The certificate was transferred to Lake Chelan Boat Company in 1929 and, in 1983, was again transferred to Lake Chelan Recreation, Inc., which continues to do business as Lake Chelan Boat Company.

24. No other certificate has been issued for ferry service on Lake Chelan. At least four other applications for a certificate have been filed, including one in 1997 by Plaintiff Jim Courtney, but in each instance the Lake Chelan Boat Company protested the application and the government denied a certificate.

CURRENT REGULATION OF FERRY SERVICE ON LAKE CHELAN

25. Under current regulations, a certificate of public convenience and necessity is required to "operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state." Wash. Rev. Code § 81.84.010(1); *see also* Wash. Admin. Code § 480-51-025(2).

26. The process for obtaining a certificate of public convenience and necessity is lengthy, burdensome, prohibitively expensive, and almost certain to end in denial.

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27. To apply for a certificate, the applicant must pay a $200 application fee, prepare an application form, and submit, among other things, the following materials to the WUTC:

- "Pro forma financial statement of operations";
- "Ridership and revenue forecasts";
- "The cost of service for the proposed operation";
- "An estimate of the cost of the assets to be used in providing service";
- "A statement of the total assets on hand of the applicant that will be expended on the proposed operation"; and
- "A statement of prior experience, if any, in providing commercial ferry service."

Wash. Admin. Code § 480-51-030(1), (3).

28. The WUTC must provide notice of the application, and of the time and place of the hearing at which the WUTC will consider the application, to the would-be ferry provider's competitors—that is, "all persons presently certificated to provide service" and "any common carrier which might be adversely affected." Wash. Admin. Code § 480-51-040(1); Wash. Rev. Code § 81.84.020(1). The WUTC must also provide notice to: "all present applicants for certificates to

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provide service"; the Department of Transportation; "affected cities, counties, and public transportation benefit areas"; and "any other person who has requested . . . to receive such notices." Wash. Admin. Code § 480-51-040(1); Wash. Rev. Code § 81.84.020(1).

29. Any such persons, including existing certificate holders, "may file a protest with the commission within thirty days after service of the notice," stating "the interest of the protestant" and "the specific grounds for opposing the application." Wash. Admin. Code § 480-51-040(1); *see also id.* § 480-07-370(f).

30. Applications for a certificate and protests to applications trigger an adjudicative proceeding. *See* Wash Admin. Code § 480-07-300(2)(c); *id.* § 480-07-305(3)(e), (g).

31. The applicant and any protesting persons or entities are made parties to the adjudicative proceeding. *See* Wash Admin. Code § 480-07-340(3). The WUTC may allow any other person claiming a "substantial interest in the subject matter of the hearing," or whose "participation is in the public interest," to intervene in the proceeding. *Id.* § 480-07-355(3); *see also id.* § 480-07-340(1)(b), (3).

32. The adjudicative proceeding resembles a civil lawsuit and involves, among other things, motion practice, Wash Admin. Code §§ 480-07-375 to -385;

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discovery, including data requests, record requisitions, bench requests, and depositions, *id.* §§ 480-07-400 to -425; a prehearing conference, *id*. § 480-07-430; a live hearing that includes both the presentation of evidence and the live testimony of witnesses, who are subject to direct, cross, and redirect examination, *id.* §§ 480-07-440 to -495; a public comment hearing, *id.* § 480-07-498; post-hearing initial briefs and reply briefs (twelve copies of each); *id.* §§ 480-07-390 to -395; and oral argument, *id.* § 480-07-390.

33. Protesting certificate holders and any intervening parties may subject the applicant to discovery requests, depose the applicant, cross-examine the applicant's witnesses, and present their own evidence and witnesses, among other things. Their participation drastically increases the costs of the certificate process for the applicant and causes lengthy delays in the WUTC's processing of an application.

34. Applicable statutes require the applicant to prove three elements in order to obtain a certificate. First, the applicant must prove that the proposed ferry service is required by the "public convenience and necessity." Wash. Rev. Code § 81.84.010(1).

35. Second, if the applicant seeks to provide ferry service in a territory already served by a certificate holder, it must prove that the existing certificate

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holder:

- "has not objected to the issuance of the certificate as prayed for";
- "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."

Wash. Rev. Code § 81.84.020(1). Thus, by withholding consent, an incumbent ferry provider can veto the applicant's ability to enter the market—a veto that can only be overridden if the applicant can prove that the incumbent's service is not reasonable, adequate, or in accord with its certificate and tariffs.

36. Third, the applicant must prove that it "has the financial resources to operate the proposed service for at least twelve months." Wash. Rev. Code § 81.84.020(2).

37. The applicant carries the burden of proof on each of these elements.

38. The applicable statutes and regulations provide no definition of the terms "public convenience and necessity" and "reasonable and adequate service," and no objective criteria exist for the WUTC to use in applying those terms or in

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determining whether an applicant has the financial resources to operate the proposed service for at least twelve months.

39. The process for seeking a certificate of public convenience and necessity is prohibitively expensive. Because of the complexity of the application process and its adjudicative nature, an applicant for a certificate effectively must hire an attorney or other professional representative, such as a transportation consultant. *Cf.* Wash. Admin. Code § 480-07-345(1)(c) (stating that although "an officer or employee of a party" may appear in an adjudicative proceeding "if granted permission by the presiding officer to represent the party," the presiding officer may nevertheless "refuse to allow a person who does not have the requisite degree of legal training, experience, or skill to appear in a representative capacity"). Moreover, because of the economic nature of many of the inquiries involved in the process, an applicant may have to hire one or more experts to testify.

40. The certificate of public convenience and necessity requirement and the WUTC's policies and practices in processing certificate applications create an effectively insurmountable barrier to entry into the Lake Chelan ferry market, make it virtually impossible for applicants to obtain a certificate, and constitute a de facto ban on new ferry services.

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41. In a 2010 legislatively-commissioned report, the WUTC identified "protection from competition" as the "[r]ationale" for the public convenience and necessity requirement.

CONSEQUENCE OF THE PUBLIC CONVENIENCE AND NECESSITY REQUIREMENT

42. Since the public convenience and necessity requirement was imposed in 1927, Washington has issued only one certificate for ferry service on Lake Chelan.

43. At least four would-be competitors have applied for certificates—in 1953, 1972, 1976, and 1997—but in each instance Lake Chelan Boat Company protested the application and the government denied a certificate. Thus, Lake Chelan Boat Company has the exclusive right to operate a ferry on the lake.

44. Lake Chelan Boat Company's schedule is impractical and inconvenient. During peak months—June through September—it operates two boats, but each makes only one trip per day and both boats depart Chelan at the same time—8:30 a.m.—and head in the same direction.

45. The impractical schedule means vacationers, especially those arriving from out of town, such as Seattle or Spokane, must often arrive a day early and stay overnight on the lake's southeast end in order to catch one of the early morning ferries that depart for Stehekin.

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46. Because both boats depart at the same time and in the same direction, three hours is the most a summer tourist can spend in Stehekin without staying overnight. Thus, a visitor must either forego the many activities—sightseeing, horseback trips, bicycle rentals, rafting, kayaking, *etc*.—that Stehekin has to offer or stay an extra night and catch one of the two ferries returning the next afternoon. Daytrips to Stehekin from Chelan are therefore impracticable.

47. Similarly, Stehekin residents who need to make the trip to Chelan for medical appointments, business meetings, *etc*., are forced to spend at least one and likely two nights in Chelan. Boarding an afternoon ferry from Stehekin puts them into Chelan mid- to late-afternoon. Assuming their appointment or meeting is scheduled for the same afternoon or evening, they must spend the night in Chelan and board the 8:30 a.m. return ferry the next day. If, however, their appointment or meeting is not until the next day, they must spend yet another night in Chelan and catch the 8:30 a.m. return ferry two days after they began their travels.

48. The inconvenience of the ferry schedule is even worse during non-summer months. For example, during the winter, Lake Chelan Boat Company operates only one boat, which makes only one trip per day, three days per week: Monday, Wednesday, and Friday.

49. The impracticality and inconvenience of the ferry schedule, as well as

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the significant cost of the fare, impose hardships on Stehekin residents, discourage tourists from visiting the community, and deprive the area's businesses of economic opportunity.

ATTEMPTS TO PROVIDE AN ALTERNATIVE, STEHEKIN-BASED SERVICE

50. Plaintiffs—brothers and business partners Jim and Cliff Courtney—have long suffered the Lake Chelan ferry monopoly. They are fourth-generation residents of Stehekin, which their great-grandparents helped settle. They and their siblings have several businesses in and around the community.

51. Cliff owns Stehekin Valley Ranch, a rustic ranch with cabins and a lodge house, and Stehekin Outfitters, a recreation company that offers white water river outings and horseback riding.

52. Jim is a Stehekin-based contractor. He is the former owner of Stehekin Air Services and former part-owner of Chelan Airways, both float plane companies.

53. Jim and Cliff's brother Cragg and Cragg's wife Roberta own the Stehekin Pastry Company and Stehekin Log Cabins.

54. For years, Jim and Cliff listened as their and their siblings' customers complained about the inconvenience and less-than-satisfactory service of Lake Chelan's lone ferry operator. They began exploring the possibility of offering

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Stehekin's visitors and residents another choice: a Stehekin-based service that runs at more convenient times and that has all the modern amenities of a first-class vessel. Their boat would not only benefit Courtney family businesses and patrons—it would provide a boon to other Stehekin-based business and the wider community.

55. Jim and Cliff's boat would be insured, inspected, and certified, and their crew members would be licensed with extensive safety training.

56. Since 1997, Jim and Cliff have initiated four significant efforts to provide such service on Lake Chelan, only to be thwarted by the public convenience and necessity requirement on each occasion.

Application for a Certificate (1997-1998)

57. On July 3, 1997, Jim applied for a certificate of public convenience and necessity to provide a Stehekin-based ferry service between points on Lake Chelan. The ensuing process—which ended in denial—lasted thirteen months.

58. The incumbent ferry provider, Lake Chelan Boat Company, protested Jim's application on July 28, 1997.

59. Lake Chelan Boat Company was represented by an attorney from a major Seattle law firm.

60. Jim had to retain a transportation consultant to represent him before

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the WUTC because he did not feel capable of undergoing the application process without professional representation.

61. The WUTC held a prehearing conference in Olympia on February 17, 1998.

62. The WUTC held a two-day evidentiary hearing on March 24 and 25, 1998. Eighteen witnesses testified at the hearing, including Jim, who was subjected to cross-examination by the Lake Chelan Boat Company's attorney. The hearing yielded a 515-page transcript, and some 37 exhibits were admitted into evidence.

63. In order to try to prove that he had "the financial resources to operate the proposed service for at least twelve months," Wash. Rev. Code § 81.84.020(2), Jim was forced to disclose sensitive financial and business data that he was not comfortable disclosing—for example, assets on hand, ridership and revenue forecasts, and estimates of costs related to the service he was proposing.

64. Following the evidentiary hearing, Jim had to submit a post-hearing brief, as well as a reply brief responding to Lake Chelan Boat Company's post-hearing brief. Lake Chelan Boat Company also filed a reply brief responding to Jim's post-hearing brief.

65. On June 22, 1998, an administrative law judge (ALJ) entered an

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initial order denying the application. The initial order concluded that Jim had not carried his burden of proving: that Lake Chelan Boat Company was not furnishing reasonable and adequate service; that the public convenience and necessity required the service Jim was proposing; and that Jim had the financial ability to provide at least twelve months of service.

66. Jim filed a petition for administrative review of the ALJ's initial order on July 13, 1998.

67. On August 3, 1998—a year and a month after Jim filed his application—the WUTC issued an order affirming the ALJ's order and denying Jim a certificate of public convenience and necessity. The WUTC rested its decision primarily on Jim's failure to prove by "substantial and competent evidence" that Lake Chelan Boat Company had failed to furnish "reasonable and adequate service." The WUTC also found it problematic that Jim's "financial analysis and general business plan depend on taking business from Lake Chelan Boat Company."

68. Jim incurred approximately $20,000 in expenses for the failed certificate application process, including fees for the transportation consultant he hired to represent him, travel expenses for himself and the consultant, and administrative expenses, such as costs for reproduction of briefs, exhibits, and the

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petition for administrative review. This was money Jim otherwise could have invested in his proposed ferry business, existing business, and family. The money was wasted, as it became apparent that the application would never succeed as long as Lake Chelan Boat Company opposed it.

69. Jim also spent countless hours of his own time on the failed application process—time he otherwise could have spent on his proposed ferry business, existing business, and family. The time was wasted, as it became apparent that the application would never succeed as long as Lake Chelan Boat Company opposed it.

Proposed On-Call Boat Service (2006-2009)

70. Several years later, Jim tried to provide another service: a Stehekin-based, on-call boat transportation service. Jim believed the service fell within a "charter service" exemption to the WUTC's public convenience and necessity requirement. *See* Wash. Admin Code § 480-51-022(1).

71. Because much of the northern end of Lake Chelan is in a national recreation area and some of the docking sites on the lake are federal facilities, Jim applied to the United States Forest Service in November 2006 for a special use permit to use the docking sites in conjunction with his planned on-call service.

72. In September 2007, the Forest Service informed Jim that because

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special use permits require that the holder comply with all applicable state laws, it would have to confirm with the WUTC that his proposed boat service was exempt from the certificate requirement before issuing a special use permit.

73. In an email dated October 10, 2007, WUTC staff opined that Jim's proposed service would be exempt from the certificate requirement.

74. After WUTC staff rendered that opinion, however, Lake Chelan Boat Company contacted the WUTC and Forest Service to object to Jim's proposed service. WUTC staff then abruptly "changed its opinion" and informed Jim, by email dated March 31, 2008, that he would need a certificate of public convenience and necessity.

75. In that light, on May 5, 2008, the Forest Service's district ranger sent Jim a letter informing him that the Forest Service had "put a hold" on his special use permit application until he obtained a certificate of public convenience and necessity.

76. WUTC staff changed its mind yet again in an email dated July 18, 2008, opining anew that Jim's proposed boat service would be exempt from the certificate requirement.

77. On August 25, 2009, the Forest Service's district ranger sent a letter to Defendant David Danner, the WUTC's executive director, requesting a formal

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opinion as to whether Jim required a certificate of public convenience and necessity. He took the step because of the conflicting opinions from WUTC staff and because "the current passenger ferry operation, [t]he Lake Chelan Boat Company, [wa]s concerned over a second ferry service on the Lake."

78. Forest Service staff informed Jim by email that "[o]nce [the district ranger] has [the WUTC's] formal decision that no cert[ificate] is needed, . . . he will sign your permit."

79. The WUTC interpreted the district ranger's inquiry as a petition for a declaratory order and, on September 9, 2009, issued a "notice of receipt of petition for declaratory order."

80. Surprised at the WUTC's action, the district ranger sent a letter to Mr. Danner on September 14, 2009, explaining that "my intent in sending the request was not for a hearing or a Petition for a Declaratory Order because I am not interested in presenting any argument concerning how the Commission should classify Mr. Courtney's service." Rather, he explained, "an advisory opinion letter . . . would satisfy my inquiry."

81. In response to the district ranger's letter, the WUTC dismissed the "petition for declaratory order" on September 25, 2009. Mr. Danner, however, then declined to provide the requested advisory opinion.

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82. Because it could not obtain an advisory opinion from the WUTC, the Forest Service did not issue a special use permit for Jim to use the federal facilities on Lake Chelan, and Jim was therefore unable to launch his on-call boat service.

Proposed Service for Patrons of Courtney Family and Other Stehekin Businesses (2008-2009)

83. In 2008, Cliff Courtney contacted Defendant and WUTC Executive Director David Danner to describe various boat transportation services he might offer—services distinct from Jim's proposed on-call service—and to determine whether such services would require a certificate. Specifically, Cliff sent a letter to Mr. Danner on September 9, 2008, presenting "several scenarios" and asking for "help . . . to understand what leeway we have without applying for another certificate."

84. The first scenario Cliff described was one in which "I have chartered . . . [a] vessel for my guests"—for example, persons who "want[] to stay at the ranch [and] go river rafting"—and offer a package with transportation on the chartered boat as one of the guests' options.

85. The second scenario Cliff proposed was one in which "I buy the . . . boat and carry my own clients . . . [who] are booked on to one of my packages or in to one of the facilities I manage."

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86. Mr. Danner responded by letter on November 7, 2008, opining that the services Cliff described would require a certificate and that "the Commission would provide you a certificate to operate a commercial ferry service on Lake Chelan (assuming you provide appropriate financial and other information) *only* if it determined that Lake Chelan Boat Company was not providing reasonable or adequate service, or if Lake Chelan Boat Company did not object to you operating a competing service. Whether Lake Chelan Boat Company's Service is not 'reasonable and adequate' would be a factual determination for the commission based on an evidentiary record developed in accordance with the Administrative Procedure Act."

87. Cliff sent a follow-up letter to Mr. Danner on November 19, 2008, clarifying and emphasizing that his proposed boat transportation service "will be incidental to a former and much larger engagement of services with our companies." Explaining that "a vessel is a substantial investment"; that "I would like to nail down how you will rule if a complaint is issued against me when I start service"; and that "I will not be able to obtain dock permits until agencies are satisfied I am complying with WUTC regulations or [am] exempt from them," Cliff requested "a timely response."

88. Mr. Danner responded by letter some two-and-a-half months later, on

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February 2, 2009. He reiterated his earlier conclusion that the services Cliff described would require a certificate, stating that it "does not matter whether the transportation you would provide is 'incidental to'" other businesses because the service would still be "for the public use for hire." Mr. Danner explained that WUTC staff interprets the term "for the public use for hire" to include "all boat transportation that is offered to the public—even if use of the service is limited to guests of a particular hotel or resort, or even if the transportation is offered as part of a package of services that includes lodging, a tour, or other services that may constitute the primary business of the entity providing the transportation as an adjunct to its primary business."

89. Mr. Danner indicated that the conclusions in his letter reflected "the Commission staff's opinion" and that a "formal determination by the commissioners could only follow either a petition for a declaratory ruling (in which the existing certificate holder would have to agree to participate) or a 'classification proceeding' . . ., which [WUTC] staff could ask the Commission to initiate if you were to initiate service without first applying for a certificate." The declaratory ruling process, particularly as it would require the agreed participation of Lake Chelan Boat Company, would be as futile as the certificate of public convenience and necessity process, and Jim and Cliff were, and still are, not

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willing to initiate service in violation of the law and risk fines.

90. Around the time of this correspondence, Cliff also contacted WUTC staff by telephone to discuss several additional scenarios, including an association or club that would provide boat service for its own members. In each instance, Cliff was advised that the scenarios he proposed would require a certificate.

91. Consequently, Cliff never undertook any of the services described in the scenarios he proposed.

Pursuit of a Legislative Relaxing of the Public Convenience and Necessity Requirement (2009-2010)

92. Frustrated that he and Jim had been repeatedly thwarted by the anti-competitive ferry regulations, Cliff sent a letter on February 14, 2009, to Governor Gregoire and to Jim and Cliff's state legislators—Senator Linda Evans Parlette, Representative Mike Armstrong, and Representative Cary Condotta—describing the need for competition on Lake Chelan, explaining the problems created by the public convenience and necessity requirement (including the futility of applying for a certificate), and urging them to eliminate or relax the certificate requirement.

93. That spring, the legislature passed, and Governor Gregoire signed into law, Engrossed Senate Bill 5894, which, among other things, directed the WUTC to conduct a study and report on the appropriateness of the regulations

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governing commercial ferry service on Lake Chelan. *See* 2009 Wash, Legis. Serv. ch. 557, § 6 (West).

94. The WUTC published its report in January 2010 and recommended that there be no "changes to the state laws dealing with commercial ferry regulation as it pertains to Lake Chelan."

95. The report noted that the WUTC could conceivably "allow some limited competition" on Lake Chelan under the existing regulatory framework "by declining to require a certificate for certain types of boat transportation services that are arguably private rather than for public use"—for example, "a hotel or resort providing transportation services for the exclusive use of its guests, either with its own vehicles or by arranging a 'private charter.'" But the report added that any such interpretation would have to be "supported by expert testimony in an adjudicative hearing" and would have to be shown to not "significantly threaten the regulated carrier's ridership, revenue and ability to provide reliable and affordable service."

96. The report concluded that it is "unlikely" that such an interpretation "could be relied upon to authorize competing services on Lake Chelan."

HARM TO PLAINTIFFS

97. The public convenience and necessity requirement has harmed and

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continues to harm Jim and Cliff Courtney.

98. Jim and Cliff have had, and continue to have, the desire and ability to start a competing boat transportation service on Lake Chelan that is open to the general public, but the public convenience and necessity requirement has prevented them from doing so.

99. Jim and Cliff have had, and continue to have, the desire and ability to provide boat transportation service on Lake Chelan for customers and patrons of Courtney family businesses and other businesses, but the public convenience and necessity requirement has prevented them from doing so.

100. The public convenience and necessity requirement has subjected Jim and Cliff's right to use the navigable waters of the United States—specifically, in connection with their right to earn an honest living—to a veto by established business interests and by a government agency acting to protect those interests from competition.

101. Jim has already applied for and been denied a certificate of public convenience and necessity. Having to undergo the certificate process again would impose substantial financial and personal costs on Jim and Cliff. It would require them to: expend tens of thousands of dollars in application fees, attorneys' fees, expert fees, and related costs; force them to divulge sensitive financial and

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business data to the government and the incumbent ferry provider (that is, their would-be competitor); subject them to intrusive discovery requests, depositions, and cross-examination at the hands of the incumbent ferry provider's attorneys; and consume an incalculable amount of personal time and energy. The money, time, and energy that Jim and Cliff would be forced to expend in applying for a certificate is money, time, and energy they could otherwise invest in their proposed boat transportation business, other businesses, and families.

102. Jim and Cliff's experience—including Jim's previous application and denial of a certificate for Lake Chelan; their thwarted attempts to provide various types of boat service on the lake; and the WUTC's refusal to relax the certificate requirement on the lake—is that the WUTC will not authorize any additional boat transportation service on Lake Chelan. Jim and Cliff have concluded that any further efforts with the WUTC are futile. They have been dealing with the WUTC for fourteen years, have pursued every angle they can think of to provide boat transportation service on Lake Chelan, and have received the absolutely consistent message that they will not be allowed to provide such service under current law and WUTC policies.

103. Jim and Cliff's experience is that the elements they would have to prove to secure a certificate of public convenience and necessity are unnecessary

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and unrelated to the safe provision of boat transportation services on Lake Chelan. Thus, even if they could ultimately obtain a certificate, it would come at the cost of being subjected to an onerous and expensive application process that serves as a significant barrier to entry and does nothing to protect the public safety.

104. Jim and Cliff have been in negotiations to purchase a boat that they would use to provide their planned transportation services and that complies with all applicable Coast Guard and Department of Labor and Industry standards, but they have refrained from purchasing the vessel because of their inability to provide transportation services with the boat. If they are unable to engage in their desired business in the near future, they may lose the favorable terms they have negotiated for the purchase and, possibly, the opportunity to purchase the boat at all.

105. If Jim and Cliff were to exercise their constitutional right to use the navigable waters of the United States without undergoing the certificate process, or after availing themselves of the certificate process and being denied a certificate, they would face conviction of a gross misdemeanor, punishable by up to 364 days' imprisonment, a $5,000 fine, and significant monetary penalties. *See* Wash. Rev. Code §§ RCW 81.04.390, .385; *id.* § 81.84.050; *id.* § 9.92.020.

106. In addition to barring Jim and Cliff from engaging in the business of providing boat transportation services on Lake Chelan, the certificate requirement

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harms Jim and Cliff as Stehekin residents who are forced to use the inefficient and unresponsive monopolist ferry service in commuting to and from the southeast end of the lake. When Jim, Cliff, and their respective families have medical appointments, business meetings, *etc.*, on the southeast end of the lake, they are forced to spend at least one and often two unnecessary nights in Chelan before returning home.

107. The public convenience and necessity requirement also harms Cliff as owner of Stehekin Valley Ranch and Stehekin Outfitters. The inconvenient schedule and service of the existing monopoly have dissuaded potential patrons of the ranch and outfitter from making the trip to Stehekin and patronizing the businesses. This has resulted in lost revenues to Cliff, his businesses, and his family.

CONSTITUTIONAL VIOLATIONS

CLAIM I: FEDERAL PRIVILEGES OR IMMUNITIES

(Boat Transportation Service on Lake Chelan Open to the General Public)

108. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

109. The Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall make or enforce any law

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which shall abridge the privileges or immunities of citizens of the United States . . . ."

110. "The right to use the navigable waters of the United States" is one of the privileges protected by the Privileges or Immunities Clause. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

111. The right to use the navigable waters of the United States is inextricably linked with the economic liberty of citizens. It guarantees citizens the ability to use such waters not only in looking for and traveling to work, but also in engaging in business—for example, providing boat transportation service that is open to the general public, or providing boat transportation service for customers or patrons of specific businesses or group of businesses.

112. Lake Chelan is a navigable water of the United States.

113. By requiring a certificate of public convenience and necessity to provide boat transportation service on Lake Chelan that is open to the general public, the WUTC is abridging the right of citizens, including Jim and Cliff Courtney, to use the navigable waters of the United States.

114. Because the right to use the navigable waters of the United States is inextricably linked with the economic liberty of citizens, by requiring a certificate of public convenience and necessity to provide boat transportation service on Lake

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Chelan that is open to the general public, the WUTC is also abridging the economic liberty of citizens, including Jim and Cliff Courtney, whose ability to pursue their chosen livelihood has been barred by the certificate requirement.

115. The regulatory regime requiring a certificate of public convenience and necessity is incredibly burdensome and operates as a de facto prohibition on the use of Lake Chelan in connection with a boat transportation enterprise. The elements an applicant must prove to secure a certificate—that the public convenience and necessity require the proposed service; that the existing certificate holder is not providing reasonable and adequate service; and that the applicant has the financial ability to provide at least twelve months of service—are unreasonable, unnecessary, and effectively insurmountable conditions for the government to require before allowing someone to provide boat transportation service on Lake Chelan that is open to the general public. The certificate application process is litigious, prohibitively expensive, and incredibly time-consuming, and it requires an applicant to divulge sensitive business plans and financial data to the government and the incumbent ferry provider. In Jim and Cliff's experience, the process is futile and allows the established provider to effectively veto the right of new operators to use the lake.

116. The WUTC has no compelling, substantial, or even legitimate interest

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in requiring a certificate of public convenience and necessity to provide boat transportation service on Lake Chelan that is open to the general public.

117. The WUTC's justification for its public convenience and necessity regulations—"protection from competition"—is not a legitimate governmental interest, much less a substantial or compelling one. The purpose and effect of the regulations are anti-competitive and provide an advantage to one commercial enterprise over another.

118. The certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, are not narrowly tailored to achieve, nor are they rationally related to, any compelling, substantial, or legitimate governmental interest.

119. As applied to the provision of boat transportation service on Lake Chelan that is open to the general public, the certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin.

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Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, are so burdensome, unreasonable, and unnecessary as to violate the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution.

120. As a direct and proximate result of Defendants' enforcement of the certificate of public convenience and necessity regulations on Lake Chelan, Jim and Cliff Courtney have no adequate remedy at law by which to prevent or minimize the continuing irreparable harm to their rights. Unless Defendants are enjoined from committing the above-described constitutional violations, Jim and Cliff will continue to suffer great and irreparable harm.

CLAIM II: FEDERAL PRIVILEGES OR IMMUNITIES

(Boat Transportation Service on Lake Chelan for Customers or Patrons of Specific Businesses or Groups of Businesses)

121. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

122. The Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."

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123. "The right to use the navigable waters of the United States" is one of the privileges protected by the Privileges or Immunities Clause. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

124. The right to use the navigable waters of the United States is inextricably linked with the economic liberty of citizens. It guarantees citizens the ability to use such waters not only in looking for and traveling to work, but also in engaging in business—for example, providing boat transportation service that is open to the general public, or providing boat transportation service for customers or patrons of specific businesses or group of businesses.

125. Lake Chelan is a navigable water of the United States.

126. By requiring a certificate of public convenience and necessity to provide boat transportation service on Lake Chelan for customers or patrons of specific businesses or groups of businesses, the WUTC is abridging the right of citizens, including Jim and Cliff Courtney, to use the navigable waters of the United States.

127. Because the right to use the navigable waters of the United States is inextricably linked with the economic liberty of citizens, by requiring a certificate of public convenience and necessity to provide boat transportation service on Lake Chelan for customers or patrons of specific businesses or groups of businesses, the

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WUTC is also abridging the economic liberty of citizens, including Jim and Cliff Courtney.

128. The regulatory regime requiring a certificate of public convenience and necessity is incredibly burdensome and operates as a de facto prohibition on the use of Lake Chelan in connection with a boat transportation enterprise. The elements an applicant must prove to secure a certificate—that the public convenience and necessity require the proposed service; that the existing certificate holder is not providing reasonable and adequate service; and that the applicant has the financial ability to provide at least twelve months of service—are unreasonable, unnecessary, and effectively insurmountable conditions for the government to require before allowing someone to provide boat transportation service on Lake Chelan for customers or patrons of specific businesses or groups of businesses. The certificate application process is litigious, prohibitively expensive, and incredibly time-consuming, and it requires an applicant to divulge sensitive business plans and financial data to the government and the incumbent ferry provider. In Jim and Cliff's experience, the process is futile and allows the established provider to effectively veto the right of new operators to use the lake.

129. The WUTC has no compelling, substantial, or even legitimate interest in requiring a certificate of public convenience and necessity to provide boat

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transportation service on Lake Chelan for customers or patrons of specific businesses or group of businesses.

130. The WUTC's justification for its public convenience and necessity regulations—"protection from competition"—is not a legitimate governmental interest, much less a substantial or compelling one. The purpose and effect of the regulations are anti-competitive and provide an advantage to one commercial enterprise over another.

131. The certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. §§ Code 480-07-300 to -885, are not narrowly tailored to achieve, nor are they rationally related to, any compelling, substantial, or legitimate governmental interest.

132. As applied to the provision of boat transportation service on Lake Chelan for customers or patrons of specific businesses or group of businesses, the certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash.

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Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, are so burdensome, unreasonable, and unnecessary as to violate the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution.

133. As a direct and proximate result of Defendants' enforcement of the certificate of public convenience and necessity regulations on Lake Chelan, Jim and Cliff Courtney have no adequate remedy at law by which to prevent or minimize the continuing irreparable harm to their rights. Unless Defendants are enjoined from committing the above-described constitutional violations, Jim and Cliff will continue to suffer great and irreparable harm.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

A. A declaratory judgment by the Court that, as applied to the provision of boat transportation service on Lake Chelan that is open to the general public, the certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, violate the Privileges or Immunities Clause

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of the Fourteenth Amendment to the United States Constitution;

B. A declaratory judgment by the Court that, as applied to the provision of boat transportation service on Lake Chelan for customers or patrons of specific businesses or group of businesses, the certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, violate the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution;

C. A preliminary and permanent injunction prohibiting Defendants from enforcing the certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, to the provision of boat transportation service on Lake Chelan that is open to the general public;

D. A preliminary and permanent injunction prohibiting Defendants from enforcing the certificate of public convenience and necessity requirements set

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forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, to the provision of boat transportation service on Lake Chelan for customers or patrons of specific businesses or group of businesses;

E. An award of attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988; and

F. Such other legal or equitable relief as this Court may deem appropriate and just.

Dated: October 19, 2011

Respectfully submitted,

s/ Michael E. Bindas
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EXHIBIT B

FOR

DECLARATION

OF

JAMES COURTNEY

SERVICE DATE
AUG 0 4 1998

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of JAMES COURTNEY d/b/a STEHEKIN BOAT SERVICE for a Certificate of Public Convenience and Necessity to Operate Vessels in Furnishing Passenger and Freight Service.	)	HEARING NO. B-78659 S.B.C. ORDER NO. 549 COMMISSION DECISION AND ORDER DENYING REVIEW; AFFIRMING AND ADOPTING INITIAL ORDER

NATURE OF PROCEEDING: James Courtney, d/b/a Stehekin Boat Service, applied for a Certificate of Public Convenience and Necessity to operate vessels in furnishing passenger and freight service on Lake Chelan. The authority requested overlaps that held by Lake Chelan Recreation, Inc. d/b/a Lake Chelan Boat Company under Certificate No. B-34. Lake Chelan Boat Company protests the application.

INITIAL ORDER: Administrative Law Judge Dennis J. Moss entered an Initial Order on June 22, 1998. The Initial Order would deny the application.

ADMINISTRATIVE REVIEW: Stehekin Boat Service seeks administrative review. It asks the Commission to reverse the essential findings of fact and conclusions of law set forth in the Initial Order and to grant Stehekin Boat Service's application.

COMMISSION: The Commission denies the Petition for Administrative Review, affirms, and adopts the Initial Order. Stehekin Boat Service failed to carry its burden to show the existing certificate holder, Lake Chelan Boat Company, has failed or refused to furnish reasonable and adequate service or has failed to provide the service described in its certificate or tariffs. Stehekin Boat Service failed to demonstrate the public convenience and necessity require the proposed service. Stehekin Boat Service failed to carry its burden to show it has the financial resources to operate the proposed service for at least twelve months. RCW 81.84.020 therefore requires us to deny Stehekin Boat Service's application.

APPEARANCES: Michael D. Duppenthaler, Registered Practitioner, Seattle, represents Applicant, Stehekin Boat Service. Kenneth Hobbs, Attorney, Seattle, represents Protestant, Lake Chelan Boat Company. Ann E. Rendahl, Assistant Attorney General, Olympia, represents the Commission Staff.

MEMORANDUM

Procedural History. James Courtney d/b/a Stehekin Boat Service filed on July 3, 1997, an application for a certificate of public convenience and necessity to operate a commercial ferry service between points on Lake Chelan, Washington. Lake Chelan Recreation, Inc. d/b/a Lake Chelan Boat Company holds Certificate No. B-34 which authorizes it to provide service between the same points, and other points, on Lake Chelan. Lake Chelan Boat Company protested the application on July 28, 1997.

On January 27, 1998, the Commission set the application for a hearing scheduled to begin on March 4, 1998. On February 17, 1998, the Commission convened a prehearing conference in Olympia, Washington and by teleconference bridge. Witness schedule conflicts convinced the Commission to continue the hearing date until March 24, 1998.

The Commission conducted evidentiary hearings in Chelan, Washington on March 24 and 25, 1998, before Administrative Law Judge Dennis J. Moss. Eighteen witnesses testified and produced a transcript of 515 pages; the presiding officer marked 37 exhibits for identification and admitted all but one. The presiding officer reopened the proceedings briefly by teleconference hearing on April 2, 1998, and accepted Exhibit No. 38 (worksheet to correct Exhibit No. 34) into evidence.

Applicant and Protestant filed initial briefs on May 18, 1998. Applicant and Protestant filed answering briefs on June 8, 1998. Staff indicated by letter dated June 4, 1998, that it takes no position on this application.

Administrative Law Judge Dennis J. Moss issued an Initial Order Denying Application, S.B.C. Order No. 546, on June 22, 1998. Stehekin Boat Service filed a Petition for Administrative Review on July 13, 1998. No answer was filed.

Discussion. Washington State regulates entry to various segments of the intrastate transportation industry including commercial ferry service on the inland waters. The Legislature sets the regulatory course the Commission must follow. RCW 81.84.010 dictates that no commercial ferry may operate a vessel for hire between fixed termini or over a regular route without first applying for and obtaining from the Commission a certificate that declares the public convenience and necessity require the service proposed. RCW 81.84.020(1) requires the Commission to conduct a hearing on an application and empowers the Commission to issue a certificate as requested, to refuse to issue a certificate, or to issue a certificate to allow partial exercise only of the privilege sought; the Commission may attach terms and conditions as required by the public convenience and necessity. RCW 81.84.020(1) also provides, however, that the Commission:

> shall not have power to grant a certificate to operate [in] any territory . . . already served by an existing certificate holder unless such certificate 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 period allowed to initiate service has elapsed . . ..

RCW 81.84.020(2) imposes another barrier to entry; the Commission may not issue a certificate unless it determines the applicant possesses adequate financial resources to operate the proposed service for at least one year. The applicant bears the burden of going forward and the ultimate burden of proof on each issue. An existing certificate holder that operates in the territory at issue may play an almost equally significant role, however, by providing evidence relative to the issues of whether the service it provides is reasonable and adequate.

In this case, Stehekin Boat Service seeks a certificate to operate on Lake Chelan between fixed termini and on a flag stop basis in territory presently served by Lake Chelan Boat Company under certificate no. B-34. Given the specific statutory limitation on the Commission's power to grant Stehekin Boat Service's application for a certificate to operate in overlapping territory, the focus of our inquiry, as in the Initial Order, is the question of whether Stehekin Boat Service proves by substantial competent evidence that Lake Chelan Boat Company fails to provide reasonable and adequate service.[1] Because we agree with the Initial Order's finding that Lake Chelan Boat Company provides reasonable and adequate service, we find no need to discuss at length the related question of whether Stehekin Boat Service demonstrates on the record that the public convenience and necessity require the proposed service. Similarly, there is no need to discuss at length the separate question of whether Stehekin Boat Service demonstrates on the record that it possesses financial wherewithal to conduct the proposed service for at least twelve months. Nevertheless, we acknowledge and address Applicant's exceptions to the pertinent findings in the Initial Order on all these points.

I. Does Lake Chelan Boat Company provide reasonable and adequate service in the territory where Stehekin Boat Company seeks authority to operate?

Stehekin Boat Service first takes exception to the Initial Order's third Finding of Fact that: "Lake Chelan Boat Company has not failed or refused to furnish reasonable and adequate service to the traveling public on Lake Chelan, nor has it

[1]There is no suggestion in the record, argument, or Initial Order that Lake Chelan Boat Company fails to provide the service described in its certificate and tariff.

failed to provide the service described in its certificate or tariffs." Neither the record nor Applicant's advocacy suggest Lake Chelan Boat Company has failed to provide the service described in its certificate or tariffs. The question reduces, then, to whether the existing certificate holder "has failed or refused to furnish reasonable and adequate service." RCW 81.84.020(1).

The current owner/operator of Lake Chelan Boat Company, Mr. Jack Raines, came on board with two partners in 1983. TR. 424 (J. Raines). They purchased the company including two vessels, the Lady II, a 350 passenger steel hull vessel, and Lady of the Lake, a wood-hulled craft then licensed to carry 120 passengers. *Id.* After two years, Mr. Raines took the company helm as sole owner. The record establishes conclusively that in the fifteen years Mr. Raines has been involved, Lake Chelan Boat Company's service has responded to changing public demands. The company increased "shoulder season" (*i.e.*, spring and fall) service by 61 days on which daily service is provided. TR. 479 (J. Raines). The company increased winter season service from three days to five days a week except for six weeks from November 1 through December 19, when Lake Chelan Boat Company provides service four days a week. *Id.*; Exh. No. 27. The company proposed in August 1995 to eliminate the Sunday schedule for the following November 1 through December 19 period, but when customers expressed dissatisfaction the plan was abandoned. TR. 394-95 (Engstrom); Exh. No. 33. Lake Chelan Boat Company operates winter schedules despite the fact that the company consistently loses money from October through April. Exh. Nos. 25, 26.

In 1990, Lake Chelan Boat Company added the higher speed Lady Express to the fleet and increased service during the summer months to twice daily. TR. 479 (J. Raines). The company decided simultaneously to retire from regular service the aging, though still seaworthy, Lady of the Lake. Although the higher speed boat is more expensive to passengers during the summer months, it makes the trip from Field's Point to Stehekin in one hour and forty-five minutes as compared with two hours and forty-five minutes for the slower, less expensive passage on the Lady II. Exh. No. 10. The Lady Express provides the same fast service during the winter, but at the lower rate charged for Lady II summer service.

Undoubtedly, all business owners in Stehekin rely on, and benefit from, Lake Chelan Boat Company's passenger ferry operations. This includes the Stehekin Lodge, a U.S. Forest Service concession operated for the past several years by Mr. J. Raines. Stehekin Boat Service asserts Lake Chelan Boat Company's promotion of Stehekin Lodge, which provides overnight accommodations, tours, and bicycle rentals in Stehekin, "goes to the reasonableness and adequacy of the existing service." The suggestion is that Lake Chelan Boat Company unfairly leverages its position as a certificate holder to capture market share in other sectors where it competes against other Stehekin businesses.

The Initial Order states in a preliminary section that Applicant's argument on this point "simply is not germane to the issues." Stehekin Boat Service objects to the Initial Order's dismissive treatment of its argument. On review, we examine the record first to determine whether there is any credence to Stehekin Boat Service's factual assertions. We focus particularly on Ms. Becky Holder's testimony cited, in part, in Applicant's petition. We find Applicant's characterization of Ms. Holder's testimony and selective use of quotation disingenuous. In fact, Ms. Holder, who is the receptionist, reservationist, and front office manager for Lake Chelan Boat Company, testified that she provides the public

> a very wide variety of information, not only the information on the boats and [their] schedules[--]accommodations in Stehekin Valley, including the [Stehekin] lodge, Silver Bay Inn, private cabin rentals, Stehekin Valley Ranch, what time of year the pastry company is open--the pastry company is a very popular place in Stehekin--when do the trails open up and can I camp or is there a permit that I have to get from the Park Service.
>
> We give information out on the times of year that each of the businesses in the Stehekin valley are open and closed and where their offices are.
>
> We have a lot of brochures in our front office . . . in the front office rack as you approach the counter . . . including Holden Village, Stehekin Valley Ranch, Cascade Corrals, the Stehekin Lodge, Lady of the Lake, Stehekin Vacation Rentals, Silver Bay Lodge . . ..

TR. 249-50. Ms. Holder also testified Lake Chelan Boat Company provides the public with a "vacation planner" and the Lady of the Lake newspaper (Exhibit No. 20), both of which include information on the full range of businesses and recreation opportunities in Stehekin. TR. 251-53. Ms. Holder testified that she informs visitors who ask her opinion that they must "keep in mind that I book reservations for the lodge" when weighing her recommendations; she also discusses the pros and cons of the various types of accommodations, actively promotes and makes referrals to a variety of Stehekin businesses other than the Stehekin Lodge, and even assists those businesses in their operations from time to time. TR. 253-56.

We find no support in the record for Stehekin Boat Company's factual assertion that Lake Chelan Boat Company unfairly promotes businesses operated by its owner, Mr. J. Raines. Indeed, it is powerfully evident that quite the opposite occurs. Accordingly, we need not examine the legal and policy question of whether leveraging

any market power derived from holding a certificate of public convenience and necessity into other market sectors bears on the reasonable and adequate service issue.

Stehekin Boat Service's second argument concerns Lake Chelan Boat Company's plans to purchase another vessel to provide additional service in the near term future. Lake Chelan Boat Company began investigating the idea of adding a third, even faster, boat to its fleet during the fall of 1996. TR. 435 (J. Raines). By January 1997, Mr. J. Raines began considering plans for a specific type of craft, a high speed catamaran. *Id.;* Exh. No. 35. Protestant's plans culminated in a contract for the construction of such a craft at a cost of $600,000 in March 1998. Exh. No. 36. The contract provides a July 28, 1998, completion date with monetary penalties to the builder after that date. Protestant expects to begin twice a day service with the new boat in August 1998 through September 15, then once a day service until the end of September. One trip a day service will resume June 1-15, 1999, and two trips a day will commence again on June 16, 1999.

Stehekin Boat Service argues the Commission should infer from this evidence of Lake Chelan Boat Company's improved service that "a higher level of service was needed" as of the application filing date and, therefore, "the existing certificate holder has failed or refused to furnish reasonable and adequate service." Stehekin Boat Service cites Order No. M.V. 131310, *In re United Truck Lines, Inc.,* App. No. E-18895 (January 1985) for the proposition that "improved efforts by the protestant after the filing of an application supports a grant of authority."

Stehekin Boat Service fails to recognize the critical point that to the extent this principle applies at all, it applies only to improved efforts *initiated* by a protestant after an application is filed. We cannot infer, as Applicant urges, that an improvement initiated by a current certificate holder before an overlapping application is filed merely reflects the incumbent's effort to undercut the application, even though steps to implement the improved service continue after the application is filed. Instead, we infer logically that such improvements reflect the incumbent's independent efforts to meet its obligation to provide reasonable and adequate service. Thus, this argument on exceptions reduces at the threshold to the question of whether Lake Chelan Boat Company's proposed new service simply is a response to Stehekin Boat Service's application, as Applicant contends, or is unrelated to that application.

Stehekin Boat Service asks us to consider only that Lake Chelan Boat Company did not file new schedules for the catamaran service until October 1997, three months after the application was filed in July 1997. We do not ignore that evidence, or other evidence that Lake Chelan Boat Company took yet additional steps to implement this expanded service after Stehekin Boat Service filed its application. We also decline, however, to ignore evidence that shows Lake Chelan Boat Company

initiated plans for expanded service fully six months before Stehekin Boat Service filed its application.

In particular, we consider and are persuaded by Mr. Raines' testimony on this point, as cited in the Initial Order (*i.e.*, TR. 434-38; 442-43). The Initial Order credits Mr. Raines testimony that he initiated discussions with boat builders as early as the fall of 1996 and received at least some drawings and specifications, including those in Exhibit No. 35 dated January 8, 1997, on or about that date.

We reject Stehekin Boat Service's argument that the Administrative Law Judge erred by considering Exhibit No. 35 corroborating evidence for Mr. Raines' testimony. Applicant asks us to infer that the document--drawings and boat specifications Mr. J. Raines' testified he received in January 1997, and which bear a handwritten note dated January 8, 1997--is misdated (*i.e.*, Stehekin Boat Company argues the date should be January 8, 1998). The twelve page exhibit appears actually to include two documents. One document is a single drawing that bears a last revision date of August 5, 1997. The other document is an eleven page set of specifications and drawings that bears a handwritten note including a date of January 8, 1997. It is perfectly clear from comparing these two documents that they reflect different boat designs. The fact that one document included in Exhibit No. 35 could not have been provided to Mr. Raines before August 1997, does not require, or even permit, an inference that the other document is misdated. Mr. Raines testified that in addition to the documents presented in Exhibit No. 35, "I have . . . quite a stack of additional information that [Don Burg or Air Right Craft, Inc.] sent me in the interim between the time that I was working with him [beginning in the fall, 1996] and beginning to work with Shaw boat in Hoquiam." TR. 437-38. The logical inference we find is that the drawing bearing the August 1997 revision date was part of this "additional information."

We find substantial competent evidence to establish the fact that Lake Chelan Boat Company initiated plans for a new boat and expanded service well in advance of, and therefore not in response to, Stehekin Boat Service's application. Thus, we agree with the treatment of this question in the Initial Order and reject Stehekin Boat Service's argument on exceptions.

Stehekin Boat Service next disputes the Initial Order's determination that "[a]pplicant fails to show the number of passenger seats available to travelers on a daily basis is inadequate." The Initial Order also states "there is scant evidence at all even arguably on this point." This is not to say there is no evidence, just that the evidence is not strong enough to support a finding of inadequate service within the meaning of RCW 81.84.020. We agree.

We consider both Mr. Crawford's testimony, upon which Stehekin Boat Service's argument relies exclusively, and other evidence cited in the Initial Order relative to supply and demand for commercial ferry service on Lake Chelan. As

Stehekin Boat Company relates, Mr. Crawford testified that fixed seats are not always available for his use on Chelan Boat Company's vessels and he may stand rather than use the folding seats provided for passengers who presumably arrive too late to secure a fixed seat. TR. 182-83. Mr. Crawford believes there have been occasions when no seat has been available for some passengers. TR. 185. In fact, other evidence directly on this point shows only a single occasion when Lake Chelan Boat Company failed to accommodate a passenger on its downlake schedule. TR. 91 (J. Courtney). On that occasion, Lake Chelan Boat Company arranged to fly the passenger downlake on a float plane. *Id.*

Mr. Crawford also testified that in ten years he has been unable "to get up the lake" to offer church services "probably two to three times," but that had nothing to do with the availability of seats on Lake Chelan Boat Company's ferries. TR. 183-85. The plain import of this evidence is that, except for one occurrence over the course of many years, Lake Chelan Boat Company's capacity consistently proves adequate to meet passenger demand. In the one definite instance that a passenger seat was not available, Lake Chelan Boat Company met its obligation to provide reasonable and adequate service by providing alternative passage.

Stehekin Boat Service challenges the Initial Order's determination that "[t]he evidence does not show that demand for service on Lake Chelan is growing." Stehekin Boat Service's argument on this point is somewhat equivocal. On the one hand, the argument is that demand growth "is not the issue." Petition at 2. On the other hand, Stehekin Boat Service argues "[t]he Initial Order fails to point out that some businesses in Stehekin are building additional rental units or have permits for expansion and the number of housing units available for rent in Stehekin will be increasing." Petition at 3.

On the first point, it is essential that we consider demand for service in the relevant market. Stable demand, juxtaposed against Lake Chelan Boat Company's service expansion during recent years and planned additions to service in the near-term future, powerfully evidences that the existing certificate holder's service is reasonable and adequate and that the incumbent provider both anticipates and responds to existing and potential market needs, including the needs of Stehekin residents, overnight visitors, and so-called day-trippers.

Turning to the second point, we review the evidence and confirm the Initial Order's observation that "the level of accommodations available for overnight guests who wish to stay in Stehekin [remains a very] stable [number], virtually unchanged for the past 15 years." This precise point is supported by Mr. J. Raines' testimony and is uncontradicted by the evidence Stehekin Boat Service cites in its petition. Stehekin Boat Service cites the prospective addition of a single rental cabin in Stehekin, and Mr. Sherer's possession of "a conditional use permit to build a 30 person Bible Camp" that

may be constructed at some indefinite future time. This is not substantial competent evidence from which increased demand for passenger ferry service can be inferred.

The balance of Stehekin Boat Service's argument against the Initial Order's third finding of fact and underlying analysis is somewhat less focused. Applicant states the principle that "[w]here the supporting shipper testifies that it is aware of the Protestants [sic] services and they demonstrates [sic] that the applicants [sic] specialized services are better suited to their [sic] requirements it supports that the existing service is not adequate." Petition at 3. Applicant's suggestion that Stehekin Boat Service proposes to offer "specialized services" is incorrect. Stehekin Boat Service seeks to provide service identical in all material respects to the service Lake Chelan Boat Company offers. The facts that Applicant's proposed service offers a different schedule for passenger and light freight transport between identical termini on Lake Chelan and may appeal to only limited segments of the traveling public (*i.e.*, Stehekin residents and overnight guests who stay at Stehekin, according to Applicant), rather than to all travelers, does not make it "specialized."

The only distinct service Applicant proposes, compared to what Lake Chelan Boat Company offers, is the year around transportation of pets. Before Stehekin Boat Service filed its application, Lake Chelan Boat Company offered pet transportation only during the off-season.[2] The Initial Order analyzes this point thoroughly. We reexamine the evidence and agree with the Initial Decision that "problems associated with [Lake Chelan Boat Company's] animal shipment policy are infrequent and isolated. Shippers . . . have alternatives . . .. Animals, including pets, can be shipped via barge, tour boat, or float plane on a year around basis . . .."

We further agree with the Initial Order that Stehekin Boat Service's willingness to transport pets during the summer months does not make its proposed service "materially different from that presently available in terms of the nature or quality of service." The customer class that might be defined in part by a desire to ship pets during the summer season is not large enough to make that feature of the proposed service consequential to our analysis of the existing service's adequacy. The difference between the two pet policies is particularly a matter of small consequence given that several pet transportation alternatives exist to meet shipper's needs.

The other aspect of Stehekin Boat Service's argument that its supporting shipper witnesses demonstrated "special needs" unfulfilled by Lake Chelan Boat Company relates exclusively to the question of daily schedules. The Initial Order

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[2] We follow our usual practice and do not consider Lake Chelan Boat Company's decision, first announced at hearing, to offer year around pet transportation.

examines the record exhaustively on this question. We adopt the Initial Order's analysis and incorporate it at length, as follows:

> Applicant posits that 75 percent of the overnight guests who visit Stehekin during the summer months will elect to use his proposed 12:00 noon departure from Field's point rather than the 9:20 a.m. or 9:45 a.m. departure times offered by Lake Chelan Boat Company. Similarly, Applicant suggests these guests will prefer Applicant's 9:00 a.m. departure from Stehekin rather than waiting for Lake Chelan Boat Company's 11:45 a.m. or 2:00 p.m. departures. TR. 46, 53 (J. Courtney). The basis for these estimates is unclear, but they appear to be little more than a guess–Mr. Courtney's "feel" for what is "realistic" based on an undescribed and apparently informal "survey" of Stehekin businesses. *Id.* The record does not disclose that any actual overnight guests were "surveyed" or even interviewed on this question. Rather, the estimate is derived from interviews with the business owners in Stehekin who are patronized by visitors, including those who stay overnight. This testimony is, at best, uncorroborated hearsay and is tainted by speculation; this diminishes the weight this evidence can be given as a measure of demand for Applicant's proposed schedules.
>
> The rationale offered to support Applicant's ridership estimates is that vacation travelers journeying to Stehekin will prefer to drive directly "from more distant points" and board the noon ferry rather than "having to be in Chelan at 8:30 in the morning." App. Brf. at 4. The rationale for the return trip ridership estimate is that "people would be able to get an earlier start and get to Fields [sic] Point around 11:00 am [sic] which allows them time to go to outlying points such as Seattle or Spokane to make connections with extending [sic] flights without having to spend a night in Chelan prior to departure." *Id.* Although this reasoning may seem plausible enough on its face, it is unsupported by any evidence. No witness testified to a need to drive from any "distant point" and board a midday ferry to Stehekin. No witness testified that it is necessary under existing schedules for travelers who visit Stehekin to then "spend a night in Chelan" before continuing their travels; no evidence shows it is necessary to arrive at Field's Point by 11:00 a.m. to travel on to Seattle,

Spokane, or other destinations, or to make flight connections. Applicant offered no travel itineraries or flight schedules as indirect evidence that even hypothetical travelers need the proposed schedules to meet their travel demands.

The testimony that does relate to the rationale advanced by Applicant, in fact, either contradicts it, or is only marginally supportive. Mr. Dinwiddie, who owns Silver Bay Lodging in Stehekin (Exh. No. 15), testified that "in the summertime people get up early in the morning, drive over [from Seattle or outlying areas], catch the [Lake Chelan Boat Company] boat at Field Point." TR. 137-38. He also said that as he has gotten older he personally is less likely to want to drive over the mountain pass from Seattle in the winter. *Id.* He prefers to spend the night in Chelan when traveling to Stehekin in the winter and encourages his guests to follow that practice as well. He testifies that "a boat that leaves later from down lake is a benefit to the people that are coming from a further distance, say Seattle or Spokane or Portland, and not have to stay overnight in Chelan, can safely drive to Chelan[,]" (TR. 139), but Stehekin Boat Service's application does not provide for winter service so this testimony is, to that extent, purely hypothetical. Finally, Mr. Dinwiddie testifies that the incentive for his guests to take an early boat would be "to get an early start so they don't have to travel at night or in the darkness or before rush hour traffic, so they'd like to get an earlier start." TR. 146. As Protestant points out in its reply brief (p. 5), however, the drive to Seattle or Spokane is three to three and one half hours. The Lady Express arrives at Field's Point at 1:35 p.m; travelers departing then to Seattle, Spokane, or even Portland would arrive hours before sunset. During the summer, even those using the Lady of the Lake II, which arrives at Field's Point at 4:45 p.m. would make Seattle or Spokane before nightfall. Once the new catamaran service is initiated, travelers will have yet another early arrival at Field's Point from Stehekin, 11:25 a.m., based on a 10:30 a.m. uplake departure.

Mr. C. Courtney, who operates the Stehekin Valley Ranch lodging facilities, testified it is an advantage to his guests to be able to travel downlake and arrive at Field's

point in time to continue their travels in daylight. TR. 222-23. Ms. R. Courtney testified in the same vein and said with respect to the proposed downlake schedule that "I imagine it could benefit some people, especially people driving from Seattle, Portland. Older guests don't like to drive at night." TR. 156. Again, however, daytime travel to Seattle, Portland, or other destinations is equally feasible under Lake Chelan Boat Company's current schedules which include an arrival at Field's Point from Stehekin just 95 minutes later than that proposed by Stehekin Boat Service, at about the same price. During the summer, departure by automobile from Field's Point at 1:35 leaves six or more hours of daylight travel.

Another customer class whose needs must be considered are the residents of Stehekin. Stehekin is an isolated community with a small population. The approximately 70 people who live there on a permanent basis choose to reside in a place to which there is no access by road, which has virtually no telephone service, no grocery or hardware stores. It is not a convenient place to live. TR. 480-81 (J. Raines). The residents who also choose to not own boats adequate to make the trip downlake, or a float plane, must rely on whatever transportation is available for hire and are accustomed to arranging their lives accordingly. TR. 167 (Sherer); 192 (Scutt). Undoubtedly, the residents prefer to have as many transportation for hire options available as commerce on Lake Chelan can support. But that begs the question of whether the public convenience and necessity require the proposed service, and does not address the fundamental issue of whether the existing service fails to meet their needs.

Ms. R. Courtney, who resides in Stehekin and operates businesses there, was asked if she relies exclusively on boat service. TR. 155-56. She replied that she flies "quite often." TR. 156. She believes the proposed schedule "would behoove any person that lives in Stehekin." *Id.* However, her decision to take a boat or fly turns not on the availability of service, but on how busy she is; that is, on whether or not she has time to take the relatively longer boat trip. *Id.*

Mr. Sherer, a former full-time resident, now lives in Stehekin during the summer only. He plans to return full-time in eight years when his children finish highschool. He rents out a cabin and a house in Stehekin and has a permit to operate a Bible Camp, though it is unclear if and when that facility will be available. . . . Mr. Sherer testified that "[t]he work the [Lake Chelan] Boat Company does, they do very well." *Id.*

On the subject of transportation options that he uses, Mr. Sherer described the availability of his own boat "when its been in the water," a tour boat that meets its customers' schedules, and "the plane." TR. 165. Mr. Sherer flies when he has a "[s]ense of urgency to get down the lake for one reason or another." Apparently, it is only in the winter "when the boat schedule is not every day," that availability of boat service affects his decision relative to mode of transportation. TR. 167. Fundamentally, Mr. Sherer's support for the proposed service is not because it provides any particular advantage, or satisfies some unmet need, but rather because he is "a firm believer in competition." *Id.*

Mr. Sherer testified that "I could use most any service that was available. What we usually do in Stehekin, we schedule our down the lake time to meet whatever transportation systems are available. We have to. So if there are alternatives, its always good for those of us that are up there." *Id.* Presently, Chelan is the more convenient point of departure and arrival for him, but he would use Stehekin Boat Service's proposed service from Field's Point: "I can't say exclusively, but I would make an accommodation in my travel schedule and have to rethink my parking plan. Again, it depends on what's available transportation wise as to what we use when we are in Stehekin." TR. 175. Finally, when asked whether the addition of Stehekin Boat Service's proposed schedule would benefit his company, Mr. Sherer testified: "I don't know that I can answer that intelligently at this point. I'd have to evaluate more carefully how we would adapt to the schedules. I simply support alternatives in the schedule, that's all." TR. 176. Mr. Sherer never has asked Lake Chelan Boat Company to change its schedule. TR. 169. Taken together, this testimony illustrates powerfully that Mr. Sherer's support for the application is not based on

an unmet need for service; his testimony does not suggest any inadequacy relative to the existing service.

In like manner, Ms. Scutt testified that the proposed service would "benefit" her as a Stehekin resident. TR. 191. She related back to Mr. Sherer's testimony and testified that "we sort of design our lives so that we can make best use of our time, and that is dependent upon the transportation service that's available to us." TR. 192. Ms. Scutt's support for the application is based not on any expressed unmet need or identified inadequacy in the existing service provided by Protestant, but rather on factors such as her preference for another Stehekin-based business that she feels might better promote her bicycle rental operation than does the Chelan Boat Company.

Mr. Burns spends all but the winter months in residence at Domke Lake, a remote site accessible only by float plane or by hiking in approximately two and one-half miles from the boat landing at Lucerne which is approximately ten miles downlake from Stehekin. He maintains two "very rustic rental cabins and . . . nine rental boats at the site." TR. 205. Eighty-five to ninety percent of Mr. Domke's customers arrive by float plane. TR. 210. Asked if he had experienced problems with Lake Chelan Boat Company, Mr. Burns related a brief dispute, resolved to his satisfaction, approximately 11 years ago concerning the mail service and one occasion when a customer was unable to attract the boat's attention for a flag stop. TR. 205-07; 211. Mr. Burns testified that he would find the proposed 9:00 a.m. departure from Stehekin personally beneficial, but he said he could not speak for his customers. TR. 208-09. Like other witnesses, he believes this would facilitate his personal business transactions by giving him access to Chelan or other destinations earlier in the day. As to his few customers who use boat transportation to Lucerne, Mr. Burns testified that the present boat schedule "seems to suit hiking traffic." TR. 209.

Ms. Parson's, another Stehekin resident, testified that the proposed schedule would benefit her personally. TR. 217. She offered that "[t]here's times that you need to run down for a doctor's appointment, your animal needs to see

the vet. You could do that and get back home." *Id.* Considering all existing and proposed schedules, the actual opportunity to realize this suggested advantage is rather slight. Applicant's proposed arrival time at Field's Point is 11:00 a.m. It takes approximately one-half hour to travel from there to Chelan, and about an hour to Wenatchee. The latest departure from Field's Point is 2:00 under Lake Chelan Boat Company's proposed catamaran schedule. There would be a one to two hour window of opportunity for the hypothetical appointment, at best. Ms. Parson's principal reason for supporting the application is that the proposed business would be "Stehekin based." TR. 218. Ms. Parson's also was led to testify that the proposed Stehekin based boat would be available to transport people to the hospital in the case of an emergency. TR. 219. That, however, is not part of the proposed service. Moreover, as Mr. Sherer testified (TR. 170) and as Ms. Parson's own testimony suggests, emergency transportation is handled by the Sheriff's department and it has several options, including boats and helicopters for evacuating victims in emergency situations.

Lake Chelan Boat Company, like Applicant, undertook some informal investigation of Stehekin visitors' boat schedule preferences. Mr. J. Raines testified that none of his customers, including customers at who stay at Stehekin Lodge, the largest single overnight accommodation in Stehekin, have expressed a desire for the earlier service departing from Stehekin that Applicant proposes. TR. 482. Ms. Engstrom testified that there have been no formal or informal requests to Lake Chelan Boat Company for early morning service starting in Stehekin. TR. 395. Mr. J. Raines testified that if a demand for such service were brought to his company's attention "we would recognize and we would explore it." *Id.* Mr. Raines states that adding such a schedule is "something that takes some time and some real thought, and its not--certainly not an impulsive item." *Id.* He notes that expansion for the sake of "small need" can be contrary to the public's interest in affordable transportation. Finally, he states that based on the testimonies offered in support of the application, he is "absolutely not" persuaded that there is a need for the proposed service.

Applicant's asserted target markets are Stehekin residents and overnight guests at Stehekin. TR 46, 52 (J. Courtney). Applicant presented no evidence in its direct case that it expected passenger traffic from individuals for whom Lucerne is a point of origin or destination. In its initial brief, Applicant did not mention Lucerne traffic as presenting any unmet need for boat transportation on Lake Chelan. In its reply brief, however, Applicant suggests for the first time that its ridership estimates include passenger traffic to and from the Lutheran retreat known as Holden Village that is accessed primarily via boat at Lucerne. This suggestion simply is not credible under the circumstances. Moreover, the suggestion is belied by the testimony of Protestant's witness, Mr. Wiersma, the business manager at Holden Village.

Mr. Wiersma explained that Holden Village is located approximately 11 miles west of Lucerne in the mountains that rise above Lake Chelan. TR. 309. Access is by boat or float plane at Lucerne, followed by a scheduled bus service provided by Holden Village for its guests, or by hiking. Approximately 6,000 guests per year visit Holden Village for varying lengths of time; the average stay for guests is about seven days, though the Village records "about 60,000 people days per year," including staff days. TR. 312 (Wiersma). Most visitors arrive by boat, and staff members also rely on boat service.

Mr. Wiersma testified that he had reviewed with Mr. J. Courtney the schedule Applicant proposes to operate and "given Mr. Courtney's schedule, we would still--our guests and staff would still be dependent on service provided by Lake Chelan Boat Company." TR. 312-13. Basically, Holden Village makes limited use of its vehicles to conserve resources and minimize environmental impacts; the matter has been considered and a decision made that Holden Village will not initiate additional bus service to coordinate with the proposed Stehekin Boat Service schedules. TR. 313-14. Visitors to Holden Village who are willing to wait at the landing for approximately one hour to one and one-half hours could use the Stehekin Boat Service's proposed service from Field's Point. TR. 314. Their option is to continue to use Lake Chelan Boat Company's service to

> which Holden Village's bus service schedules are coordinated. The most reasonable inference is that visitors at Holden Village, in fact, would continue to use the existing service even if alternative service was made available.

Speculation that some overnight Stehekin visitors might find Applicant's proposed schedules useful, and testimony by several Stehekin residents that they might sometimes prefer, and use, Applicant's proposed service is not adequate evidence to show that Lake Chelan Boat Company has failed to provide reasonable and adequate service. Moreover, there is substantial competent evidence to show affirmatively that Lake Chelan Boat Company does provide reasonable and adequate service to meet the present and foreseeable needs of travelers on Lake Chelan. We find Applicant fails to carry its burden of proof under RCW 81.84.020(1) and we deny the application accordingly.

II. Do the public convenience and necessity require the proposed service?

Stehekin Boat Service takes exception to the fourth Finding of Fact that: "[t]here is no unmet need for commercial passenger ferry service on Lake Chelan. Existing schedules, capacity, and quality of service are adequate to satisfy the demonstrated needs of the traveling public." Stehekin Boat Service's petition recognizes that the evidence on this point is inextricably intertwined with that discussed in connection with the third Finding of Fact. Stehekin Boat Service advances no additional argument on the point.

We see no need to indulge in additional analysis of the issue here beyond observing again that the evidence does not show an unmet need for service on Lake Chelan. Lake Chelan Boat Company demonstrates a history of responding to changing public needs, including most recently the ongoing expansion of its operations to include a new type of service. We do find significant that while Lake Chelan Boat Company's decision to spend approximately $800,000 dollars (TR. 500 (J. Raines)) to implement this new service appears to be predicated on the company's perception that the market will support a new type of service at a higher price (*i.e.*, high speed transport on a relatively small vessel), the new service coincidentally will provide schedules that offer even more options to travelers than would be provided by Stehekin Boat Service's proposal. TR. 431-32; 439 (J. Raines); Exhibit No. 27. Thus, although the evidence in this record does not support a finding that the public convenience and necessity require additional schedules, even if we accept *arguendo* that additional schedules are required, the need is met by service expansions that were initiated by Lake Chelan Boat Company well before Stehekin Boat Service filed its application.

III. Has the applicant shown it has the financial resources to operate the proposed service for at least twelve months?

Stehekin Boat Service takes exception to the Initial Order's fifth Finding of Fact that: "Stehekin Boat Service failed to show that it has the financial resources to operate the proposed service for at least twelve months or that it otherwise is financially fit and prepared to operate commercial passenger ferry service on Lake Chelan."

Stehekin Boat Service bears the burden to demonstrate its financial fitness to undertake the proposed service. RCW 81.84.020(2) provides in pertinent part:

> Before issuing a certificate, the commission shall determine that the applicant has the financial resources to operate the proposed service for at least twelve months, based upon the submission by the applicant of a pro forma financial statement of operations. Issuance of a certificate shall be determined upon, but not limited to, the following factors: Ridership and revenue forecasts; the cost of service for the proposed operation; an estimate of the cost of the assets to be used in providing the service; a statement of the total assets on hand of the applicant that will be expended on the proposed operation; and a statement of prior experience, if any, in such field by the applicant.

The Initial Order's essential determination on this issue is that Stehekin Boat Service failed to carry its burden; that the financial evidence it submitted is, in significant part, demonstratively inaccurate, too speculative, and too incomplete to support the determination required by RCW 81.84.020(2). Stehekin Boat Service's Petition includes no argument and cites no evidence that persuades us to the contrary.

Although Stehekin Boat Service's Petition submits its estimated "revenue and expense figures . . . are reasonably accurate," the only "analysis" it offers on this point is that the "vessel proposed by the applicant for use in this service[,] described in Exhibit No. 9[,]" has a 65 passenger capacity while estimated ridership is only 22.5 passengers per one-way trip, or 35 percent of the vessel's capacity. Nothing in the record suggests, however, that Applicant based its ridership estimates on some logically derived percentage of the proposed vessel's capacity. Indeed, the record discloses that at the time Applicant prepared its ridership estimate, as reflected in Exhibit No. 6, Applicant did not have a specific boat in mind. TR. 43, 60, 81-82 (J. Courtney).

Exhibit No. 6 reflects Stehekin Boat Service's estimate that it will provide 6,905 one-way passenger trips distributed over 153 days of operation at a fare of $20.00 per trip to yield a projected "First Year Gross" of $138,100. Stehekin Boat Service argues these "pro forma" figures are based on Mr. J. Courtney's "research and knowledge and the knowledge of others in their respective fields." A significant part of the forecasted ridership is based on Mr. J. Courtney's estimate that 75 percent of the vacation travelers who stay overnight at Stehekin will use his service rather than Protestant's service. We agree with the Initial Order, however, that the estimate is conjecture--little more than a guess based on Mr. Courtney's "feel" for what is "realistic." Although described as a "survey" of Stehekin businesses (TR. 46, 53 (J. Courtney)) the record does not disclose any systematic collection of data. Instead, Applicant simply informally interviewed certain business owners regarding the number of their patrons who are overnight guests in Stehekin and "estimated" 75 percent of them would use the proposed service instead of the existing service. No actual overnight guests were "surveyed" or even interviewed on this question.

We adopt the Initial Order's analysis of this evidence as follows:

> Uncorroborated hearsay and speculation are not satisfactory bases upon which to rest projections of ridership and revenue, both vital considerations in the analysis of financial fitness. Aside from the shaky foundation upon which Applicant's ridership forecast rests, there is other evidence that suggests it may be overly optimistic. In terms of fare and other attributes (*e.g.*, size, trip duration), Applicant's service would compete most directly against Protestant's Lady Express offering. Yet nearly half of his estimated riders would have to be enticed away from the significantly less expensive ride available on the Lady II (*i.e.*, $22 round trip or $14.50 one-way on the Lady II versus $40 round trip or $20 one-way proposed by Applicant). Exhibit No. 24; TR. 378 (Engstrom). Applicant's suggestion that it will transport 84 percent more passengers per summer day between Field's Point and Stehekin than presently travel that route on the comparably priced Lady Express is questionable on its face and there is no substantiating evidence to support the idea.

As to local residents who might elect the proposed service over the existing service, it is significant that ninety percent of Lake Chelan Boat Company's regular commuter passengers travel between Stehekin and Chelan; even though the Field's Point option is available. Exh. No. 27; TR. 363-370, 402, 415 (Engstrom). These customers also are influenced by the availability and cost of ground

transportation, business and family connections, and other factors that would motivate them to continue using the existing service to and from Chelan rather than the proposed service at Fields Point. TR. 371, 389-90 (Engstrom); Exh. No. 30.

We note, too, that commuter traffic on Lake Chelan accounts for less than five percent of total annual boat ridership; Lake Chelan Boat Company recorded 2,804 one-way commuter passages in 1997. Exhibit No. 31. There is nothing in the record to suggest what part of this traffic Applicant expects to capture, but Applicant's commuter witnesses' testimony shows they will continue to use the existing boat service and other transportation options available to meet their various needs during the course of the year. Mr. Sherer's previously cited testimony offers a good example and bears repeating. Mr. Sherer said his transportation options include his own boat "when its been in the water," a tour boat that meets its customers' schedules, and "the plane." TR. 165. Mr. Sherer flies when he has a "[s]ense of urgency to get down the lake for one reason or another." Mr. Sherer testified that Chelan presently is a more convenient point of departure and arrival for him than Field's Point. He said that he would use Stehekin Boat Service's proposed service from Field's Point, but "I can't say exclusively, but I would make an accommodation in my travel schedule and have to rethink my parking plan." TR. 175.

Albeit in another connection, Stehekin Boat Service's Petition suggest another source of ridership would be guests at Holden Village, a Lutheran Retreat accessed by most patrons via the boat landing at Lucerne. Significantly, as discussed in the Initial Order:

> Applicant presented no evidence in its direct case that it expected passenger traffic from individuals for whom Lucerne is a point of origin or destination. In its initial brief, Applicant did not mention Lucerne traffic as presenting any unmet need for boat transportation on Lake Chelan. In its reply brief, however, Applicant suggests for the first time that its ridership estimates include passenger traffic to and from the Lutheran retreat known as Holden Village that is accessed primarily via boat at Lucerne. This suggestion simply is not credible under the circumstances. Moreover, the suggestion is belied by the testimony of Protestant's witness, Mr. Wiersma, the business manager at Holden Village.

We agree with the Initial Order that the inadequacies of Stehekin Boat Service's ridership and revenue analyses are especially significant when considered together with Applicant's cost of service presentation. Applicant's cost of service evidence is a table of projected "First Year Expenses" displayed in Exhibit No. 6. The

table reflects total expenses of $47,420, including entries for insurance, fuel, deck hand, office, advertising, dock lease, and miscellaneous. Mr. J. Courtney testified the miscellaneous category includes oil and "small items that would have to be taken care of [on the boat]." TR. 45.

Stehekin Boat Service did not prepare Exhibit No. 6 based on operation of a specific boat. TR. 43, 60, 81-82 (J. Courtney). The problem this engenders for purposes of expense analysis is illustrated by considering Applicant's estimated fuel consumption. Exhibit No. 6 is based on $80 per round trip fuel cost. Taking Applicant's fuel consumption figures from Exhibit No. 9, which reports 35 gallons per hour consumption at the cruising speed of the vessel Applicant proposes to use, Applicant's estimated fuel transportation costs at 15 cents per gallon, fuel costs of 82 cents per gallon from Exhibit No. 28, and assuming a bare minimum three hours operating time per trip, the fuel cost is more than $100 per round trip or 25 percent more than Applicant's estimate in Exhibit No. 6. In terms of annual expense, this represents an underestimate of more than $6,000. If this additional cost alone is added in, Applicant's first year expense is nearly 13 percent higher than what is reflected in Exhibit No. 6.

Another significant cost factor Applicant failed to account for adequately is crew expense. Even with a specific craft in mind at the time of hearing, Mr. Courtney did not know whether he would require one or two crew members because he did not know whether the proposed vessel is just under or just over 65 feet in length. If even slightly over 65 feet, an additional crew member will be required at all times adding significant annual expense to the operation. TR. 57. Initially, Mr. Courtney testified he calculated "deck hand" wages based on 8 hours a day at $7.50 per hour and that calculation is readily verified mathematically (*i.e.*, 8 hours x $7.50 x 153 days = $9,180, the amount reflected on Exhibit No. 6). Later, however, Mr. Courtney testified that the $9,180 included wages for a relief skipper at $12 or $15 per hour, assuming the deck hand could be worked less than eight hours a day. TR. 67. However the estimate was made, it does not include payroll taxes. Significantly, too, there is no wage for Mr. J. Courtney despite his intended roles as full-time captain and boat maintenance crew. TR. 97. He testified he "hope[s] there is a profit."

An operating cost Stehekin Boat Service failed to take into account at all is parts or repair costs. TR. 100, 117 (J. Courtney). Mr. J. Raines estimates annual repair and maintenance on the proposed vessel will cost in the range of $10,000 based on one-half the actual costs incurred to maintain the Lady II which has identical engines. TR. 464. Other unaccounted for, yet unavoidable annual costs include taxes, required employee insurance, periodic hull inspections, and sewage disposal. TR. 68-69; Exh. No. 28. These costs may be as much as $19,000 a year. TR. 471-72; Exh. No. 28.

Applicant also failed to consider significant start-up costs, including, for example, the costs of moving the boat he proposes to purchase from its present location to Lake Chelan. Mr. J. Courtney estimated $10,000 to $15,000 (TR. 55); Mr. Raines testified that it cost $20,000 to move the Lady Express from Edmonds to Chelan in 1990. TR. 468. Mr. Raine's testimony also was that based on his experience and observation "serious surgery" may be required to move the proposed vessel because of its height, as depicted in Exhibit No. 8. If this is required, relocation costs could be much higher. TR. 470-71. Applicant had no knowledge of this potential problem at the time its pro forma was prepared based on a "rough estimate" with no particular boat in mind. TR. 55, 83 (J. Courtney).

Applicant plans to have a fuel tank installed at Stehekin, but did not account for its cost. Mr. J. Raine's testimony suggests this cost could be in the range of $32,000. TR. 472-73. Mr. Courtney's dock at Stehekin would require modification, but he did not account for this cost in his estimates. TR. 61. The amount involved would be in the range of $5,000. Exh. No. 28.

Stehekin Boat Service's Petition argues its assets are adequate to finance the purchase of the craft it proposes to use, but this is tilting at windmills. The Initial Order notes on this question:

> The general failure of Applicant to satisfy its burden to produce reasonable and reliable ridership forecasts and a meaningful cost of service analysis makes unnecessary additional discussion of financial considerations that might otherwise be pertinent to this application. Accordingly, although briefed by the parties, matters related to the cost of the assets to be used in the operation and Applicant's financial ability to procure those assets need not be considered.

We agree. Even if Stehekin Boat Service might be able to muster sufficient assets to purchase the vessel it proposes to buy, the company manifestly failed to demonstrate its financial fitness to conduct the proposed operation. Applicant's financial analyses simply are too inaccurate and too incomplete to support findings that would permit a favorable determination under RCW 81.84.020(2).

Applicant asks us to look beyond the paucity of evidence offered to show financial fitness directly and focus on Applicant's assertion that Mr. J. Courtney has operated other businesses successfully, including "float plane operations, tug and barge operations, construction companies, etc [sic]." Applicant says this somehow demonstrates Applicant's "financial ability to conduct [the proposed] operations with its present business structure." Stehekin Boat Service's quote is taken from a headnote in

Order M.V. No. 135558, *In re Keener's Inc. d/b/a K&N Meats,* App. No. P-70608 (September 1987).[3] Even if Mr. J. Courtney has experienced business success in these other ventures, the fact is significant neither to the Initial Order's analysis nor to ours on review. Mr. J. Courtney's general business acumen does not show Applicant's "financial ability to conduct operations with its present business structure." Stehekin Boat Service is a completely new company that has nothing to do with any "present business structure." Applicant presently is a contractor and operates no commercial watercraft on Lake Chelan or anywhere else. In short, *Keener's Inc.* is inapposite.

In apparent criticism of the Initial Order, Stehekin Boat Service asserts that "[a]n applicant's financial picture must be evaluated as a whole, without placing undo [sic] emphasis on one line of a balance sheet." We are at a loss to understand Applicant's point. Applicant draws this principle from Order S.B.C. No. 468, *In re Belairco, Inc.,* App. No. B-313 (May 1990). The Commission determined in that case that the intervenors placed undue emphasis on "a substantial retained earnings deficit" reflected in Belairco, Inc's financial data. The Commission criticized the intervenor's narrow, self-serving analysis and remarked that an applicant's "financial picture must be evaluated as a whole." Order S.B.C. No. 648 at 6. There is nothing in this case, either in Protestant's arguments on brief, or in the Initial Order, that even remotely relates to the circumstances that prompted the Commission's remarks in *Belairco, Inc.* The Initial Order here devotes four pages to analysis of Stehekin Boat Service's "financial picture" and focuses nowhere on "one line of Stehekin Boat Service's balance sheet." All available "lines" of financial data are considered in the Initial Order and by the Commission on review. We concur with the Initial Order that the resulting "financial picture" presented by Stehekin Boat Service is incomplete, inaccurate, and insufficient to the task of proving Applicant's financial ability to conduct the proposed operations for at least twelve months.

Finally, Applicant cites *Belairco, Inc., supra,* for the proposition that "if an applicant has conducted operations under an existing certificate, without having failed to meet financial obligations as they fall due, the Commission may reason that the applicant is financially fit." Again, Applicant's point escapes us. *Belairco, Inc.* involved an application for extension of an existing certificate; Stehekin Boat Service's application is for new authority--it has no "existing certificate." If Applicant means to imply that Mr. J. Courtney's nominal interest in Certificate No. G-192 (Exhibit No. 4)--under which his brother, Mr. T. Courtney, collects and transports refuse for the U.S. Forest Service--brings our analysis within the compass of the principle quoted from *Belairco, Inc.*, we reject that suggestion. Mr. J. Courtney does not "conduct operations"

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[3] The headnote in *Keener, Inc.* bears the routine notation that "Headnotes are provided as a service to readers and do not constitute an official statement of the Commission. That statement is made in the order itself."

under Certificate No. G-191. His "interest" is in name only; he receives no share of the profit from his brother's operations under the certificate; and the extent of Mr. J. Courtney's involvement, as his brother testified, is that "basically he'd help me on the barge once in awhile . . . if I was short of help."

At bottom, we agree again with the Initial Order: "Applicant's ridership and revenue forecasts and other financial estimates are inaccurate, incomplete, and highly speculative." Applicant bears the burden of proof. Applicant failed to produce substantial competent evidence to support a finding that it is financially fit within the meaning of RCW 81.84.020(2). The application should be denied.

IV. Can the market support more than the currently certificated service without an adverse effect on the viability of the current service?

Stehekin Boat Service takes exception to the Initial Order's sixth Finding of Fact that: "Stehekin Boat Service's proposed operations, if approved, would affect adversely Lake Chelan Boat Company's existing operations." We begin our analysis on review by recognizing that Applicant does not suggest the addition of its service will materially expand, or expand at all, current market demand for service. Applicant's financial analyses and general business plan depend on taking business from Lake Chelan Boat Company.

Applicant says "[o]ver eighty-percent of the Protestants [sic] volume consists of 'day trippers'" and "applicant's proposed service will not effect [sic] this segment of Protestants [sic] business . . .." Petition at 5. Applicant fails to explain how or why this is significant. Under Stehekin Boat Company's own assumption that these are full fare passengers, the impact on Lake Chelan Boat Company's bottom line is the same regardless of what market segments Stehekin Boat Service believes it will capture. If Applicant attracted the passengers predicted in its pro forma analyses, Lake Chelan Boat Company would loose approximately $111,000 per year in gross income. Exh. Nos. 24, 25. All other things being equal, this would result in a net loss to the company on an annual basis. *Id.*, TR. 337 (Mayer).

This is not to say Lake Chelan Boat Company would go out of business, or be forced to offer a diminished quality of service. The more likely result, as suggested by Lake Chelan Boat Company, is a fare increase that would permit the company at least to match 1997 profitability. To achieve that result, again taking Applicant's assumptions at face value, Lake Chelan Boat Company would need an average increase in rates of $3.49 per round trip passenger fare. TR. 335, 343-44 (Mayer). Whether the full market would support the increased fare, or, if not, what exact effect that might have on Lake Chelan Boat Company's services and rates, is unclear. It is clear, however, that if Applicant's proposed operations were authorized,

and developed exactly as Applicant assumes, there would be a material, adverse effect on Lake Chelan Boat Company's existing operations.

IV. Have the applicant and the existing certificate holder demonstrated fitness to provide service?

RCW 81.84.020 makes consideration of Applicant's prior experience relevant as part of the Commission's overall fitness review. No doubt, this relates in part to Applicant's ability to operate the proposed business to ensure its financial success. In the case of proposed passenger boat operations, however, public safety is another dimension of regulatory fitness the Commission finds particularly germane. Before endorsing a proposed passenger ferry service by authorizing a certificate, the Commission should be satisfied the Applicant is prepared adequately to provide safe passage to the public.

Although the Initial Order does not turn on this point and Applicant does not take exception to the Initial Order's suggestion that Stehekin Boat Service may not be fully prepared to safely provide the service proposed, we expressly adopt the Initial Order's discussion and incorporate significant parts, as follows:

> Mr. J. Courtney intends to captain the vessel he proposes to put into service. TR. 57 (J. Courtney). As of the hearing, he did not have the necessary license from the Washington Department of Labor and Industries. *Id.* Asked about his experience, Mr. J. Courtney testified:
>
> > Well, I've operated a barge quite a bit on Lake Chelan in the last 20 years. I've operated smaller boats earlier than that. My general knowledge would be a float plane operations for 20 years, commercial float planes operation on Lake Chelan.
>
> TR. 22. As to operating vessels of the type proposed--a 65 foot long, 18 foot wide, deep-V, aluminum hulled, crew boat with twin diesel engines purportedly capable of a 21 knot (24 m.p.h.) cruising speed--he said, "[o]f this particular type, not that much [experience]. I've operated, like I say, a barge, which is not near this fast." Mr. T. Courtney, who owns the referenced barge service, stated that during the several years since 1979 when he had a contract with the U.S. Forest Service to provide garbage hauling under WUTC Permit G-191 (Exh. No. 4), in which Mr. J. Courtney has a

part interest, Mr. J. Courtney's role was that "basically he'd help me on the barge once in awhile" when Mr. T. Courtney "was short of help."

Weather and water conditions on Lake Chelan, according to Mr. J. Courtney,

> are anything from the nicest place to be in the world to a place you would never want to be again. They can vary from very calm to 30, 40-mile an hour winds in just a very short time, and the winds build up quite fast because of the narrow gorge type lake.

TR. 130. Several witnesses, all of whom have Master's licenses and who have years of experience operating Lake Chelan Boat Company's vessels testified that whatever requirements may be imposed for licensing by the Department of Labor and Industries, a minimum of two to three years service under an experienced boat captain is required to safely navigate on Lake Chelan given various weather and other navigational circumstances. TR. 272-73 (S. Raines); 291-92 (C. Raines); and 451-52 (J. Raines). Asked how soon he would expect to operate the proposed vessel after it arrives at Lake Chelan, Mr. J. Courtney testified at TR. 99:

> Well, I would like two or three weeks to operate the vessel and get used to it and make sure its up to par and everybody's trained on it. I would like two, three weeks to a month, really.

Mr. J. Courtney's lack of relevant experience, standing alone, might not provide an adequate basis to deny Stehekin Boat Service's application and it is not the basis upon which the application is denied under this order. Still, the absence of a showing in this record that Applicant's prior experience has prepared Stehekin Boat Service to provide safe and satisfactory service bears on the question of its overall fitness to provide service and suggests that Applicant may not be fully capable of providing the service proposed.

We agree with the Initial Order that this evidence reflects adversely on Applicant's general fitness to provide the proposed service. We do not decide whether this would be an adequate basis, standing alone, to deny the application. That analysis is unnecessary because Stehekin Boat Service otherwise failed to carry its burdens and clear the statutory hurdles for entry to passenger ferry service on Lake Chelan.

FINDINGS OF FACT

1. On July 3, 1997, James Courtney d/b/a Stehekin Boat Service filed an application for a certificate of public convenience and necessity to operate a commercial ferry service between points on Lake Chelan, Washington.

2. Lake Chelan Recreation, Inc. d/b/a Lake Chelan Boat Company holds Certificate No. B-34 which authorizes it to provide service between the points proposed for service in Stehekin Boat Service's application. Lake Chelan Boat Company protested the application on July 28, 1997.

3. Lake Chelan Boat Company has not failed or refused to furnish reasonable and adequate service to the traveling public on Lake Chelan, nor has it failed to provide the service described in its certificate or tariffs.

4. There is no unmet need for commercial passenger ferry service on Lake Chelan. Existing schedules, capacity, and quality of service are adequate to satisfy the demonstrated needs of the traveling public. The public convenience and necessity do not require the proposed service.

5. Stehekin Boat Service failed to show it has the financial resources to operate the proposed service for at least twelve months or that it otherwise is financially fit and prepared to operate commercial passenger ferry service on Lake Chelan.

6. Stehekin Boat Service's proposed operations, if approved, would affect adversely Lake Chelan Boat Company's existing operations.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this application and the parties pursuant to RCW 80.01.040 and RCW 81.84.005, *et seq.*

2. The Commission is not empowered to grant a certificate of public convenience and necessity to Stehekin Boat Service to operate in territory already served by existing certificate holder Lake Chelan Boat Company, because the existing certificate holder neither "has failed or refused to furnish reasonable and adequate

service" nor "has failed to provide the service described in its certificate or tariffs." RCW 81.84.020(1). Stehekin Boat Service's application accordingly must be denied.

3. The Commission must not grant Stehekin Boat Service a certificate for commercial passenger ferry service for the public use for hire between fixed termini or over a regular route upon the waters within Washington State, including Lake Chelan, because Applicant failed to show the public convenience and necessity require the service proposed. RCW 81.84.010.

4. Applicant's failure to demonstrate it is financially fit and financially able to operate the proposed service for at least twelve months requires that the application be denied. RCW 81.84.020(2).

ORDER

IT IS ORDERED That Application No. B-78659 by James Courtney d/b/a Stehekin Boat Service for a certificate of public convenience and necessity to operate vessels in furnishing passenger and freight service on Lake Chelan, Washington is denied.

DATED at Olympia, Washington and effective this 3 day of ~~July~~ August 1998.

ANNE LEVINSON, Chair

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

EXHIBIT C

FOR

DECLARATION

OF

JAMES COURTNEY

USDA United States Department of Agriculture | Forest Service | Okanogan -Wenatchee National Forest | Chelan Ranger District | 428 West Woodin Avenue | Chelan, WA 98816 | (509) 682-2576

File Code: 2720-2
Date: August 25, 2009

Mr. Dave Danner
Executive Director
Washington State Utilities and Transportation Commission
PO Box 47250
Olympia, WA 98504

Dear Mr. Danner:

I am requesting a formal opinion by the Washington State Utilities and Transportation Commission on the enclosed application I have received for boat transportation on Lake Chelan.

Several phone conversations and e-mails have occurred between my staff, Margi Gromek, the proponent, Stehekin Boat Service, and your staff, Penny Ingram. The special use permit issued by the National Forest will authorize the use of National Forest facilities by Stehekin Boat Service for the purpose of operating a charter service between Stehekin and Field's Point Landing and other dock locations on the National Forest.

I am enclosing the correspondence on this topic with both the proponent and my staff and Penny Ingram. Starting in September of 2007 where I asked Mr. Jim Courtney to check with the State of Washington WUTC to determine if a permit was needed from the State. In October of 2007 I received a letter from Mr. Courtney with an e-mail from Ms Ingram indicating that the proposed **service would be exempt** from commercial ferry operation. Feedback from the Lake Chelan Boat Company that I received prompted me to have a phone conversation on March 18, 2008 with Ms. Ingram and Jack and Cindy Raines about the staff findings that the operations would be exempt. On March 19, 2008 I requested from Penny Ingram a review of the proposal received from Mr. Courtney (Owner of Stehekin Boat Service). You will see that on March 31, 2008 we received an e-mail informing us that the **staff changed its opinion** and determined that Mr. Courtney would need a Certificate of Public Convenience and Necessity to operate his vessel on Lake Chelan. I signed a letter on May 5, 2008 addressed to Mr. Courtney indicating that he would need to obtain this Certificate and then I could proceed with our permit process. Our permit requires operators to comply with all federal, state and local regulations. Then on July 18, 2008 we were sent an e-mail from Ms Ingram that was based on further correspondence with Mr. Courtney indicating that your staff had now determined that the WUTC would not have any regulatory authority over a charter service and therefore **he would not need the Certificate of Public Convenience.**

During this time and in each correspondence it is clear that Ms. Ingram is presenting an informal opinion and is not-binding on the commission if a formal determination is requested. In order to make sure that I am not issuing a permit in violation of State of Washington's Regulations, I am asking for that formal determination. Since the current passenger ferry operation, The Lake Chelan Boat Company, is concerned over a second ferry service on the Lake, I would like to have a determination prior to issuing a permit for use of National Forest facilities.

Along with the correspondence I am also enclosing the operating plan that was submitted to us by Stehekin Boat Service which includes services offered, equipment to be used, safety plan and client charges. Does the plan of operation in this application meet the WAC 480-51-020 code that defines a charter service?

Please let me know if you need additional information.

Sincerely,

ROBERT J. SHEEHAN
District Ranger

cc: Penny Ingram, Jim Courtney

EXHIBIT D

FOR

DECLARATION

OF

JAMES COURTNEY

USDA United States Department of Agriculture | Forest Service | Okanogan -Wenatchee National Forest Chelan Ranger District | 428 West Woodin Avenue Chelan, WA 98816 (509) 682-2576

File Code: 2720-2
Date: September 14, 2009

Mr. Dave Danner
Executive Director
Washington State Utilities and Transportation Commission
PO Box 47250
Olympia, WA 98504

Dear Mr. Danner:

On September 9, 2009 I received a Notice of Receipt of Petition for Declaratory Order with the footnote that the Commission is treating my request for information as a petition for declaratory order. In discussions with Jonathan Thompson, State Assistant Attorney General, he indicated that this will be a hearing where the Forest Service will present our position in this matter.

I would like be clear that my intent in sending the request **was not for a hearing or a Petition for a Declaratory Order because I am not interested in presenting any argument concerning how the Commission should classify Mr. Courtney's service.**

I believe that an advisory opinion letter, similar to those that you sent to Cliff Courtney on Nov. 7, 2008 and Feb. 2, 2009, would satisfy my inquiry. To clarify my inquiry, it is to have your opinion on whether the service described in Mr. Jim Courtney's application to the USDA Forest Service for use of our docks, would require Mr. Courtney to obtain a commercial ferry certificate from the Commission. Mr. Courtney has discussed this matter with your staff personnel, Penny Ingram, and she has indicated both that it appeared he would need a certificate and that it appeared Mr. Courtney would be providing a charter service and therefore would not need a certificate.

I am asking for clarification on this issue and if Mr. Courtney's boat operation would be subject to a certificate or not.

Sincerely,

Robert J. Sheehan

District Ranger

Cc: Jim Courtney

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 No. _____ **DECLARATION OF CLIFFORD COURTNEY**

STATE OF WASHINGTON)
COUNTY OF KING) ss

I, Clifford Courtney, hereby declare and state:

1. I am a resident of Stehekin in Chelan County, Washington. I am over the age of 18 and make this declaration based on my personal knowledge of the facts set forth below.

2. Attached as Exhibit A to this declaration is a true and correct copy of the Complaint that my brother James Courtney and I filed, through our attorneys at the Institute for Justice, in *Courtney v. Danner* (formerly *Courtney v. Goltz*), No. 2:11-cv-00401-TOR, on October 19, 2011 in the United States District Court for the Eastern District of Washington. I have personal knowledge of the statements concerning: Lake Chelan, set forth at paragraphs 13-20 of the Complaint; the public convenience and necessity requirement and process, set forth at paragraphs 25-41 of the Complaint; the consequences of the public convenience and necessity requirement, set forth at paragraphs 42-49 of the Complaint; my brother James's and my attempts to provide an alternative boat transportation service on Lake Chelan, set forth at paragraphs 50-96 of the Complaint; and the harm that my brother James and I have suffered because of the public convenience and necessity requirement, set forth at paragraphs 97-107 of the Complaint. With one exception, these statements are true and correct to the best of my knowledge and belief. The exception is the reference to Stehekin Outfitters in paragraphs 51 and 107; I recently sold my interest in that business, but the business remains in the Courtney family.

3. Attached as Exhibit B to this declaration is a true and correct copy of the text of a September 9, 2008 letter that I sent to David Danner, then-executive director of the Washington Utilities and Transportation Commission, concerning certain boat transportation services I sought to provide on Lake Chelan. The document is in email form because I copied and pasted the text into an email and sent it to myself so that I would have a record of the letter.

4. Attached as Exhibit C to this declaration is a true and correct copy of a November 7, 2008 letter that I received from Mr. Danner in response to my September 9, 2008 to him.

5. Attached as Exhibit D to this declaration is the text of a November 19, 2008 letter that I sent to Mr. Danner in response to his November 7, 2008 letter to me.

6. Attached as Exhibit E to this declaration is a true and correct copy of a February 2, 2009 letter that I received from Mr. Danner in response to my November 7, 2008 letter to him.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed in Stehekin, Washington this 29th day of September, 2014

Clifford Courtney

CLIFFORD COURTNEY

EXHIBIT A

FOR

DECLARATION

OF

CLIFFORD

COURTNEY

INSTITUTE FOR JUSTICE WASHINGTON CHAPTER
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* *Pro hac vice* motion to be filed

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES COURTNEY and CLIFFORD COURTNEY,

Plaintiffs,

v.

JEFFREY GOLTZ, chairman and commissioner; PATRICK OSHIE, commissioner; and PHILIP JONES, commissioner, in their official capacities as officers and members of the Washington Utilities and Transportation Commission; and DAVID DANNER, in his official capacity as executive director of the Washington Utilities and Transportation Commission,

Defendants.

No. CV-11-401-LRS

CIVIL RIGHTS COMPLAINT OF PLAINTIFFS JAMES AND CLIFFORD COURTNEY FOR DECLARATORY AND INJUNCTIVE RELIEF

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INTRODUCTION

1. This case is a challenge to Washington statutes and regulations requiring a certificate of "public convenience and necessity" to operate a ferry on Lake Chelan. For fourteen years, Jim and Cliff Courtney have tried to launch a boat transportation service to bring economic opportunity to their remote community of Stehekin, located at the northwest end of the lake. Their boat would be insured, inspected, and certified, and their crew members would be licensed with extensive safety training. But Jim and Cliff's efforts have been repeatedly blocked by the public convenience and necessity requirement—a nearly century-old state law designed to protect existing ferry providers from competition. In fact, since the requirement was imposed in 1927, the state has issued only *one* certificate for ferry service on Lake Chelan. Thus, one company has the exclusive right to provide service on the lake. Washington's public convenience and necessity requirement violates the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution because it prevents Jim and Cliff Courtney from using Lake Chelan—a navigable water of the United States—to provide boat transportation services.

JURISDICTION AND VENUE

2. Plaintiffs—brothers Jim and Cliff Courtney—bring this civil rights

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lawsuit pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgments Act, 28 U.S.C. §§ 2201–2202, for violations of the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution.

3. Plaintiffs seek declaratory and injunctive relief against Washington's "certificate of public convenience and necessity" requirement as it applies to boat transportation services on Lake Chelan, and against the provisions governing the application process for a certificate of public convenience and necessity as they apply on Lake Chelan.

4. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), (4).

5. Pursuant to 28 U.S.C. § 1391(b)(2), venue is proper in this District because a substantial part of the events giving rise to Plaintiffs' claims occurred in this District.

PARTIES

6. Plaintiff James (Jim) Courtney is a resident of Stehekin, Washington, and a brother of Plaintiff Cliff Courtney. For nearly fifteen years, Jim has tried to provide boat transportation service on Lake Chelan, ranging from a ferry open to the general public to an on-call boat service. Because of the public convenience

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and necessity regulations at issue in this case, however, Jim has been, and continues to be, prevented from using the lake's navigable waters to provide such services.

7. Plaintiff Clifford (Cliff) Courtney is a resident of Stehekin, Washington, and a brother of Plaintiff Jim Courtney. Like Jim, Cliff has also tried to provide boat transportation services on Lake Chelan, including transportation of customers or patrons of his own and other Stehekin-based businesses. Because of the public convenience and necessity regulations at issue in this case, however, Cliff has been, and continues to be, prevented from using the lake's navigable waters to provide such services.

8. Defendant Jeffrey Goltz is a commissioner and chairman of the Washington Utilities and Transportation Commission (WUTC). The WUTC is an agency of the State of Washington, created and empowered under Wash. Rev. Code §§ 80.01.010 and .040, and headquartered in Olympia, Washington. It is charged with, among other things, regulating commercial ferry operations. Commissioner Goltz is sued in his official capacity.

9. Defendant Patrick Oshie is a commissioner of the WUTC. Commissioner Oshie is sued in his official capacity.

10. Defendant Philip Jones is a commissioner of the WUTC.

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Commissioner Jones is sued in his official capacity.

11. Defendant David Danner is executive director and secretary of the WUTC. Mr. Danner is sued in his official capacity.

12. Defendants have direct authority over WUTC personnel and the responsibility and practical ability to ensure that the WUTC's regulations, policies, and powers are implemented in accordance with the United States Constitution.

STATEMENT OF FACTS

LAKE CHELAN

13. Lake Chelan is a narrow, roughly 55-mile long lake nestled in the North Cascade Mountain Range in Chelan County, Washington.

14. The city of Chelan is located at the southeast end of the lake.

15. The small, unincorporated community of Stehekin is located at Lake Chelan's northwest end. Stehekin has long been a popular summer destination, albeit one with no road access. The community is accessible only by boat, plane, or foot. Its year-round population is roughly 75.

16. Stehekin and much of the northwest end of the lake are located in the Lake Chelan National Recreation Area, which is managed by the United States National Park Service as part of the North Cascades National Park Service Complex.

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17. Lake Chelan is a navigable water of the United States and has been designated as such by the United States Army Corps of Engineers.

18. Lake Chelan provides a continuously navigable waterway between Chelan, Washington, and the Lake Chelan National Recreation Area, a federal enclave.

19. Lake Chelan is presently, has been in the past, and may in the future be used for purposes of interstate commerce.

20. Lake Chelan is the source of the Chelan River, which, in turn, is a tributary of the Columbia River. The Columbia River flows through Canada and Washington and borders Oregon on its way to the Pacific Ocean.

HISTORY OF FERRY REGULATION ON LAKE CHELAN

21. Regulation of passenger and freight ferry service on Lake Chelan began in 1911, when the Washington legislature enacted a law addressing certain safety issues related to ferries and requiring that fares be reasonable. The law did not impose significant barriers to entry and, by the early 1920s, there were at least four competing ferry companies operating on the lake.

22. In 1927, however, the Washington legislature effectively eliminated competition on the lake by passing a law prohibiting ferry companies from offering ferry service without first obtaining a certificate declaring that "public

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convenience and necessity" required the ferry.

23. On or about October 4, 1927, the Department of Public Works—a predecessor of the WUTC—issued a certificate of public convenience and necessity for passenger/freight ferry service on Lake Chelan. The certificate was transferred to Lake Chelan Boat Company in 1929 and, in 1983, was again transferred to Lake Chelan Recreation, Inc., which continues to do business as Lake Chelan Boat Company.

24. No other certificate has been issued for ferry service on Lake Chelan. At least four other applications for a certificate have been filed, including one in 1997 by Plaintiff Jim Courtney, but in each instance the Lake Chelan Boat Company protested the application and the government denied a certificate.

CURRENT REGULATION OF FERRY SERVICE ON LAKE CHELAN

25. Under current regulations, a certificate of public convenience and necessity is required to "operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state." Wash. Rev. Code § 81.84.010(1); *see also* Wash. Admin. Code § 480-51-025(2).

26. The process for obtaining a certificate of public convenience and necessity is lengthy, burdensome, prohibitively expensive, and almost certain to end in denial.

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27. To apply for a certificate, the applicant must pay a $200 application fee, prepare an application form, and submit, among other things, the following materials to the WUTC:

- "Pro forma financial statement of operations";
- "Ridership and revenue forecasts";
- "The cost of service for the proposed operation";
- "An estimate of the cost of the assets to be used in providing service";
- "A statement of the total assets on hand of the applicant that will be expended on the proposed operation"; and
- "A statement of prior experience, if any, in providing commercial ferry service."

Wash. Admin. Code § 480-51-030(1), (3).

28. The WUTC must provide notice of the application, and of the time and place of the hearing at which the WUTC will consider the application, to the would-be ferry provider's competitors—that is, "all persons presently certificated to provide service" and "any common carrier which might be adversely affected." Wash. Admin. Code § 480-51-040(1); Wash. Rev. Code § 81.84.020(1). The WUTC must also provide notice to: "all present applicants for certificates to

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provide service"; the Department of Transportation; "affected cities, counties, and public transportation benefit areas"; and "any other person who has requested . . . to receive such notices." Wash. Admin. Code § 480-51-040(1); Wash. Rev. Code § 81.84.020(1).

29. Any such persons, including existing certificate holders, "may file a protest with the commission within thirty days after service of the notice," stating "the interest of the protestant" and "the specific grounds for opposing the application." Wash. Admin. Code § 480-51-040(1); *see also id.* § 480-07-370(f).

30. Applications for a certificate and protests to applications trigger an adjudicative proceeding. *See* Wash Admin. Code § 480-07-300(2)(c); *id.* § 480-07-305(3)(e), (g).

31. The applicant and any protesting persons or entities are made parties to the adjudicative proceeding. *See* Wash Admin. Code § 480-07-340(3). The WUTC may allow any other person claiming a "substantial interest in the subject matter of the hearing," or whose "participation is in the public interest," to intervene in the proceeding. *Id.* § 480-07-355(3); *see also id.* § 480-07-340(1)(b), (3).

32. The adjudicative proceeding resembles a civil lawsuit and involves, among other things, motion practice, Wash Admin. Code §§ 480-07-375 to -385;

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discovery, including data requests, record requisitions, bench requests, and depositions, *id.* §§ 480-07-400 to -425; a prehearing conference, *id*. § 480-07-430; a live hearing that includes both the presentation of evidence and the live testimony of witnesses, who are subject to direct, cross, and redirect examination, *id.* §§ 480-07-440 to -495; a public comment hearing, *id.* § 480-07-498; post-hearing initial briefs and reply briefs (twelve copies of each); *id.* §§ 480-07-390 to -395; and oral argument, *id.* § 480-07-390.

33. Protesting certificate holders and any intervening parties may subject the applicant to discovery requests, depose the applicant, cross-examine the applicant's witnesses, and present their own evidence and witnesses, among other things. Their participation drastically increases the costs of the certificate process for the applicant and causes lengthy delays in the WUTC's processing of an application.

34. Applicable statutes require the applicant to prove three elements in order to obtain a certificate. First, the applicant must prove that the proposed ferry service is required by the "public convenience and necessity." Wash. Rev. Code § 81.84.010(1).

35. Second, if the applicant seeks to provide ferry service in a territory already served by a certificate holder, it must prove that the existing certificate

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holder:

- "has not objected to the issuance of the certificate as prayed for";
- "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."

Wash. Rev. Code § 81.84.020(1). Thus, by withholding consent, an incumbent ferry provider can veto the applicant's ability to enter the market—a veto that can only be overridden if the applicant can prove that the incumbent's service is not reasonable, adequate, or in accord with its certificate and tariffs.

36. Third, the applicant must prove that it "has the financial resources to operate the proposed service for at least twelve months." Wash. Rev. Code § 81.84.020(2).

37. The applicant carries the burden of proof on each of these elements.

38. The applicable statutes and regulations provide no definition of the terms "public convenience and necessity" and "reasonable and adequate service," and no objective criteria exist for the WUTC to use in applying those terms or in

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determining whether an applicant has the financial resources to operate the proposed service for at least twelve months.

39. The process for seeking a certificate of public convenience and necessity is prohibitively expensive. Because of the complexity of the application process and its adjudicative nature, an applicant for a certificate effectively must hire an attorney or other professional representative, such as a transportation consultant. *Cf.* Wash. Admin. Code § 480-07-345(1)(c) (stating that although "an officer or employee of a party" may appear in an adjudicative proceeding "if granted permission by the presiding officer to represent the party," the presiding officer may nevertheless "refuse to allow a person who does not have the requisite degree of legal training, experience, or skill to appear in a representative capacity"). Moreover, because of the economic nature of many of the inquiries involved in the process, an applicant may have to hire one or more experts to testify.

40. The certificate of public convenience and necessity requirement and the WUTC's policies and practices in processing certificate applications create an effectively insurmountable barrier to entry into the Lake Chelan ferry market, make it virtually impossible for applicants to obtain a certificate, and constitute a de facto ban on new ferry services.

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41. In a 2010 legislatively-commissioned report, the WUTC identified "protection from competition" as the "[r]ationale" for the public convenience and necessity requirement.

CONSEQUENCE OF THE PUBLIC CONVENIENCE AND NECESSITY REQUIREMENT

42. Since the public convenience and necessity requirement was imposed in 1927, Washington has issued only one certificate for ferry service on Lake Chelan.

43. At least four would-be competitors have applied for certificates—in 1953, 1972, 1976, and 1997—but in each instance Lake Chelan Boat Company protested the application and the government denied a certificate. Thus, Lake Chelan Boat Company has the exclusive right to operate a ferry on the lake.

44. Lake Chelan Boat Company's schedule is impractical and inconvenient. During peak months—June through September—it operates two boats, but each makes only one trip per day and both boats depart Chelan at the same time—8:30 a.m.—and head in the same direction.

45. The impractical schedule means vacationers, especially those arriving from out of town, such as Seattle or Spokane, must often arrive a day early and stay overnight on the lake's southeast end in order to catch one of the early morning ferries that depart for Stehekin.

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46. Because both boats depart at the same time and in the same direction, three hours is the most a summer tourist can spend in Stehekin without staying overnight. Thus, a visitor must either forego the many activities—sightseeing, horseback trips, bicycle rentals, rafting, kayaking, *etc*.—that Stehekin has to offer or stay an extra night and catch one of the two ferries returning the next afternoon. Daytrips to Stehekin from Chelan are therefore impracticable.

47. Similarly, Stehekin residents who need to make the trip to Chelan for medical appointments, business meetings, *etc*., are forced to spend at least one and likely two nights in Chelan. Boarding an afternoon ferry from Stehekin puts them into Chelan mid- to late-afternoon. Assuming their appointment or meeting is scheduled for the same afternoon or evening, they must spend the night in Chelan and board the 8:30 a.m. return ferry the next day. If, however, their appointment or meeting is not until the next day, they must spend yet another night in Chelan and catch the 8:30 a.m. return ferry two days after they began their travels.

48. The inconvenience of the ferry schedule is even worse during non-summer months. For example, during the winter, Lake Chelan Boat Company operates only one boat, which makes only one trip per day, three days per week: Monday, Wednesday, and Friday.

49. The impracticality and inconvenience of the ferry schedule, as well as

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the significant cost of the fare, impose hardships on Stehekin residents, discourage tourists from visiting the community, and deprive the area's businesses of economic opportunity.

ATTEMPTS TO PROVIDE AN ALTERNATIVE, STEHEKIN-BASED SERVICE

50. Plaintiffs—brothers and business partners Jim and Cliff Courtney—have long suffered the Lake Chelan ferry monopoly. They are fourth-generation residents of Stehekin, which their great-grandparents helped settle. They and their siblings have several businesses in and around the community.

51. Cliff owns Stehekin Valley Ranch, a rustic ranch with cabins and a lodge house, and Stehekin Outfitters, a recreation company that offers white water river outings and horseback riding.

52. Jim is a Stehekin-based contractor. He is the former owner of Stehekin Air Services and former part-owner of Chelan Airways, both float plane companies.

53. Jim and Cliff's brother Cragg and Cragg's wife Roberta own the Stehekin Pastry Company and Stehekin Log Cabins.

54. For years, Jim and Cliff listened as their and their siblings' customers complained about the inconvenience and less-than-satisfactory service of Lake Chelan's lone ferry operator. They began exploring the possibility of offering

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Stehekin's visitors and residents another choice: a Stehekin-based service that runs at more convenient times and that has all the modern amenities of a first-class vessel. Their boat would not only benefit Courtney family businesses and patrons—it would provide a boon to other Stehekin-based business and the wider community.

55. Jim and Cliff's boat would be insured, inspected, and certified, and their crew members would be licensed with extensive safety training.

56. Since 1997, Jim and Cliff have initiated four significant efforts to provide such service on Lake Chelan, only to be thwarted by the public convenience and necessity requirement on each occasion.

Application for a Certificate (1997-1998)

57. On July 3, 1997, Jim applied for a certificate of public convenience and necessity to provide a Stehekin-based ferry service between points on Lake Chelan. The ensuing process—which ended in denial—lasted thirteen months.

58. The incumbent ferry provider, Lake Chelan Boat Company, protested Jim's application on July 28, 1997.

59. Lake Chelan Boat Company was represented by an attorney from a major Seattle law firm.

60. Jim had to retain a transportation consultant to represent him before

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the WUTC because he did not feel capable of undergoing the application process without professional representation.

61. The WUTC held a prehearing conference in Olympia on February 17, 1998.

62. The WUTC held a two-day evidentiary hearing on March 24 and 25, 1998. Eighteen witnesses testified at the hearing, including Jim, who was subjected to cross-examination by the Lake Chelan Boat Company's attorney. The hearing yielded a 515-page transcript, and some 37 exhibits were admitted into evidence.

63. In order to try to prove that he had "the financial resources to operate the proposed service for at least twelve months," Wash. Rev. Code § 81.84.020(2), Jim was forced to disclose sensitive financial and business data that he was not comfortable disclosing—for example, assets on hand, ridership and revenue forecasts, and estimates of costs related to the service he was proposing.

64. Following the evidentiary hearing, Jim had to submit a post-hearing brief, as well as a reply brief responding to Lake Chelan Boat Company's post-hearing brief. Lake Chelan Boat Company also filed a reply brief responding to Jim's post-hearing brief.

65. On June 22, 1998, an administrative law judge (ALJ) entered an

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initial order denying the application. The initial order concluded that Jim had not carried his burden of proving: that Lake Chelan Boat Company was not furnishing reasonable and adequate service; that the public convenience and necessity required the service Jim was proposing; and that Jim had the financial ability to provide at least twelve months of service.

66. Jim filed a petition for administrative review of the ALJ's initial order on July 13, 1998.

67. On August 3, 1998—a year and a month after Jim filed his application—the WUTC issued an order affirming the ALJ's order and denying Jim a certificate of public convenience and necessity. The WUTC rested its decision primarily on Jim's failure to prove by "substantial and competent evidence" that Lake Chelan Boat Company had failed to furnish "reasonable and adequate service." The WUTC also found it problematic that Jim's "financial analysis and general business plan depend on taking business from Lake Chelan Boat Company."

68. Jim incurred approximately $20,000 in expenses for the failed certificate application process, including fees for the transportation consultant he hired to represent him, travel expenses for himself and the consultant, and administrative expenses, such as costs for reproduction of briefs, exhibits, and the

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petition for administrative review. This was money Jim otherwise could have invested in his proposed ferry business, existing business, and family. The money was wasted, as it became apparent that the application would never succeed as long as Lake Chelan Boat Company opposed it.

69. Jim also spent countless hours of his own time on the failed application process—time he otherwise could have spent on his proposed ferry business, existing business, and family. The time was wasted, as it became apparent that the application would never succeed as long as Lake Chelan Boat Company opposed it.

Proposed On-Call Boat Service (2006-2009)

70. Several years later, Jim tried to provide another service: a Stehekin-based, on-call boat transportation service. Jim believed the service fell within a "charter service" exemption to the WUTC's public convenience and necessity requirement. *See* Wash. Admin Code § 480-51-022(1).

71. Because much of the northern end of Lake Chelan is in a national recreation area and some of the docking sites on the lake are federal facilities, Jim applied to the United States Forest Service in November 2006 for a special use permit to use the docking sites in conjunction with his planned on-call service.

72. In September 2007, the Forest Service informed Jim that because

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special use permits require that the holder comply with all applicable state laws, it would have to confirm with the WUTC that his proposed boat service was exempt from the certificate requirement before issuing a special use permit.

73. In an email dated October 10, 2007, WUTC staff opined that Jim's proposed service would be exempt from the certificate requirement.

74. After WUTC staff rendered that opinion, however, Lake Chelan Boat Company contacted the WUTC and Forest Service to object to Jim's proposed service. WUTC staff then abruptly "changed its opinion" and informed Jim, by email dated March 31, 2008, that he would need a certificate of public convenience and necessity.

75. In that light, on May 5, 2008, the Forest Service's district ranger sent Jim a letter informing him that the Forest Service had "put a hold" on his special use permit application until he obtained a certificate of public convenience and necessity.

76. WUTC staff changed its mind yet again in an email dated July 18, 2008, opining anew that Jim's proposed boat service would be exempt from the certificate requirement.

77. On August 25, 2009, the Forest Service's district ranger sent a letter to Defendant David Danner, the WUTC's executive director, requesting a formal

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opinion as to whether Jim required a certificate of public convenience and necessity. He took the step because of the conflicting opinions from WUTC staff and because "the current passenger ferry operation, [t]he Lake Chelan Boat Company, [wa]s concerned over a second ferry service on the Lake."

78. Forest Service staff informed Jim by email that "[o]nce [the district ranger] has [the WUTC's] formal decision that no cert[ificate] is needed, . . . he will sign your permit."

79. The WUTC interpreted the district ranger's inquiry as a petition for a declaratory order and, on September 9, 2009, issued a "notice of receipt of petition for declaratory order."

80. Surprised at the WUTC's action, the district ranger sent a letter to Mr. Danner on September 14, 2009, explaining that "my intent in sending the request was not for a hearing or a Petition for a Declaratory Order because I am not interested in presenting any argument concerning how the Commission should classify Mr. Courtney's service." Rather, he explained, "an advisory opinion letter . . . would satisfy my inquiry."

81. In response to the district ranger's letter, the WUTC dismissed the "petition for declaratory order" on September 25, 2009. Mr. Danner, however, then declined to provide the requested advisory opinion.

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82. Because it could not obtain an advisory opinion from the WUTC, the Forest Service did not issue a special use permit for Jim to use the federal facilities on Lake Chelan, and Jim was therefore unable to launch his on-call boat service.

Proposed Service for Patrons of Courtney Family and Other Stehekin Businesses (2008-2009)

83. In 2008, Cliff Courtney contacted Defendant and WUTC Executive Director David Danner to describe various boat transportation services he might offer—services distinct from Jim's proposed on-call service—and to determine whether such services would require a certificate. Specifically, Cliff sent a letter to Mr. Danner on September 9, 2008, presenting "several scenarios" and asking for "help . . . to understand what leeway we have without applying for another certificate."

84. The first scenario Cliff described was one in which "I have chartered . . . [a] vessel for my guests"—for example, persons who "want[] to stay at the ranch [and] go river rafting"—and offer a package with transportation on the chartered boat as one of the guests' options.

85. The second scenario Cliff proposed was one in which "I buy the . . . boat and carry my own clients . . . [who] are booked on to one of my packages or in to one of the facilities I manage."

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86. Mr. Danner responded by letter on November 7, 2008, opining that the services Cliff described would require a certificate and that "the Commission would provide you a certificate to operate a commercial ferry service on Lake Chelan (assuming you provide appropriate financial and other information) *only* if it determined that Lake Chelan Boat Company was not providing reasonable or adequate service, or if Lake Chelan Boat Company did not object to you operating a competing service. Whether Lake Chelan Boat Company's Service is not 'reasonable and adequate' would be a factual determination for the commission based on an evidentiary record developed in accordance with the Administrative Procedure Act."

87. Cliff sent a follow-up letter to Mr. Danner on November 19, 2008, clarifying and emphasizing that his proposed boat transportation service "will be incidental to a former and much larger engagement of services with our companies." Explaining that "a vessel is a substantial investment"; that "I would like to nail down how you will rule if a complaint is issued against me when I start service"; and that "I will not be able to obtain dock permits until agencies are satisfied I am complying with WUTC regulations or [am] exempt from them," Cliff requested "a timely response."

88. Mr. Danner responded by letter some two-and-a-half months later, on

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February 2, 2009. He reiterated his earlier conclusion that the services Cliff described would require a certificate, stating that it "does not matter whether the transportation you would provide is 'incidental to'" other businesses because the service would still be "for the public use for hire." Mr. Danner explained that WUTC staff interprets the term "for the public use for hire" to include "all boat transportation that is offered to the public—even if use of the service is limited to guests of a particular hotel or resort, or even if the transportation is offered as part of a package of services that includes lodging, a tour, or other services that may constitute the primary business of the entity providing the transportation as an adjunct to its primary business."

89. Mr. Danner indicated that the conclusions in his letter reflected "the Commission staff's opinion" and that a "formal determination by the commissioners could only follow either a petition for a declaratory ruling (in which the existing certificate holder would have to agree to participate) or a 'classification proceeding' . . ., which [WUTC] staff could ask the Commission to initiate if you were to initiate service without first applying for a certificate." The declaratory ruling process, particularly as it would require the agreed participation of Lake Chelan Boat Company, would be as futile as the certificate of public convenience and necessity process, and Jim and Cliff were, and still are, not

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willing to initiate service in violation of the law and risk fines.

90. Around the time of this correspondence, Cliff also contacted WUTC staff by telephone to discuss several additional scenarios, including an association or club that would provide boat service for its own members. In each instance, Cliff was advised that the scenarios he proposed would require a certificate.

91. Consequently, Cliff never undertook any of the services described in the scenarios he proposed.

Pursuit of a Legislative Relaxing of the Public Convenience and Necessity Requirement (2009-2010)

92. Frustrated that he and Jim had been repeatedly thwarted by the anti-competitive ferry regulations, Cliff sent a letter on February 14, 2009, to Governor Gregoire and to Jim and Cliff's state legislators—Senator Linda Evans Parlette, Representative Mike Armstrong, and Representative Cary Condotta—describing the need for competition on Lake Chelan, explaining the problems created by the public convenience and necessity requirement (including the futility of applying for a certificate), and urging them to eliminate or relax the certificate requirement.

93. That spring, the legislature passed, and Governor Gregoire signed into law, Engrossed Senate Bill 5894, which, among other things, directed the WUTC to conduct a study and report on the appropriateness of the regulations

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governing commercial ferry service on Lake Chelan. *See* 2009 Wash, Legis. Serv. ch. 557, § 6 (West).

94. The WUTC published its report in January 2010 and recommended that there be no "changes to the state laws dealing with commercial ferry regulation as it pertains to Lake Chelan."

95. The report noted that the WUTC could conceivably "allow some limited competition" on Lake Chelan under the existing regulatory framework "by declining to require a certificate for certain types of boat transportation services that are arguably private rather than for public use"—for example, "a hotel or resort providing transportation services for the exclusive use of its guests, either with its own vehicles or by arranging a 'private charter.'" But the report added that any such interpretation would have to be "supported by expert testimony in an adjudicative hearing" and would have to be shown to not "significantly threaten the regulated carrier's ridership, revenue and ability to provide reliable and affordable service."

96. The report concluded that it is "unlikely" that such an interpretation "could be relied upon to authorize competing services on Lake Chelan."

HARM TO PLAINTIFFS

97. The public convenience and necessity requirement has harmed and

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continues to harm Jim and Cliff Courtney.

98. Jim and Cliff have had, and continue to have, the desire and ability to start a competing boat transportation service on Lake Chelan that is open to the general public, but the public convenience and necessity requirement has prevented them from doing so.

99. Jim and Cliff have had, and continue to have, the desire and ability to provide boat transportation service on Lake Chelan for customers and patrons of Courtney family businesses and other businesses, but the public convenience and necessity requirement has prevented them from doing so.

100. The public convenience and necessity requirement has subjected Jim and Cliff's right to use the navigable waters of the United States—specifically, in connection with their right to earn an honest living—to a veto by established business interests and by a government agency acting to protect those interests from competition.

101. Jim has already applied for and been denied a certificate of public convenience and necessity. Having to undergo the certificate process again would impose substantial financial and personal costs on Jim and Cliff. It would require them to: expend tens of thousands of dollars in application fees, attorneys' fees, expert fees, and related costs; force them to divulge sensitive financial and

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business data to the government and the incumbent ferry provider (that is, their would-be competitor); subject them to intrusive discovery requests, depositions, and cross-examination at the hands of the incumbent ferry provider's attorneys; and consume an incalculable amount of personal time and energy. The money, time, and energy that Jim and Cliff would be forced to expend in applying for a certificate is money, time, and energy they could otherwise invest in their proposed boat transportation business, other businesses, and families.

102. Jim and Cliff's experience—including Jim's previous application and denial of a certificate for Lake Chelan; their thwarted attempts to provide various types of boat service on the lake; and the WUTC's refusal to relax the certificate requirement on the lake—is that the WUTC will not authorize any additional boat transportation service on Lake Chelan. Jim and Cliff have concluded that any further efforts with the WUTC are futile. They have been dealing with the WUTC for fourteen years, have pursued every angle they can think of to provide boat transportation service on Lake Chelan, and have received the absolutely consistent message that they will not be allowed to provide such service under current law and WUTC policies.

103. Jim and Cliff's experience is that the elements they would have to prove to secure a certificate of public convenience and necessity are unnecessary

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and unrelated to the safe provision of boat transportation services on Lake Chelan. Thus, even if they could ultimately obtain a certificate, it would come at the cost of being subjected to an onerous and expensive application process that serves as a significant barrier to entry and does nothing to protect the public safety.

104. Jim and Cliff have been in negotiations to purchase a boat that they would use to provide their planned transportation services and that complies with all applicable Coast Guard and Department of Labor and Industry standards, but they have refrained from purchasing the vessel because of their inability to provide transportation services with the boat. If they are unable to engage in their desired business in the near future, they may lose the favorable terms they have negotiated for the purchase and, possibly, the opportunity to purchase the boat at all.

105. If Jim and Cliff were to exercise their constitutional right to use the navigable waters of the United States without undergoing the certificate process, or after availing themselves of the certificate process and being denied a certificate, they would face conviction of a gross misdemeanor, punishable by up to 364 days' imprisonment, a $5,000 fine, and significant monetary penalties. *See* Wash. Rev. Code §§ RCW 81.04.390, .385; *id.* § 81.84.050; *id.* § 9.92.020.

106. In addition to barring Jim and Cliff from engaging in the business of providing boat transportation services on Lake Chelan, the certificate requirement

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harms Jim and Cliff as Stehekin residents who are forced to use the inefficient and unresponsive monopolist ferry service in commuting to and from the southeast end of the lake. When Jim, Cliff, and their respective families have medical appointments, business meetings, *etc.*, on the southeast end of the lake, they are forced to spend at least one and often two unnecessary nights in Chelan before returning home.

107. The public convenience and necessity requirement also harms Cliff as owner of Stehekin Valley Ranch and Stehekin Outfitters. The inconvenient schedule and service of the existing monopoly have dissuaded potential patrons of the ranch and outfitter from making the trip to Stehekin and patronizing the businesses. This has resulted in lost revenues to Cliff, his businesses, and his family.

CONSTITUTIONAL VIOLATIONS

CLAIM I: FEDERAL PRIVILEGES OR IMMUNITIES

(Boat Transportation Service on Lake Chelan Open to the General Public)

108. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

109. The Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall make or enforce any law

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which shall abridge the privileges or immunities of citizens of the United States . . . ."

110. "The right to use the navigable waters of the United States" is one of the privileges protected by the Privileges or Immunities Clause. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

111. The right to use the navigable waters of the United States is inextricably linked with the economic liberty of citizens. It guarantees citizens the ability to use such waters not only in looking for and traveling to work, but also in engaging in business—for example, providing boat transportation service that is open to the general public, or providing boat transportation service for customers or patrons of specific businesses or group of businesses.

112. Lake Chelan is a navigable water of the United States.

113. By requiring a certificate of public convenience and necessity to provide boat transportation service on Lake Chelan that is open to the general public, the WUTC is abridging the right of citizens, including Jim and Cliff Courtney, to use the navigable waters of the United States.

114. Because the right to use the navigable waters of the United States is inextricably linked with the economic liberty of citizens, by requiring a certificate of public convenience and necessity to provide boat transportation service on Lake

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Chelan that is open to the general public, the WUTC is also abridging the economic liberty of citizens, including Jim and Cliff Courtney, whose ability to pursue their chosen livelihood has been barred by the certificate requirement.

115. The regulatory regime requiring a certificate of public convenience and necessity is incredibly burdensome and operates as a de facto prohibition on the use of Lake Chelan in connection with a boat transportation enterprise. The elements an applicant must prove to secure a certificate—that the public convenience and necessity require the proposed service; that the existing certificate holder is not providing reasonable and adequate service; and that the applicant has the financial ability to provide at least twelve months of service—are unreasonable, unnecessary, and effectively insurmountable conditions for the government to require before allowing someone to provide boat transportation service on Lake Chelan that is open to the general public. The certificate application process is litigious, prohibitively expensive, and incredibly time-consuming, and it requires an applicant to divulge sensitive business plans and financial data to the government and the incumbent ferry provider. In Jim and Cliff's experience, the process is futile and allows the established provider to effectively veto the right of new operators to use the lake.

116. The WUTC has no compelling, substantial, or even legitimate interest

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in requiring a certificate of public convenience and necessity to provide boat transportation service on Lake Chelan that is open to the general public.

117. The WUTC's justification for its public convenience and necessity regulations—"protection from competition"—is not a legitimate governmental interest, much less a substantial or compelling one. The purpose and effect of the regulations are anti-competitive and provide an advantage to one commercial enterprise over another.

118. The certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, are not narrowly tailored to achieve, nor are they rationally related to, any compelling, substantial, or legitimate governmental interest.

119. As applied to the provision of boat transportation service on Lake Chelan that is open to the general public, the certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin.

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Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, are so burdensome, unreasonable, and unnecessary as to violate the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution.

120. As a direct and proximate result of Defendants' enforcement of the certificate of public convenience and necessity regulations on Lake Chelan, Jim and Cliff Courtney have no adequate remedy at law by which to prevent or minimize the continuing irreparable harm to their rights. Unless Defendants are enjoined from committing the above-described constitutional violations, Jim and Cliff will continue to suffer great and irreparable harm.

CLAIM II: FEDERAL PRIVILEGES OR IMMUNITIES

(Boat Transportation Service on Lake Chelan for Customers or Patrons of Specific Businesses or Groups of Businesses)

121. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

122. The Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."

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123. "The right to use the navigable waters of the United States" is one of the privileges protected by the Privileges or Immunities Clause. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

124. The right to use the navigable waters of the United States is inextricably linked with the economic liberty of citizens. It guarantees citizens the ability to use such waters not only in looking for and traveling to work, but also in engaging in business—for example, providing boat transportation service that is open to the general public, or providing boat transportation service for customers or patrons of specific businesses or group of businesses.

125. Lake Chelan is a navigable water of the United States.

126. By requiring a certificate of public convenience and necessity to provide boat transportation service on Lake Chelan for customers or patrons of specific businesses or groups of businesses, the WUTC is abridging the right of citizens, including Jim and Cliff Courtney, to use the navigable waters of the United States.

127. Because the right to use the navigable waters of the United States is inextricably linked with the economic liberty of citizens, by requiring a certificate of public convenience and necessity to provide boat transportation service on Lake Chelan for customers or patrons of specific businesses or groups of businesses, the

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WUTC is also abridging the economic liberty of citizens, including Jim and Cliff Courtney.

128. The regulatory regime requiring a certificate of public convenience and necessity is incredibly burdensome and operates as a de facto prohibition on the use of Lake Chelan in connection with a boat transportation enterprise. The elements an applicant must prove to secure a certificate—that the public convenience and necessity require the proposed service; that the existing certificate holder is not providing reasonable and adequate service; and that the applicant has the financial ability to provide at least twelve months of service—are unreasonable, unnecessary, and effectively insurmountable conditions for the government to require before allowing someone to provide boat transportation service on Lake Chelan for customers or patrons of specific businesses or groups of businesses. The certificate application process is litigious, prohibitively expensive, and incredibly time-consuming, and it requires an applicant to divulge sensitive business plans and financial data to the government and the incumbent ferry provider. In Jim and Cliff's experience, the process is futile and allows the established provider to effectively veto the right of new operators to use the lake.

129. The WUTC has no compelling, substantial, or even legitimate interest in requiring a certificate of public convenience and necessity to provide boat

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transportation service on Lake Chelan for customers or patrons of specific businesses or group of businesses.

130. The WUTC's justification for its public convenience and necessity regulations—"protection from competition"—is not a legitimate governmental interest, much less a substantial or compelling one. The purpose and effect of the regulations are anti-competitive and provide an advantage to one commercial enterprise over another.

131. The certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. §§ Code 480-07-300 to -885, are not narrowly tailored to achieve, nor are they rationally related to, any compelling, substantial, or legitimate governmental interest.

132. As applied to the provision of boat transportation service on Lake Chelan for customers or patrons of specific businesses or group of businesses, the certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash.

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Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, are so burdensome, unreasonable, and unnecessary as to violate the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution.

133. As a direct and proximate result of Defendants' enforcement of the certificate of public convenience and necessity regulations on Lake Chelan, Jim and Cliff Courtney have no adequate remedy at law by which to prevent or minimize the continuing irreparable harm to their rights. Unless Defendants are enjoined from committing the above-described constitutional violations, Jim and Cliff will continue to suffer great and irreparable harm.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

A. A declaratory judgment by the Court that, as applied to the provision of boat transportation service on Lake Chelan that is open to the general public, the certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, violate the Privileges or Immunities Clause

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of the Fourteenth Amendment to the United States Constitution;

B. A declaratory judgment by the Court that, as applied to the provision of boat transportation service on Lake Chelan for customers or patrons of specific businesses or group of businesses, the certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, violate the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution;

C. A preliminary and permanent injunction prohibiting Defendants from enforcing the certificate of public convenience and necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, to the provision of boat transportation service on Lake Chelan that is open to the general public;

D. A preliminary and permanent injunction prohibiting Defendants from enforcing the certificate of public convenience and necessity requirements set

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forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the provisions governing the application process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, to the provision of boat transportation service on Lake Chelan for customers or patrons of specific businesses or group of businesses;

E. An award of attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988; and

F. Such other legal or equitable relief as this Court may deem appropriate and just.

Dated: October 19, 2011

Respectfully submitted,

s/ Michael E. Bindas
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* *Pro hac vice* motion to be filed

EXHIBIT B

FOR

DECLARATION

OF

CLIFFORD

COURTNEY

Cliff Courtney

From: "Cliff Courtney" <svranch@hughes.net>
Sent: Friday, November 21, 2008 11:52 AM
Subject: Fw: Stehekin Passenger Boat Proposal

9/9/08

Clifford G. Courtney

PO Box 36

Stehekin WA 98852

David Danner, Secretary

Washington Utilities and Transportation Commission

P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

Dear David,

Please allow me to introduce myself. I have lived in the Stehekin Valley all of my life and am 4th generation in this area. I manage both Stehekin Valley Ranch and Stehekin Landing Resort and have interest in Stehekin Adventure, LLC. For decades there has been a need for better Stehekin boat service. The current owners seemed willing to attempt to ramp up their operations when another entity proposed a passenger service a few years back and so that certificate was denied. Since that time the ramped up operation has been discontinued.

As a business owner and community member I am unclear as to just what is possible under the laws as far as charter, excursion, etc. without facing challenges or penalties. I contacted your office and I was told the best thing to do would be write you a letter explaining what my intent was so that you could advise me as to what was the proper interpretation. I will write out several scenarios and you can help me to understand what leeway we have without applying for another certificate. I will start by trying to describe the demand and the need and a little history so you understand the scenario so that you can best advise me.

Lake Chelan has various needs for transport much like the San Juans do because there is no road access. The major needs are:

- lakeside residents, hikers and hunters
- Day Trip Clients who return to Chelan the same day
- Overnight guests and residents
- Agency personnel, tradesmen and contractors

Each of these groups have differing needs. I will mostly be speaking to the category that pertains to folks who spend at least one night in the valley because that is the primary purpose of this vessel.

The normal overnight visitor to Stehekin comes primarily from the Seattle area. To a lesser degree we also have clients from Portland or Spokane and of course other outlying areas. No matter which way they are coming it is currently necessary to either rise very early to drive over in time to meet a boat or you must rent a room for the night so you can easily catch the boat the next morning. One night rooms in the area are expensive and hard to obtain and will get to be more so as motel facilities are transitioned to condominiums. The way out is a little more desirable when the Lady Express is running because folks can get back to their vehicle in time to drive home that same day. This year the Lady Express schedule is being cut to try and reduce expenses due to low ridership.

Over the years it has become apparent that what Stehekin needs for the category of clients who live here or visit overnight is a Stehekin based boat. The reason for this is that the schedule automatically works to the advantage of the visitor and resident. This boat would naturally leave in the morning and return in the afternoon. The way in would be an early afternoon departure which is perfect. Visitors could drive from home comfortably and catch the boat to their destination the same day. On the way out visitors could arrive back to their cars before noon and drive home or to their next destination in the daylight. Residence could go out and have all afternoon on that day as well as all morning the next for shopping or appointments. This would often cut their stay by a night. This schedule has been considered and even tried by using a faster boat from the Chelan end but all attempts have ultimately failed. When Lake Chelan Recreation (LCR) ordered the Lady Express they envisioned a double run that could have fulfilled this need. Lack of speed without enormous fuel flows from this boat caused that idea to be scrapped. Later, when another party attempted to gain permission to operate on this schedule LCR threw on another high speed catamaran with a double run. This did block the other company but now it is also discontinued. One of the things that causes the demise of this idea from the Chelan end is that to make a double run you need to have a fast vessel and the fuel consumption becomes tremendous and therefore your price point becomes high. This is an obstacle that does not need overcome from the Stehekin end and a more frugal 15 kph vessel could be used.

At this juncture when the float planes are no longer running and LCR is truncating their service I am forced to consider other options for the happiness of my guests. I am currently scrambling to figure out transport for guests that have booked tickets on airlines that have had the Lady Express canceled out from under them in Late September. The residents and businesses of this community have grown weary of the singular certificate on this lake that holds our community hostage.

With all this in mind I need your help figuring out my best options. I am proposing a vessel that will be around 50' in length travel at about 15 kph and be licensed for 49+2. It is my hope that there will be a float plane service on the lake again next season and between the three modes of transport, those being certificated boat service, charter boat service, and airplane service, we can bring quality and convenience to the clients and stop the downward ridership trend.

A scenario could look like this: Client A wants a Stehekin experience and has called my 800 number. She wants to stay at the ranch, go river rafting and then return to Chelan the next day. I have chartered the above vessel for my guests on the day which she wants to arrive so I offer that as one of her options. She decides she wants to ride the above boat so I quote her $199 for the package she wanted. She pays me

the money for the entire package and I Email the charter company and name her as one of my guests. She has been told that the boat leaves Fields Point at 1:30 pm and Leaves Stehekin at 10 am the next day. The charter company only takes people on that run that are my guests because I have chartered that run that day and many other days.

Client B call and ends up wanting to Stay at Stehekin Landing Resort, he wants to boat up and fly back. I book him into the resort, on to that same 1:30 pm boat up, onto a 9:00 am flight out and he pays me for the entire package. I then contact the charter company telling them I have one more guest that they are to allow passage to. I do this time and time again and quote the same times. I take all of the money for all services and I pay the charter company with one check for the run and I am the only client that the charter company has for that run. The question is: Is that charter company running a legal run that does not require a certificate for a scheduled run?

Another scenario would look like this: I buy the above boat and carry my own clients on it that are booked on to one of my packages or in to one of the facilities I manage. I place on my website that the boat for these facilities which comes with your package or as a part of the deal when you rent a room leaves at 1:30 pm going up and at 10 pm going back. I only haul my guests. The question is: Is that a scheduled public run and subject to scheduled run regulations?

The twist to either of the above scenarios is that what if a Stehekin resident wants to get on either one of these runs? It is not a run advertised to the public but since it runs at the same time every day this resident learns pretty quickly that the opportunity exists. This resident logs on to my companies website and books a 2 night Chelan Tour package, pays my company by credit card and prints their selves an e-ticket and shows up to get on the boat. That person is now my guest getting on the boat that I am either operating exclusively for my guests or chartering for the same. Did that person board a scheduled boat because he/she knew what time it left every day even though it was not advertised to the general public?

I hope the above scenarios give you ample detail. My intent is to run a company boat for my guests or to charter a boat for my guests. The other question that comes up is that: If a person who was not a guest showed up at departure and I had not filled the boat, could the charter company allow that person on board that was not my guest and charge for that ticket if they had my permission?

I appreciate your time. It appears the first two scenarios follow the intent of the regulations as I read them but I will await your interpretation. Depending on the answers I will then move forward as planned above, or attempt to secure a legislative exemption such as has been given to the San Juans or the Pend Oreille River. The other option is to try to gain another certificate to operate on a scheduled basis but this looks to be expensive, improbable and will most likely not be able to allow the operation enough agility.

Thank you very much for your attention to this query.

Sincerely,

Clifford G. Courtney

EXHIBIT C

FOR

DECLARATION

OF

CLIFFORD

COURTNEY

STATE OF WASHINGTON
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 S. Evergreen Park Dr. S.W., P.O. Box 47250 • Olympia, Washington 98504-7250
(360) 664-1160 • TTY (360) 586-8203

November 7, 2008

Mr. Clifford Courtney
Stehekin Valley Ranch
1328 W. Woodin
Stehekin, WA 98852

Dear Mr. Courtney:

Thank you for your letter requesting guidance on our regulations governing boat services on Lake Chelan. In your letter, you set forth several scenarios for boat services and ask whether these would be permissible under current state law and Utilities and Transportation Commission (UTC) regulation. I have consulted with my transportation regulatory staff and counsel in preparing this response, but please know that these views are not necessarily those of the commissioners, who would have to make a final determination of your compliance with UTC rules in an adjudicatory proceeding should you decide to challenge the existing provider or should another party challenge your proposed service.

State regulation of ferry services

RCW 81.84.010 provides that a "commercial ferry may not operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state ... without first applying for and obtaining from the commission a certificate declaring that public convenience and necessity require such operation." The term "commercial ferry" means a company or person that owns or operates any vessel over and upon the waters of this state. WAC 480-51-020.

RCW 81.84.020 further provides that the commission may not grant a certificate to operate into any territory "already served by an existing certificate holder, unless the existing certificate holder has failed or refused to furnish reasonable and adequate service, has failed to provide the service described in its certificate or tariffs after the time allowed to initiate service has elapsed, or has not objected to the issuance of the certificate as prayed for."

What this means is that the Commission would provide you a certificate to operate a commercial ferry service on Lake Chelan (assuming you provide appropriate financial and other information) *only* if it determined that Lake Chelan Boat Company was not providing reasonable or adequate service, or if Lake Chelan Boat Company did not object to you operating a competing service. Whether Lake Chelan Boat Company's service is not "reasonable and adequate" would be a

factual determination for the commission based on an evidentiary record developed in accordance with the Administrative Procedures Act.

While you state in your letter your view that the Lake Chelan Boat Company's service is not satisfactory, I cannot speculate as to what the commissioners would determine based on such an evidentiary record. I note that the commission in 1998 ruled against a previous entity, Stehekin Boat Service, finding that it failed to demonstrate that Lake Chelan Recreation, Inc., had failed or refused to furnish reasonable and adequate service or failed to provide the service described in its certificate or tariff.

Your proposed services

In your letter, you present a number of scenarios for potential services on Lake Chelan. You state that your "intent is to run a company boat for my guests or to charter a boat for my guests." You also ask what would happen if Stehekin residents were to join these runs.

Again, any person providing transportation by vessel that is "between fixed termini or over a regular route" and is "for the public use for hire" must obtain a commercial ferry certificate. All of the scenarios you describe clearly involve service "between fixed termini or over a regular route upon the waters within this state." Therefore, the key question appears to be whether the service would be "for the public use for hire" (which would require a commercial ferry certificate) or whether it would be for private use only (which would not require a commercial ferry certificate).

"For public use or hire" is synonymous with the legal concept of "common carriage." The Washington courts apply a three-part test to determine whether a business that transports passengers as part of a business that includes other services is a "common carrier." The test is as follows: "(1) The carriage must be part of the business; (2) the carriage must be for hire or remuneration; and (3) the carrier must represent to the public that this [transportation] service is part of the particular business in which he is engaged, and that he is willing to serve the public in that business." *McDonald v. Irby*, 74 Wn.2d 431 (1968) (finding that a private airport parking lot owner's transportation of customers between the parking lot and the airport terminal was common carriage even though provided exclusively to customers of the parking lot). With this test in mind, I will address the scenarios you present in which your resort would own the vessel and transport resort guests either one way or round trip.

It appears that the combined resort and transportation business that you describe (in which the resort owns or operates vessel) would meet the definition of common carriage and therefore would require a commercial ferry certificate. The transportation would become as integral a part of the business as the lodging you provide at the resort. You would necessarily have to charge your customers enough for lodging, or for lodging and transportation as separate services, to recover your transportation expenses; as such, the transportation would be for hire or remuneration. And finally, it appears that you would advertise to and draw your resort/vessel customers from the general public.

Next, I address the scenarios you present in which either your resort or your guests would engage the services of what you refer to as a "charter." Here again, the question is really whether this service is open to a significant portion of the public. The term "charter" refers to a form of private carriage in which an individual or self-standing group contracts for the exclusive use of a vessel and for the services of a captain and crew. A vessel providing "charters" to only one organization or group may in fact be operating as a common carrier if membership in the organization or group is open to a significant segment of the public. In this case, participation in the "charter" apparently would be available to anyone who also purchases lodging at your resort. You describe, in effect, the joint marketing of the resort and the charter vessel to the general public. Carriage on the vessel would be available to that segment of the public that chooses a package comprised of lodging at your resort and transportation by the "charter." Because of the public nature of this combined offering, the service likely would be found to be a common carrier, and would require a commercial ferry certificate.

In any of the scenarios you describe, including Stehekin residents among the passengers would make it even more likely that the commissioners or a court would conclude that the purported charter is in fact providing its services "to the public for hire"— that is, common carriage requiring a certificate.

Again, please know that this opinion is my own and not necessarily that of the commissioners. You may wish to consult an attorney before proceeding with any of the scenarios you lay out in the letter.

Please feel free to call me at (360) 664-1208 if you would like to discuss this further.

Sincerely,

David W. Danner
Executive Director and Secretary

EXHIBIT D

FOR

DECLARATION

OF

CLIFFORD

COURTNEY

Mr. Clifford Courtney
PO Box 36
Stehekin WA 98852

11/19/08

David W. Danner, Executive Director
WUTC
PO Box 47250
Olympia WA 98504

Dave,

Thank you for your response on 11/7/08. The response helped me to understand the position your agency will take. None of the scenarios that I set forth were proposals but were rather advanced so that I could learn more about what was possible or if the language was so restrictive that a certificate or an exemption would be the only options. Having considered the law, rules, court cases and your letter I offer the following comments that I hope you will comment on. The reason I need a timely response is because a vessel is a substantial investment and I would like to nail down how you will rule if a complaint is issued against me when I start service. I also wish to have a ruling from your office because I will not be able to obtain dock permits until agencies are satisfied I am complying with WUTC regulations or are exempt from them. Time is short to secure a vessel, get it certified, and launch and test it on Lake Chelan waters for the 2009 season.

First comment:
I do not believe our customers fall under the same category as the customers in McDonald v Irby. Our customers will be persons who are signed up for a service or facility or both that are part of companies owned by the same people who own the vessel or who hire a charter boat operator to haul our passengers as a group. I stated in my scenario letter that I owned one and managed another business but in actuality I am part owner and manager of the second entity as well. While it is true that transport of said guests will not be gratuitous it will be incidental to a former and much larger engagement of services with our companies. I do not believe our customers can be considered part of the larger public. We are talking about approximately 3000 people who will only be eligible for our transportation if they sign up for packages, services, or facilities.

Second comment:
The law and rules governing airporter's are different than those governing vessels. It is stated in McDonald v Irby that his service was not on a schedule. Transport in a vessel that is unscheduled is automatically excluded from the need from a certificate of necessity it appears. Our vessel would not need to run a schedule per se. There could be a range of time that we could make it work and the first party that signed up for any particular date would have some leeway much like the system used by Chelan Airways in the past. This system made it so that after a flight was set then other passengers were added to that run. The range of times available would be dictated somewhat by morning and afternoon trip but would not run at identical times or be advertised. This appears to fall under charter rules, as long as only one company (ourselves) pays for guests on that boat. It also it appears that this could work if we hired a charter boat because our pre-registered customers would be the only passengers and would pay no money individually to the boat service but would board as a group whose way was chartered by our company. An example of this is a group of 30 plus folks that come to the ranch for fall colors. They currently ride the Lady II and have vouchers to board with. I think it is established that I would have the right to charter a boat for that group if there was one large enough available.

Third comment:
Our customers are not part of the public because we would not be offering one way fares and we will be departing from Stehekin with one trip daily. With the above limitations plus the fact that the service could

not possibly work for day trippers we could not service the largest portion of the general public. We would not be on a set or advertised schedule, we will not be advertising transporation to the public and the entire load will be chartered by one entity. We do have services in Stehekin that cater to the day tripper and we will continue to work with the existing certificate holder to service that group of visitors as well as those brought in by Chelan Airways if it happens to be re-established. If our customers prefer to travel by some other mode we will work with all entities to assure their arrival but we will not be providing transport for one-way traffic or day trippers. If our customers prefer another means of arriving into Stehekin whether it be by foot, horseback, private boat, private plane, a Lake Chelan Recreation vessel, or by Chelan Airways they can have that option. By necessity because of the limited size of our vessel or because of scheduling many of our guests will still arrive by other means.

Fourth comment:
It is not necessary for our vessel to return to the same dock the same day. While this exemption would not be optimal it could be possible if it became necessary. We will hold a Commercial Permit on the federal facilities and we also have a private dock available. We could depart from one and end up at the other. Because of service and fueling this could be a natural pattern for the vessel.

In closing I would like to emphasize that our intent is not to weaken or drive any existing service out of business. Lean economic times and strong competition for recreational vacations dictate that we come up with an option that fits our client's needs. We believe this service will not harm the existing certificate holder in the long run. Activity creates activity and history shows that competition hones quality and ultimately lowers prices. Our own viability depends upon having some control of quality, run times, and price points. It is estimated that 80% of our clients would stay an extra day in Stehekin if we can satisfy the formerly mentioned points. Since our average stay is less than 3 nights we look forward to an approximate 25% increase in possible occupancy. To assume another company owns transport rights to guests we have marketed to and booked is erroneous. If we are unable to remedy the situation our businesses may cease and that will have a far worse impact than the alternative we feel compelled to strive for.

Thank you for your time,
Sincerely,

Clifford Courtney, owner
Stehekin Valley Ranch
Managing member, Stehekin Adventure, LLC.
General Manager, Stehekin landing Resort a DBA of
Stehekin Adventure, LLC.

EXHIBIT E

FOR

DECLARATION

OF

CLIFFORD

COURTNEY

STATE OF WASHINGTON
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 S. Evergreen Park Dr. S.W., P.O. Box 47250 • Olympia, Washington 98504-7250
(360) 664-1160 • TTY (360) 586-8203

February 2, 2009

Cliff Courtney
P.O. Box 36
Stehekin, Washington 98852

Dear Mr. Courtney:

I am writing in response to your letter dated November 19, 2008, which was delivered to the Commission's offices on December 9, 2008. As we've discussed by phone, my holiday schedule and the subsequent legislative session have delayed my response to you, and I apologize for that. In your letter you ask me to provide a "ruling" as to whether the Commission would require you to obtain a commercial ferry certificate in order to transport customers of your existing businesses by boat between Chelan and Stehekin.

I can only provide you with the Commission staff's opinion as to whether you would be required to apply for a commercial ferry certificate under the circumstances you describe. A formal determination by the commissioners could only follow either a petition for a declaratory ruling[1] (in which the existing certificate holder would have to agree to participate) or a "classification proceeding" under RCW 81.04.510, which staff could ask the Commission to initiate if you were to initiate service without first applying for a certificate. Another avenue that is available to you is to apply for a certificate for the service you propose to provide and to demonstrate that the existing certificate holder is not providing satisfactory service.[2]

Although my first letter to you addresses most of the issues you raise in your subsequent letter, I can offer you the following additional clarification:

RCW 81.84.010 requires a certificate of public convenience and necessity for any person or entity that operates for the transportation of passengers:

(1) a vessel on the waters of this state,

(2) for the public use for hire,

(3) between fixed termini or over a regular route.

If the proposed mode of water transportation lacks any of these three elements, then the statute does not require a certificate. I will elaborate on each of the requirements in turn.

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[1] *See* WAC 480-07-930 and RCW 34.05.240.

[2] *See* WAC 480-51-030.

As to the first point, "vessel" is defined at WAC 480-51-020(4). If the boat you propose to use does not meet the definition of vessel, then no certificate is required.

As to the third point, if the service is *either* between fixed termini (i.e., endpoints) *or* over a regular route, then it meets this requirement. It does not matter whether the transportation service is scheduled or unscheduled. Regardless of whether the service you are proposing departs at different times from day to day or departs only on alternate days, it would nonetheless be "between fixed termini or over a regular route" because it would run between endpoints at the north and south ends of the lake.

As I noted in my prior letter, the main question is whether your service would be "for the public use for hire" within the meaning of RCW 81.84.010. In staff's view, it does not matter whether the transportation you would provide is "incidental to a former and much larger engagement of services with [your] companies," as you suggest in your letter. It appears that you have in mind a test for "common carriage" (or for-hire public transportation) that the Commission has not applied in interpreting the commercial ferry certification law. Staff's view is that if you offer to the public a transportation service by vessel between fixed termini, even if it is necessary for customers to purchase some other non-transportation service (such as lodging or a "fall color" tour), the transportation is still "for the public use for hire." The relative size of the transportation and non-transportation aspects of the service is irrelevant, in staff's view.[3] (Staff notes, however, that the expense of transporting customers would have to be significant in this case given the exceptional length of Lake Chelan.)

Admittedly, the "private carriage" test you propose is one that the Commission has adopted for auto transportation (bus) companies, which the Commission regulates under RCW 81.68 and WAC 480-30. Under the rules applicable to auto transportation companies, the Commission has specifically exempted persons owning "hotel buses" and "private carriers who, in their own vehicles, transport passengers as an incidental adjunct to some other established private business owned or operated by them in good faith."[4] Although the Commission arguably could adopt an "incidental to a primary business" exemption from the commercial ferry certificate requirement, it has not done so and staff would oppose adopting such an exemption for commercial ferries. Staff would advocate for an interpretation of the phrase "for the public use for hire" that includes all boat transportation that is offered to the public -- even if use of the service is limited to the guests of a particular hotel or resort, or even if the transportation is offered as part of a package of services that includes lodging, a tour, or other services that may constitute the primary business of the entity providing the transportation as an adjunct to its primary business.[5]

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[3] *See McDonald v. Irby*, 74 Wash. 2d 431, 435 (1968) (the "true test" for common carriage is "whether the given undertaking is a part of the business engaged in by the carrier which he has held out to the general public as his occupation, rather than the quantity or extent of the business actually transacted, or the number or character of the conveyances used in the employment," *citing Cushing v. White*, 101 Wash. 172 (1918)).

[4] WAC 480-30-011(g) and (i).

[5] This is consistent with the court's analysis in *McDonald v. Irby*, 74 Wash. 2d 431 (1968), where a single entity owned a pay-parking facility and carried its customer to the airport by bus. The court said "[t]he only condition affixed to the

In such a case, if the "primary business" owns the boat and controls the crew, then it would be that business that would require a certificate. If the primary business contracts with a vessel owner/operator to transport its customers, then the vessel owner-operator would require a certificate.

Even under the broad private carrier exemption that the commission has adopted for bus companies, if more than one business were to group together to transport their customers, or if persons other than customers of the business were included as passengers, the private carrier exemption would not apply. Also, with regard to the proposal in your January 7, 2009, e-mail concerning a Costco-type "club" for boat transportation and other services, I would point out that the courts have enjoined similar arrangements on the grounds that they are really a form of public, for-hire carriage for which the law requires a certificate.[6]

Staff believes that the commercial ferry statutes and policy considerations specific to the operation of ferries disfavor more than one certificated carrier on a particular route unless the existing ferry service provider is not providing satisfactory service or is failing to serve a particular market niche.[7] Staff believes it is best to address these questions in a proceeding in which the existing certificate holder is able to address the assertions against it, rather than adopting exemptions to the certificate requirement.

[transportation] service—use of the parking facilities—is closely related to the transportation and does not void its public character." *Id.* at 436. For examples of how this broad definition has been applied going back many years under regulatory statutes virtually identical to RCW 81.84 see *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 60 L.Ed. 984, 36 Sup. Ct. 583 (1916) (holding that taxicab company that contracted with hotel to provide exclusive service to the guests of the hotel nonetheless came within regulatory statute applicable to common carriers for the conveyance of persons for hire); *Terminal Taxicab* was cited with favor on this point in *McDonald v. Irby*, 74 Wash. 2d at 436 (holding that owner of airport parking facility that also transported its parking customers to the airport terminal by van was a "common carrier" despite argument that it was primarily engaged in parking business); *Las Vegas Hacienda, Inc. v. Civil Aeronautics Board*, 298 F.2d 430 (1962) (resort hotel that furnished air transportation to and from another city that in a manner that was only incidental to the promotion and operation of the resort hotel was, nonetheless, properly determined to be within regulatory statute applicable to "carriage by aircraft of persons . . . as a common carrier for compensation or hire."); *M&R Investment Co., Inc. v. Civil Aeronautics Board*, 308 F.2d 49 (1962) (Hotel-casino that sold "tours" to the public, including flights between Los Angeles and Las Vegas exclusively its guests was engaged in "carriage by aircraft of persons . . . as a common carrier for compensation for hire" and subject to regulation as such).

[6] *Kitsap Co. Transp. Co. v. Manitou Beach-Agate Pass Ferry Association*, 176 Wash. 486, (1934) (upholding court injunction obtained by existing ferry certificate holder against the operation of a vessel chartered by members of private association of passengers, the real purpose of which was to establish ferry service); *Horluck Transportation Co. v. Eckright*, 56 Wash. 2d 218 (1960) (enjoining a voluntary association or "club" of individuals that collectively owned a bus from operating between fixed termini without an auto transportation certificate under RCW 81.68 on the grounds that the law requires a certificate for transportation of persons for compensation between fixed termini); *Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552 (1972) (a "social club" whose real business was selling tours and air transportation on chartered aircraft was required to have a certificate as an air carrier with the Civil Aeronautics Board).

[7] *See Kitsap Co. Transp. Co., above.*

The Commission's rules for commercial ferries presently include an exemption for certain "excursion" and "charter" services.[8] The statutory basis for these exemptions[9] expired as of 2001 and therefore the exemptions are no longer valid. However, staff would not support the regulation of an entity that offers charter party contracts for vessel and crew on an *ad hoc* (not regular or recurring) basis to individuals or *pre-existing* groups such as a family, a scouttroop, a church group, or the like. Neither would staff advocate for regulation of a true excursion, where the sole objective is sightseeing from the boat rather than transportation between termini. The transportation you propose fits neither of these exceptions, however, because it is clear that the purpose is to transport people to and from Stehekin for the purpose of using the services you offer at that location.

I hope this further explanation is useful to you.

Sincerely,

David W. Danner
Executive Director and Secretary

[8] WAC 480-51-022.

[9] 1995 Washington Laws, ch. 361, Sections 3 and 4. This act made explicit that operators of excursions must obtain a certificate of public convenience and necessity with certain listed exceptions—which are still listed under WAC 480-51-022. The act contained its own repeal or "sunset" date of January 1, 2001.

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 No. _____ **DECLARATION OF MICHAEL E. BINDAS**

STATE OF WASHINGTON) ss
COUNTY OF KING)

I, Michael E. Bindas, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

1. I am a resident of Kirkland in King County, Washington. I am over the age of 18 and make this affidavit based on my personal knowledge of the facts set forth below.

2. I am a senior attorney with the Institute for Justice, which represents James and Clifford Courtney in this matter, as well as in *Courtney v. Danner* (formerly *Courtney v. Goltz*), over which the United States District Court for the Eastern District of Washington is currently retaining jurisdiction.

3. Attached as Exhibit A to this declaration is a true and correct copy of the December 2, 2013, Opinion of the U.S. Court of Appeals for the Ninth Circuit in *Courtney v. Danner*, which I received from the court when the opinion was filed.

4. Attached as Exhibit B to this declaration is a true and correct copy of the U.S. District Court for the Eastern District of Washington's March 13, 2014, Order Retaining Jurisdiction Over Plaintiffs' Second Claim And Staying Case in *Courtney v. Danner*, which I received from the court when the order was filed.

5. Attached as Exhibit C to this declaration is a true and correct copy of the Washington Utilities and Transportation Commission's (WUTC's) January 2010 report titled, "Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan." The report is available on the WUTC's website.

6. Attached as Exhibit D to this declaration is a true and correct copy of a list of navigable water of the United States within the Seattle District of the United States Army Corps of Engineers. I obtained the list form the Corps of Engineers in response to a Freedom of

Information Act request that I submitted to the Corps on April 6, 2011.

7. Attached as Exhibit E to this declaration is a true and correct copy of the U.S. District Court for the Eastern District of Washington's April 17, 2012, Order Granting Motion to Dismiss in *Courtney v. Danner*, which I received from the court when the order was filed.

8. Attached as Exhibit F to this declaration is a true and correct copy of the petition for writ of certiorari that I and my law firm, Institute for Justice, filed in the United States Supreme Court on behalf of James and Clifford Courtney in *Courtney v. Danner*. We filed the petition on March 3, 2014.

9. Attached as Exhibit G to this declaration is a true and correct copy of the United States Supreme Court's order denying a writ of certiorari in *Courtney v. Danner*. I accessed this order from the Westlaw database on September 25, 2014.

10. Attached as Exhibit H to this declaration is a true and correct copy of the Statement Outlining Plaintiffs' Intentions Regarding Pursuit of Their Second Claim that I and my law firm, Institute for Justice, filed in the United States District Court for the Eastern District of Washington on behalf of James and Clifford Courtney in *Courtney v. Danner*. We filed the statement on July 1, 2014.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed in Bellevue, Washington this 30th day of September, 2014

MICHAEL E. BINDAS

EXHIBIT A

FOR

DECLARATION

OF

MICHAEL

BINDAS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES COURTNEY and CLIFFORD COURTNEY, *Plaintiffs-Appellants*, v. JEFFREY GOLTZ, chairman and commissioner; PATRICK OSHIE, commissioner; PHILIP JONES, commissioner, in their official capacities as officers and members of the Washington Utilities and Transportation Commission; DAVID DANNER, in his official capacity as executive director of the Washington Utilities and Transportation Commission, *Defendants-Appellees*.	No. 12-35392 D.C. No. 2:11-cv-00401-TOR OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Thomas O. Rice, District Judge, Presiding

Argued May 6, 2013
Submitted December 2, 2013
Seattle, Washington

Filed December 2, 2013

Before: Michael Daly Hawkins, Sidney R. Thomas, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY*

Civil Rights/Pullman Doctrine

The panel affirmed in part and vacated in part the district court's dismissal of an action in which plaintiffs challenged Washington statutes that require a certificate of "public convenience and necessity" in order to operate a ferry on Lake Chelan in central Washington state.

Plaintiffs first alleged that the state laws abridged their right to use the navigable waters of the United States, in violation of the Privileges or Immunities Clause of the Fourteenth Amendment. The panel held that the Privileges or Immunities Clause of the Fourteenth Amendment does not encompass a right to operate a public ferry on intrastate navigable waterways and affirmed the district court's dismissal of this claim.

Plaintiffs also challenged the certificate requirement as applied to the provision of boat transportation services on Lake Chelan solely for patrons of specific businesses. As to this claim, the panel found that the district court properly abstained from deciding the issue under the doctrine set forth

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), but that the district court should have retained jurisdiction instead of dismissing the claim. Therefore, the panel vacated and remanded the second claim with instructions that the district court retain jurisdiction over the constitutional challenge.

COUNSEL

Michael Eugene Bindas (argued) and Jeanette Motee Petersen, Institute for Justice, Bellevue, Washington, for Plaintiffs-Appellants.

Fronda Colleen Woods (argued), Assistant Attorney General, Office of the Attorney General, Olympia, Washington, for Defendants-Appellees.

David Wiley, Williams Kastner, Seattle, Washington, for Amicus Curiae.

OPINION

NGUYEN, Circuit Judge:

James and Clifford Courtney challenge Washington statutes that require a certificate of "public convenience and necessity" ("PCN") in order to operate a ferry on Lake Chelan in central Washington state. The Courtneys claim that these state laws abridge their right to use the navigable waters of the United States, in violation of the Privileges or Immunities Clause of the Fourteenth Amendment. The

Washington Utilities and Transportation Commission and its various officers and directors (collectively, "WUTC") successfully moved to dismiss the case and this appeal followed.

The Courtneys' first claim for relief challenges the constitutionality of the PCN requirement as applied to the provision of public ferry service on Lake Chelan. We hold that the Privileges or Immunities Clause of the Fourteenth Amendment does not encompass a right to operate a public ferry on intrastate navigable waterways and affirm the district court's dismissal of this claim. The Courtneys' second claim challenges the PCN requirement as applied to the provision of boat transportation services on Lake Chelan solely for patrons of specific businesses. As to this claim, we find that the district court properly abstained from deciding the issue under the *Pullman* doctrine, but that it should have retained jurisdiction instead of dismissing the claim. Therefore, we vacate and remand the second claim with instructions that the district court retain jurisdiction over the constitutional challenge.

BACKGROUND

I

James and Clifford Courtney are fourth-generation residents of Stehekin, a small unincorporated community on the northwest end of Lake Chelan in central Washington state. Lake Chelan is a narrow, fifty-five-mile long lake, which has been designated by the Army Corps of Engineers as a "navigable water of the United States." The northwest portion of Lake Chelan, including Stehekin, is part of the Lake Chelan National Recreation Area. Although it is only

accessible by boat, plane, or foot, Stehekin has long been a summer destination for tourists. *See* WUTC, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan* 3–4 (2010), *available at* http://www.wutc.wa.gov/webimage.nsf/0/d068a7290f85512a882576ac007e2d73/ ("Ferry Report"). The Courtneys and their siblings own and operate several businesses in Stehekin, which provide lodging and recreational activities such as white water rafting tours and horseback riding.

Most tourists and residents reach Stehekin by way of a public ferry operated by the Lake Chelan Boat Company. The state has regulated ferry service on Lake Chelan since 1911. By the 1920s, there were at least four different ferry companies offering services on Lake Chelan. Then, in 1927, the Washington legislature enacted a law that conditioned the right to operate a ferry service upon certification that such service was required by "public convenience and necessity."[1]

[1] The Courtneys cite a 1927 *Seattle Daily Times* article in support of their argument that the legislature's goal in passing the PCN requirement was to protect existing ferry owners from competition, and have asked that we take judicial notice of this article. Because we do not rely upon the article, we deny the motion.

The Ferry Report describes the rationale for the regulation as follows: for certain industries that "typically have very high capital costs, benefit from economies of scale, and provide an indispensable service to the public[,] . . . the legislature has made a judgment that the public's interest in reliable and affordable service is best served by a single, economically regulated provider whose owners can make the sizeable investments needed to initiate and maintain service without the threat of having customers drawn away by a competing provider." Ferry Report 11.

II

A

In its current form, Washington Revenue Code § 81.84.010 dictates that a "commercial ferry may not operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within [Washington] . . . without first applying for and obtaining from the [WUTC] a certificate declaring that public convenience and necessity require such operation." Wash. Rev. Code § 81.84.010(1). In order to obtain a PCN certificate, a potential ferry operator must prove that its proposed operation is required by "public convenience and necessity," and that it "has the financial resources to operate the proposed service for at least twelve months." *Id.* § 81.84.020(1)–(2). If the territory in which the applicant desires to set up operation is already served by a commercial ferry company, no PCN certificate may be granted unless the applicant proves that the existing certificate holder: "[(a)] has failed or refused to furnish reasonable and adequate service[; (b)] has failed to provide the service described in its certificate or tariffs after the time allowed to initiate service has elapsed[;] or [(c)] has not objected to the issuance of the certificate as prayed for." *Id.* § 81.84.020(1).

B

Since the statute's enactment, only one PCN certificate has been issued for providing ferry services on Lake Chelan. It is now held by Lake Chelan Recreation, Inc. d/b/a Lake

Chelan Boat Company.[2] In 1997, James Courtney applied for a PCN certificate to operate a commercial ferry out of Stehekin. The Lake Chelan Boat Company objected, and the WUTC denied Courtney's application, finding that the Lake Chelan Boat Company provided "reasonable and adequate service," the proposed service might "tak[e] business from" the company, and Courtney failed to satisfy the financial responsibility requirement. Courtney did not seek judicial review of the WUTC's decision. *See* Wash. Rev. Code §§ 34.05.570, 34.05.574.

In 2006, James Courtney explored the possibility of starting an on-call boat service out of Stehekin, which he thought might fall within the "charter service" exemption to the PCN requirement. Because the proposed service would need to utilize federally owned docks, Courtney applied to the United States Forest Service for a special-use permit, which required confirmation that the proposed service was actually exempt from the PCN requirement. The WUTC initially opined that a PCN certificate would not be needed for the proposed on-call boat service, but changed its mind after the Lake Chelan Boat Company objected to the proposal. Several months later, the WUTC again reversed course, indicating that the proposed service would be exempt from the PCN requirement. However, no formal decision was ever rendered. WUTC's executive director, David Danner, did not respond to the Forest Service's request for an advisory opinion on this issue.

[2] At least four potential ferry operators have applied for a PCN certificate over the last sixty years, but all were denied by the WUTC after Lake Chelan Boat Company objected to the applications.

In 2008, Clifford Courtney wrote to David Danner, inquiring whether various other kinds of boat transportation services (distinct from the proposed on-call service) would require a PCN certificate. The suggested services included (a) one in which Clifford would charter a boat and offer transportation as part of a package for guests who intended to stay at his ranch and go river rafting, and (b) a scenario in which he would purchase his own vessel in order to transport patrons of his various Stehekin-based businesses. Danner responded that such services would require a certificate because they would still be "for the public use for hire," and that it "[did] not matter whether the transportation [Clifford] would provide [was] 'incidental to'" other businesses. However, Danner noted that his response merely reflected the opinion of the WUTC staff and Courtney was free to pursue a formal declaratory ruling by the commissioners provided that "the existing certificate holder . . . agree[d] to participate" in the proceeding. Were Courtney simply to proceed with the proposed service, the WUTC could initiate a "classification proceeding," during which Clifford would be required to testify and prove that his activities did not require a PCN certificate. The WUTC also orally confirmed to Courtney that his proposed services would likely require a PCN certificate.

C

In 2009, after Clifford Courtney wrote to the governor and several state legislators regarding the PCN requirement, the legislature directed the WUTC to conduct a study on the regulation of commercial ferry services on Lake Chelan. The report by the WUTC, which issued in January 2010, concluded that Lake Chelan Boat Company was providing satisfactory service and recommended that there be no change

to the existing laws and regulations. The WUTC noted that there might be flexibility under the existing law to permit some competition by exempting certain services from the PCN certificate requirement, provided that any such service would not "significantly threaten" the existing certificate holder's business.

D

In October 2011, the Courtneys sued the WUTC and various commissioners and directors in their official capacities, seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. The Courtneys claimed that the PCN requirement abridges their right to use the navigable waters of the United States under the Privileges or Immunities Clause of the Fourteenth Amendment, and is therefore unconstitutional.

The WUTC moved to dismiss the Courtneys' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court granted the motion. The district court dismissed the Courtneys' first claim—challenging the constitutionality of the PCN requirement as applied to the provision of public ferry service on Lake Chelan—with prejudice. The district court concluded that it was unclear that the "right to use the navigable waters of the United States" was "truly a *recognized* Fourteenth Amendment right," and that even if it was, it did not extend to protect the right "to operate a ferry service open to the public." The district court dismissed the Courtneys' second claim—challenging the constitutionality of the PCN requirement as applied to provision of boat transportation services on Lake Chelan solely for patrons of specific businesses—without prejudice. As to the second claim, the court held that the Courtneys lacked standing; their

claim was unripe; and, notwithstanding its ripeness finding, the court would abstain pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

DISCUSSION

I

To state a claim for relief under 42 U.S.C. § 1983, the Courtneys must allege facts that, if true, constitute a violation of a right guaranteed by the United States Constitution. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Their claim for declaratory relief under 28 U.S.C. § 2201 similarly requires that the Courtneys allege facts that, if true, would violate federal law. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950).

"We review *de novo* a district court's dismissal for failure to state a claim under Federal [Rule of] Civil [Procedure] 12(b)(6)." *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011). In doing so, we take all factual allegations in the complaint as true and construe them in the light most favorable to the Courtneys. *See id.*

II

A

The Courtneys argue that the district court erred in dismissing their first claim relating to the provision of public ferry service because the Privileges or Immunities Clause of the Fourteenth Amendment protects the right "to use the

navigable waters of the United States."[3] We agree with the district court that even if the Privileges or Immunities Clause recognizes a federal right "to use the navigable waters of the United States," the right does not extend to protect the Courtneys' use of Lake Chelan to operate a commercial public ferry.

In its seminal decision interpreting the Privileges or Immunities Clause of the Fourteenth Amendment—the *Slaughter-House Cases*, 83 U.S. 36 (1872)—the Supreme Court upheld a Louisiana statute that granted a private company the exclusive right to operate a slaughter-house on the Mississippi River. *Id.* at 58–61, 83. In doing so, the Court distinguished between rights that accompany state citizenship and those that exist by virtue of United States citizenship. *Id.* at 72–77. The Court explained that the Fourteenth Amendment protects "the privileges or immunities of citizens of *the United States*," which are distinct from those that exist by virtue of *state* citizenship. *Id.* at 73–74 (emphasis in original).

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[3] Section I of the Fourteenth Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*; nor shall any state deprive any person of liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis added).

The "privileges *and* immunities" referred to in Article IV are conferred by *state* citizenship and consist of those rights "which are *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign." *Id.* at 76 (first emphasis added, second emphasis in original). They fall under "the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." *Id.* (internal quotation marks omitted).

By contrast, the "privileges *or* immunities" discussed in the Fourteenth Amendment consist of rights "which ow[e] their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79 (emphasis added). In analyzing the legislative history of the Thirteenth and Fourteenth Amendments, the Court noted that "the one pervading purpose" of the amendments was to ensure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.* at 71.

B

The Supreme Court in the *Slaughter-House Cases* ultimately concluded that the rights asserted by the butchers were rights "which belong to citizens of the States as such," and therefore the Court did not need to "defin[e] the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those

privileges [made] it necessary to do so." *Id.* at 78–79. However, the Court suggested some examples of inherently federal privileges, such as the right "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas . . .[,] [t]he right to peaceably assemble and petition for redress of grievances, . . . [and t]he *right to use the navigable waters of the United States*, however they may penetrate the territory of the several States." *Id.* at 79 (emphasis added).

The Courtneys' case is predicated entirely on the Supreme Court's passing reference to a "right to use the navigable waters of the United States"—a phrase that has yet to be interpreted by a single federal appellate court in the privileges or immunities context. As such, the boundaries of the term "use" have not been established. Still, we are not faced with an entirely blank slate. The historical backdrop upon which the Supreme Court enunciated the navigable waterway right strongly suggests that the Court did not intend a panoptic definition of the term. Moreover, our Privileges or Immunities Clause jurisprudence does not support an interpretation that would foreclose states from regulating public transportation upon their intrastate navigable waterways. Thus, even if we assume that the examples of rights deriving from national citizenship set forth by the Supreme Court in the *Slaughter-House Cases* are not mere dicta, we nevertheless find that the right "to use the navigable waters of the United States" does not include a right to operate a public ferry on Lake Chelan.

Turning to the historical context, Article 4 of the Northwest Ordinance of 1787 established navigable waters within newly federal territory as "common highways" that would be "forever free," even in the event portions of the

Northwest Territory were incorporated into newly formed States. Ordinance of 1787 art. IV; *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 118–19 (1921) ("The public interest in navigable streams . . . does not arise from custom or implication, but has a very definite origin[;] [b]y article 4 of the compact in the Ordinance of July 13, 1787 . . . it was declared: 'The navigable waters . . . shall be common highways, and forever free . . . as to the citizens of the United States . . . .'").

Cases interpreting the language in the Northwest Ordinance emphasize the states' responsibility to avoid destroying navigable waters or rendering them *unnavigable*.[4] The Supreme Court has explicitly held that the Ordinance did

[4] *See, e.g.*, *Ill. River Packet Co. v. Peoria Bridge Ass'n*, 38 Ill. 467, 479 (1865) ("The ordinance does not mean that the river and its navigation shall be . . . free from all and every condition, but only that it shall be free from obstruction . . . ."); *Nedtweg v. Wallace*, 237 Mich. 14, 20 (1926) ("[T]he [1787] ordinance accomplished no more than to preserve the rivers and lakes as common highways and in no sense prevents the state from granting the soil under navigable waters to private owners. The state is sovereign of the navigable waters within its boundaries, bound, however, in trust, to do nothing in hindrance of the public right of navigation, hunting, and fishing." (citation omitted)); *Sewers v. Hacklander*, 219 Mich. 143, 150 (1922) (holding that Article 4 of the Northwest Ordinance has "no bearing upon riparian rights and ownership, except [if] there is an interference with navigation"); *Hogg v. Zanesville Canal & Mfg. Co.*, 5 Ohio 410, 416 (1832) ("Every citizen of the United States has a perfect right to its free navigation. A right derived, not from the legislature of Ohio, but from a superior source. With this right the legislature can not interfere. In other words, they can not, by any law which they may pass, impede or obstruct the navigation of this river."); *Spooner v. McConnell*, 22 F. Cas. 939, 945 (Ohio C.C. 1838) ("[T]he legislature may improve . . . the navigable rivers of the state, and authorize the construction of any works on them which shall not materially obstruct their navigableness.").

not prevent states from granting exclusive ferry franchises, so long as such franchises did not encroach on the federal commerce power. *See Fanning v. Gregoire*, 16 How. (U.S.) 524, 534 (1853) (holding that "the free navigation of the Mississippi river . . . does not . . . interfere with the police power of the States, in granting ferry licenses"); *Conway v. Taylor*, 66 U.S. 603, 635 (1861) (noting that "[since] before the Constitution had its birth, the States have exercised the power to establish and regulate ferries," not Congress, and that "the authority [to do so] lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the States respectively[]'").

In light of the foregoing, a reasonable interpretation of the right to "use the navigable waters of the United States," and the one we adopt, is that it is a right to *navigate* the navigable waters of the United States. Here, it is clear that the Courtneys wish to do more than simply navigate the waters of Lake Chelan. Indeed, they are not restrained from doing so in a general sense. Rather, they claim the right to utilize those waters for a very specific professional venture. While navigation of Lake Chelan is a necessary component of the Courtneys' proposed activity, it is neither sufficient to achieve their purpose nor the cause of their dissatisfaction. The Supreme Court in the *Slaughter-House Cases* declined to define the plaintiffs' asserted rights broadly, finding that the statute did not prohibit the butchering of animals in general because it was specifically "the slaughter-house privilege, which [was] mainly relied on to justify the charges of gross injustice to the public, and invasion of private right." *Slaughter-House Cases*, 83 U.S. at 61. Similarly here, the district court correctly identified the actual privilege at stake as a ferry operation privilege, not a broad navigation privilege. Were navigation all the Courtneys wished to do,

they would not need the WUTC's permission and this dispute would never have arisen. We find it exceedingly unlikely that the Supreme Court in the *Slaughter-House Cases* contemplated operation of a public ferry as part of the right "to use the navigable waters of the United States," so as to divest the states of their historic authority to regulate public transportation on intrastate navigable waterways.

Indeed, the *Slaughter-House* decision, itself, contains suggestions that contradict such an understanding. In discussing the nature of the states' police power, the majority noted that, with respect to "laws for regulating the internal commerce of a State, and those which respect . . . ferries . . . [, n]o direct general power . . . is granted to Congress; and consequently they remain subject to State legislation." *Id*. at 63 (quoting *Gibbons v. Ogden*, 22 U.S. (Wheaton) 1, 203 (1824)) (internal quotation marks omitted). Moreover, while the dissenting minority disagreed with the majority's acceptance of a slaughter-house monopoly, it seemed to approve of ferry franchises, stating that

> [i]t is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent . . . upon particular individuals or corporations, it may of course stipulate for such exclusive privileges . . . as it may deem proper, without encroaching upon the freedom or the just rights of others.

Id. at 88 (Field, J., dissenting).

Further, the driving force behind this litigation is the Courtneys' desire to operate a particular business using Lake Chelan's navigable waters—an activity driven by economic concerns. We have narrowly construed the rights incident to United States citizenship enunciated in the *Slaughter-House Cases*, particularly with respect to regulation of intrastate economic activities. *See, e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 983–84 (9th Cir. 2008).[5]

C

Finally, although the *Slaughter-House* Court acknowledged that "the right to engage in one's profession of choice" was a "fundamental" privilege belonging to "citizens of all free governments," it "made it very clear" that such a right "[was] *not* protected by the Privileges or Immunities Clause if [it was] not of a 'federal' character." *Id*. at 983 (emphasis added) (citations omitted). Operation of a ferry service is not inherently "federal" in character. To the contrary, the regulation of ferry operation has traditionally been the prerogative of state and local authorities. *See, e.g.*, *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 215–17

[5] In *Merrifield*, we upheld a pest-control licensing requirement under the Privileges or Immunities Clause, despite the appellant's contention that the license requirement "infringe[d] on his right to practice his chosen profession." 547 F.3d at 983. We noted that the Supreme Court's decision in *Saenz v. Roe*, 526 U.S. 489 (1999), "represents the Court's only decision qualifying the bar on Privileges or Immunities claims against 'the power of the State governments over the rights of [their] own citizens,'" *id*. at 983 (quoting *Slaughter-House Cases*, 83 U.S. at 77); that "[*Saenz*] was limited to the right to travel[,]" *id.* at 984; and that "[t]he Court has not found other economic rights protected by [the Privileges or Immunities C]lause," *id.* We have made clear that this "limitation on the Privileges or Immunities Clause" remains in effect. *See id.*

(1885) (recognizing that "[t]he power of the states to regulate matters of internal police includes the establishment of ferries" so long as regulations do not burden interstate commerce); *Can. Pac. Ry. Co. v. United States*, 73 F.2d 831, 833 (9th Cir. 1934) (explaining that "[a]t common law a franchise was necessary to the creation of a ferry and . . . an integral part of the definition"); *Kitsap Cnty. Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n*, 30 P.2d 233, 234–35, 237 (Wash. 1934) (finding a state PCN requirement to be within the state's police power in order to serve "the best interests of the traveling public at large").

In this case, the state of Washington has a vital interest in regulating traffic on its navigable waterways. As the WUTC noted in its Ferry Report, "[t]he combination of statutory protection from competition, on the one hand, and stringent regulation of rates and terms of service, on the other, has historically been adopted for industries believed to have characteristics of a 'natural monopoly.'" Ferry Report 11 (citing Charles F. Phillips, Jr., *The Regulation of Public Utilities* 49–73 (3d ed. 1993)). The PCN requirement creates precisely the kind of ferry franchise that has existed with approval since before the *Slaughter-House Cases* were decided. *See, e.g.*, *Conway*, 66 U.S. at 633–35.

The Courtneys contend that ferry operation on Lake Chelan is "nationalized" because of the "national character of the forum in which such a ferry operates," and that Lake Chelan is "uniquely federal" due to its incorporation into "the federal Lake Chelan National Recreation Area." However, the Courtneys provide no actual authority for the proposition that the Lake Chelan National Recreation Area renders unconstitutional state regulation of ferry service on wholly intrastate waterways. The Lake Chelan National Recreation

Area does not appear to contemplate preemption of state ferry regulations, and the federal government has in the past refrained from exercising exclusive jurisdiction over its National Recreation Areas. *See* 16 U.S.C. § 90a-1; *see also Silas Mason Co. v. Tax Comm'n of Wash.*, 302 U.S. 186, 244 (1937) (finding that "the evidence is clear that the Federal Government contemplated the continued existence of state jurisdiction consistent with federal functions" with respect to the federal Grand Coulee Dam site in Lake Roosevelt); 36 C.F.R. § 7.55 (setting forth regulations for Lake Roosevelt as a National Recreation Area).

D

At the end of the day, the state legislation the Courtneys challenge is narrow in scope, merely restricting the operation of commercial public ferries to those who obtain a PCN certificate. The PCN requirement does not constrain the Courtneys from traversing Lake Chelan in a private boat for private purposes. *See* Wash. Rev. Code § 81.84.010(1) (restricting ferry operation "for the public use for hire"). Nor does it affect their ability to operate a commercial freight transportation service. *See id.* For that matter, the Courtneys are free to operate a commercial ferry service so long as they apply for and obtain a PCN certificate. *See id.* Although the Courtneys have apparently found the PCN requirement to be a difficult hurdle to surmount, "the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity." *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 520–21 (1885). Because we hold that the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan, we affirm the district court's dismissal of the Courtneys' first claim for relief.

III

The district court declined to express an opinion as to whether the right to use the navigable waters of the United States covers the use of such waters for private boat services for patrons of specific businesses or groups of businesses. Instead, it found that the Courtneys lacked standing, the claim was unripe, and the issue was appropriate for abstention under the doctrine enunciated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). We disagree as to standing[6] and need not reach the ripeness issue because we find that the district court did not abuse its discretion in abstaining from considering the claim under the *Pullman* doctrine. However, we conclude that the district court should have retained jurisdiction over the Courtneys' case and vacate and remand with instructions that it do so.

The *Pullman* doctrine is "based on the avoidance of needless friction between federal pronouncements and state policies." *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970) (internal quotation marks omitted). It vests federal courts with discretion[7] to abstain from adjudicating disputes that hinge on

[6] Although a close question, the threat of a classification proceeding, Washington Supreme Court precedent, and the economic loss the Courtneys have already suffered from having to refrain from purchasing a vessel for which they had negotiated favorable terms make their fear of enforcement and injury sufficiently actual to confer standing here.

[7] The district court incorrectly stated that a federal court "must abstain" from considering a federal constitutional question if the *Pullman* requirements are satisfied. To the contrary, its ultimate decision to abstain is discretionary under such circumstances. *See Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 889 (9th Cir. 2011) ("*Pullman* is a discretionary doctrine that flows from the court's equity powers.").

significant and unsettled questions of state law. *See Pullman*, 312 U.S. at 499–500.

Abstention under *Pullman* is an appropriate course where

> (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the possible determinative issue of state law is uncertain.

Confederated Salish v. Simonich, 29 F.3d 1398, 1407 (9th Cir. 1994). The court "has no discretion to abstain in cases that do not meet the requirements." *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 939 (9th Cir. 2002).

A

The array of cases dealing with waterways and water-based transportation in Washington state suggests that regulation of water traffic is indeed a sensitive issue of social policy in Washington. *See Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1094 (9th Cir. 1976) (pointing to the "array of state constitutional provisions and statutes" involving land use planning as evidence that it is "a sensitive area of social policy" in California). Given the ubiquity of waterways in Washington, and the unique importance of water navigation in the Lake Chelan area specifically, it follows that regulation of water routes and resources in the area would be of great concern to the state. *See Reetz*, 397 U.S. at 87 (noting that "fish resources" was

"an asset unique in its abundance in Alaska," and that "the management [of fish resources was] a matter of great state concern").

B

In addition, "[a] state court decision . . . could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." *Id.* at 86–87. If, for example, the WUTC issues a declaratory order that the "charter" boat service proposed by the Courtneys is not "for the public use for hire," within the meaning of Washington Revised Code § 81.84.010(1), the PCN requirement would not apply to them and the claim would be rendered moot. The Courtneys have challenged the state statutory scheme *as applied* to their proposed transportation services. A decision by the WUTC that the Courtneys do *not* need a PCN certificate to operate their proposed services would obviate the need for this constitutional challenge.

Moreover, even if the WUTC concludes that the PCN requirement applies to the Courtneys' proposed services, a contrary ruling by the Washington Supreme Court could also potentially render their constitutional challenge unnecessary. *See England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 424 (1964) (Douglas, J., concurring) ("Where state administrative action is challenged, a federal court will normally not intervene where there is an adequate state court review which is protective of any federal constitutional claim.").

C

Finally, as discussed above, it is not clear whether the PCN requirement applies to the private boat transportation services the Courtneys wish to provide. An issue of state law is "uncertain" if "a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." *Pearl Inv. Co. v. City and Cnty. of S.F.*, 774 F.2d 1460, 1465 (9th Cir. 1985).

The PCN requirement in Washington Revised Code § 81.84.010 only applies to vessels or ferries "for the public use for hire." That phrase has yet to be applied in a formal agency opinion or by any state court to the services the Courtneys propose. The WUTC's 2010 Ferry Report indicated that it "might reasonably conclude that a boat service offered on Lake Chelan (and elsewhere) in conjunction with lodging at a particular hotel or resort, and which is not otherwise open to the public, does not require a certificate under [Washington Revised Code § 81.84.010]," but also that "the commission could . . . decide not to adopt that interpretation." Ferry Report 15. Notwithstanding allegations in the Courtneys' complaint that suggest the WUTC would hold them subject to the PCN requirement, it remains unclear how the Washington Supreme Court would interpret the statutory provision at issue with respect to the Courtneys' proposed services.[8]

[8] The Washington Supreme Court's decision in *Kitsap* dealt with a private club that initiated a boat transportation service reserved for its members and their guests only. 30 P.2d at 235. The court concluded that the service was still considered a "common carrier" and was subject to the PCN requirement. *Id.* In doing so, the court emphasized that the "club boat" was, in practice, essentially a competing public ferry service. *Id.* at 236. *Kitsap* is the only Washington case to have disapproved of a "private

D

In light of the foregoing, the district court did not abuse its discretion in abstaining from adjudication of the Courtneys' second claim for relief. Nevertheless, the district court should have retained jurisdiction over the case pending resolution of the state law issues, rather than dismissing the case without prejudice. We have generally considered dismissal inappropriate following *Pullman* abstention. *See Fireman's Fund Ins. Co.*, 302 F.3d at 940 ("If a court invokes *Pullman* abstention, it should stay the federal constitutional question until the matter has been sent to state court for a determination of the uncertain state law issue." (internal quotation marks and citation omitted)); *Columbia Basin Apt. Ass'n v. City of Pasco*, 268 F.3d 791, 802 (9th Cir. 2001) (same); *Int'l Bhd. of Elec. Workers, Loc. Union No. 1245 v. Pub. Serv. Comm'n of Nev.*, 614 F.2d 206, 213 (9th Cir. 1980) (finding dismissal following *Pullman* abstention improper pending Nevada courts' resolution of state issues); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir. 1979) ("If the court abstains under *Pullman*, retention of jurisdiction, and not dismissal of the action, is the proper course.").

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charter" service, and the WUTC recognized that "a boat service offered . . . in conjunction with lodging at a particular hotel or resort, and which is not otherwise open to the public, [might] not require a certificate." Ferry Report 15. The "shuttle" and "charter" services proposed by the Courtneys would be appurtenant to their Stehekin-based businesses and presumably be operated solely for patrons of these businesses. However, the Courtneys' complaint does not provide specific details regarding their proposed boat services, and it is therefore difficult to compare those services to the "club boat" scenario. Thus, the *Kitsap* case does not help us predict with any confidence how the Washington Supreme Court would rule on this issue.

The Supreme Court has found dismissal without prejudice following *Pullman* abstention to be appropriate where Texas law precluded a grant of state declaratory relief if a federal court retained jurisdiction. *See Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 88 n.14 (1975). The same does not appear to be true, however, in Washington. *See Rancho Palos Verdes Corp.*, 547 F.2d at 1096 (distinguishing California law from Texas law and the *Harris* decision in holding that the district court should have retained jurisdiction following *Pullman* abstention); *Brown v. Vail*, 623 F. Supp. 2d 1241, 1247 (W.D. Wash. 2009) (retaining jurisdiction following exercise of *Pullman* abstention, citing, *inter alia*, *Columbia Basin*, 268 F.3d at 802).

Despite its proper invocation of the *Pullman* doctrine, the district court erred in dismissing the Courtneys' second claim. Therefore, we vacate and remand the Courtneys' second claim with directions that the district court enter an order retaining jurisdiction over the constitutional claim. *See Isthmus Landowners Ass'n, Inc. v. California*, 601 F.2d 1087, 1090–91 (9th Cir. 1979) (finding failure to retain jurisdiction after *Pullman* abstention to be reversible error).

CONCLUSION

The district court's dismissal of the Courtneys' first claim for relief is **AFFIRMED**. The dismissal of their second claim for relief is **AFFIRMED** in part, **VACATED** in part, and **REMANDED** with instructions that the district court retain jurisdiction over the constitutional question.

The parties shall bear their own costs of appeal.

EXHIBIT B

FOR

DECLARATION

OF

MICHAEL

BINDAS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JAMES COURTNEY and CLIFFORD COURTNEY, Plaintiffs, v. JEFFREY GOLTZ, et al., Defendants.	NO: 11-CV-0401-TOR ORDER RETAINING JURISDICTION OVER PLAINTIFFS' SECOND CLAIM AND STAYING CASE

On December 26, 2013, the Ninth Circuit Court of Appeals remanded this case to this Court with instructions to retain jurisdiction over Defendants' second constitutional claim pending an authoritative construction of the phrase "for the public use for hire" by the WUTC or the Washington state courts. ECF Nos. 35, 36. The Court subsequently asked the parties to submit a statement explaining their respective positions on whether the case should be stayed pending action by the WUTC or a Washington state court. ECF No. 37.

The parties agree that a stay is appropriate, but disagree about the terms upon which a stay should be entered. Defendants have asked the Court to direct Plaintiffs to initiate proceedings before the WUTC or in state court within sixty (60) days of the United States Supreme Court either denying Plaintiffs' petition for a writ of certiorari or accepting certiorari and deciding the appeal on the merits. ECF No. 38. Plaintiffs object to the imposition of a deadline to initiate other proceedings, and submit that they should simply be required to file a statement outlining their intentions within thirty (30) days of any final decision by the Supreme Court. ECF No. 39.

The Court hereby orders Plaintiffs to submit a statement outlining their intentions with regard to initiating proceedings before the WUTC and/or in state court within thirty (30) days of any final disposition of their petition for a writ of certiorari by the United States Supreme Court. This statement shall include an anticipated timetable for (1) the filing of any other action(s); and (2) the resolution of those proceedings. If necessary, the Court will enter an order modifying the terms of the stay at that time.

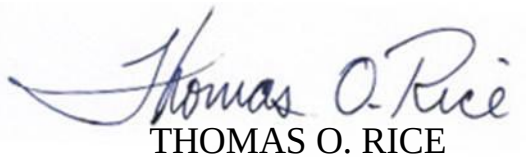
IT IS HEREBY ORDERED:

1. The Court retains jurisdiction over Plaintiffs' second constitutional claim pending an authoritative construction of the phrase "for the public use for hire" by the WUTC or the Washington state courts.

2. This case is hereby **STAYED** pending a final disposition of Plaintiffs' petition for a writ of certiorari by the United States Supreme Court. Plaintiffs shall submit a statement outlining their intentions with regard to initiating proceedings before the WUTC and/or in state court within **thirty (30) days** of any such disposition. This statement shall include an anticipated timetable for (1) the filing of any other action(s); and (2) the resolution of those proceedings.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

DATED March 13, 2014.



THOMAS O. RICE
United States District Judge

EXHIBIT C

FOR

DECLARATION

OF

MICHAEL

BINDAS

WASHINGTON UTC UTILITIES AND TRANSPORTATION COMMISSION

Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan

Report to the Legislature
Pursuant to ESB 5894

January 14, 2010

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The commissioners want to acknowledge the work of UTC staff members David Gomez and John Cupp for their work in preparing and drafting this report. Mr. Gomez served as overall coordinator of the report. Mr. Cupp coordinated public involvement, including public meetings in Stehekin and Chelan. The commissioners also want to thank Assistant Attorney General Jon Thompson, who provided legal advice and prepared a draft section addressing UTC jurisdiction, and Mary Lu White of the Washington State Library, who provided research on the history of commercial ferry service on Lake Chelan and prepared the draft of that section for the report.

Thank you also to Senator Linda Evans Parlette, Representative Mike Armstrong, and Washington State Transportation Commissioner Elmira Forner for attending and helping focus the discussion at the public meeting in Chelan, and for their continued interest in the work of the UTC. The views expressed in this report are not necessarily theirs.

I. INTRODUCTION

In 2009, the Legislature required the Utilities and Transportation Commission (UTC or Commission) to conduct a study of the existing state of commercial ferry regulation on Lake Chelan. Specifically, the Legislature stated: "Within its existing resources, the utilities and transportation commission shall study the appropriateness of rate and service regulation of commercial ferries operating on Lake Chelan. The commission shall report its findings and recommendations to the legislature by December 31, 2009." (Chapter 557, Laws of 2009, §6 Chapter 557, Laws of 2009 (ESB 5894)). This report contains the Commission's findings and recommendations, as directed by the Legislature.

In preparing this report, the Commission:

- Reviewed, by reference to historical documents, the history of regulation of ferry service on Lake Chelan;
- Reviewed the current legal framework for Commission jurisdiction over ferry service on Lake Chelan, including options for the Commission under existing law;
- Reviewed the current tariff and operations of the Lake Chelan Boat Company, the current operator of ferry service on Lake Chelan;
- Conducted two public meetings to receive the views of people in the Stehekin and Lake Chelan communities on the issues relating to rate and service regulation of commercial ferry operation on Lake Chelan;
- Solicited and reviewed written comments from the public, both by letter and by electronic mail, relating to rate and service regulation of commercial ferry operations on Lake Chelan;
- Reviewed recent correspondence between Stehekin residents and the Commission regarding ferry service and proposing a competing service; and
- Conducted interviews or otherwise solicited information from various stakeholders, including Lake Chelan Boat Company and various users of the ferry service.

This report first reviews the history of regulation of commercial ferry service on Lake Chelan and the legal framework within which such regulation takes place. It then summarizes findings relating to the current service, the views of stakeholders, and possible alternatives to the existing service. Finally, it provides the Commission's recommendations.

II. HISTORY OF REGULATION OF FERRY SERVICE ON LAKE CHELAN – A CHRONOLOGY

Lake Chelan is a long and comparatively narrow lake in Chelan County, Washington, located between mountain ranges amid beautiful scenery and idyllic surroundings. The unincorporated community of Stehekin, located on the northern end of the lake, is home to about 75 year-round

residents, and, for more than 100 years, has been a popular summer resort for Washington residents as well as tourists from outside the state. Holden Village is a community of similar size located 12 miles from Lucerne, a boat landing on the lake's eastern shore.

From the earliest days, there have been passenger ferries on Lake Chelan, operating between the city of Chelan, Washington, and Stehekin and Lucerne, and there have been numerous controversies about whether there should be competitive ferry service on the lake. This brief history is derived from the official reports of the UTC or its predecessor agencies.

1911 to 1929

Regulation of passenger and freight ferry operations on Lake Chelan began in 1911, the year the Legislature created the Public Service Commission of Washington (replacing the Railroad Commission of Washington).

In Chapter 117, Laws of 1911, the Legislature defined both passenger and freight steamboat operations for hire as common carriers. The legislation:

- Required that "all charges made for any service rendered or to be rendered in the transportation of persons or property shall be just, fair, reasonable and sufficient";
- Required ferries to "construct, furnish, maintain and provide safe, adequate and sufficient service facilities to enable them to promptly, expeditiously, safely and properly receive, transport and deliver all persons and property"; and
- Charged the new Public Service Commission to adopt rules and enforce the requirements of the statute.

The annual reports reveal some details about early passenger and freight steamboat companies operating on Lake Chelan.

In the early years after the 1911 legislation, the only carrier operating on Lake Chelan appeared to be the Columbia & Okanogan Steamboat Company, based in Wenatchee.[1] On September 30, 1912, the Public Service Commission ordered that company "to make Chelan Landing a regular scheduled landing point for passengers and freight from and after October 1, 1912."[2] By 1914, another company was operating on the Lake, the Lake Chelan Transportation Company.[3] The following year, the Commission reports note the first appearance of a Lake Chelan Boat Company, based in Chelan, though the Columbia & Okanogan Steamship Company was no longer mentioned.[4]

According to Commission records, by 1921 a controversy arose among competitors for ferry traffic on Lake Chelan. Four companies, the Lake Chelan Boat Company, Lake Chelan Freight Company, Perry Boat Company, and Mohawk Boat Company, all reported as regulated

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[1] *See Third Annual Report of the Public Service Commission of Washington 204-211* (1913).

[2] *Second Annual Report of the Public Service Commission of Washington* 98 (1912).

[3] *Fourth Annual Report of the Public Service Commission of Washington 325* (1914).

[4] *Fifth Annual Report of the Public Service Commission of Washington 254* (1916).

companies. Only one, the Lake Chelan Boat Company, had been operating (since 1918) year-round service. The others provided service only in the more remunerative summer months. In Docket No. 5254, the Department of Public Works (the latest incarnation of the Commission) commenced a proceeding naming all four boat companies as parties. The Lake Chelan Boat Company challenged the reduced summer rates of the other three boat companies, and the Commission found that reductions would result in rates that were "unjust, unfair, unreasonable, and unremunerative."[5] In its opinion in this case, the Department summarized its analysis of the economics of ferry service on Lake Chelan:

> The question was asked by some of the witnesses at this hearing and by counsel for the Perry Boat Company and the Mohawk Boat Company, "Why should the Department of Public Works refuse to permit these reductions: why should not the patrons of these companies be permitted to secure service as cheaply as possible?" This department has often been confronted by situations similar to that existing on Lake Chelan. Boat traffic in almost every part of the State of Washington is largely seasonal. A very large proportion of the traffic occurs during the summer months for the benefit of campers and tourists who desire to visit various points of interest and who ride the boats for the mere pleasure which it affords. There is a certain amount of traffic, however, which must be cared for by some carrier during the winter months and after the tourist and camping travel has ceased. If we were to permit companies to come upon the routes of the boat lines who furnish year-round service and skim off the cream of the business during the summer months when the traffic is heavy and the operation of the boats cheap and pleasant, it would result in bankrupting the boat lines that assume the duty of furnishing an all-year-round service. The testimony in this case was uniformly to the effect that the Lake Chelan Boat Company had furnished good, dependable and continuous service. Their boats are swift, and well adapted to the carrying of passengers. Their treatment of their patrons has been courteous and they have furnished an all-the-year-round service regardless of unfavorable conditions of weather and scarcity of traffic. If we were to permit a summer rate war at unremunerative rates it would in all probability result in bankruptcy to the boat lines, or at least a substantial deterioration in service and equipment, and the farmers and other residents residing along the shores of Lake Chelan would soon find themselves without a regular or dependable service of any character. While some of them seem to desire the lower passenger fare, yet when they consider that it might result in ultimately depriving them of an all-the-year-round service, we feel they will realize that the refusal of this department to permit rate cutting during the summer months is to their interest.[6]

In 1927, the Legislature revised the public service laws relating to ferry service, requiring ferry companies to seek from the Department of Public Works a certificate declaring that "public convenience and necessity" required their service.[7] The new law grandfathered existing companies by requiring that a certificate be granted if the company "was actually operating in

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[5] *First Annual Report of the Department of Public Works of Washington* 216 (1921) (containing copy of order in Docket No. 5254).

[6] *Id.*

[7] Chapter 248, Laws of 1927.

good faith over the route for which such certificate [was] sought" as of January 15, 1927. However, the law provided that in the event two or more steamboat companies were operating on that date, the Department must "determine after public hearing whether one or more certificates shall issue." In making that determination the Department was directed to "consider all material facts and circumstances including the prior operation, schedules and services rendered by either of said companies, and in case more than one certificate shall issue, the department shall fix and determine the schedules and services of the companies to whom such certificates are issued to the end that duplication of service be eliminated and public convenience furthered."[8]

The Department's 1927 annual report lists Lake Chelan Boat Company among its regulated companies, with a footnote indicating that this company "ceased operations in 1927," so it is not included in the report's list of certified passenger and ferry steamboat companies. However, on October 4, 1927, the Department issued Certificate No. 34 to L. A. Moore and D. F. Harris for a passenger/freight ferry operation on Lake Chelan.[9] Less than two years later, on April 27, 1929, the Department of Public Works issued Order S.B.C. No. 81 authorizing the transfer of rights under S.B.C. Certificate No. 34 from L. A. Moore and D. F. Harris to Lake Chelan Boat Company.

1930 to 1980

Since S.B.C. Certificate No. 34 was transferred to Lake Chelan Boat Company in 1929, there have been a few other applications for a certificate of public convenience and necessity to provide ferry service on Lake Chelan. In each instance the Commission has denied these applications for several reasons, as discussed below.

By mid-century, there were renewed efforts to inject competition into the ferry service market on Lake Chelan. In 1953, Harlan J. Eggleston, d/b/a Stehekin Ferry, applied for a certificate of public convenience and necessity to operate vessels for auto and truck ferry service between Twenty-five Mile Creek and Stehekin via Railroad Creek or Lucerne. Lake Chelan Boat Company, Inc. protested the application. There was support for both sides of the dispute. Testifying in support of the applicant was Mr. Gene Latimer, rear commodore of the Lake Chelan Yacht Club and chairman of the Recreational Development Committee of the Wenatchee Chamber of Commerce. Testifying against opening up the lake to new competitors were Mr. Ansel N. Snodgrass, Chelan agent for the Howe-Sound Company, which operated the mine at Holden, Washington, and Mr. Curtis M. Courtney, operator of a restaurant, tavern and U-drive establishment at Stehekin.

The Public Service Commission determined that Mr. Eggleston had only moderate financial ability, equipment, and experience to operate a ferry service and that his evidence was vague and inconclusive as to proper and adequate dockage and loading facilities. It concluded that neither Mr. Eggleston nor his witness provided evidence that the public convenience and necessity

[8] *Id.*

[9] *Seventh Annual Report of the Department of Public Works of Washington* 344 (1928).

required authorization of his proposed service. The Commission determined that the territory he sought to serve was already being served reasonably and adequately by Lake Chelan Boat Company, and denied his application.[10]

In 1972, North Cascades Marine Travel, Inc., applied for a certificate of public convenience and necessity to operate vessels furnishing passenger and freight service between Twenty-five Mile Creek and Stehekin, serving intermediate points as well. The applicant argued that the proposed service was justified because there was, at that point, only one scheduled boat trip on Lake Chelan each day during the summer months; from November until April there was boat service only three days per week; more boat service was needed to serve persons using and living along Lake Chelan; that Holden Village could not be fully useful without more access for its constituents, and that more frequent boat service would be needed as the North Cascades National Park developed.

Again, the Lake Chelan Boat Company protested the application. Supporting Lake Chelan Boat Company at the hearing were a representative of the North Cascades National Park Service, the district ranger for Chelan Ranger District of the Wenatchee National Forest, and Mr. A. S. Buckner, a 60-year resident of Stehekin and operator of a grocery store at the upper end of Lake Chelan. In addition, several witnesses from the general public testified that the Lake Chelan Boat Company provided adequate service with an eye to expanding service when needed. Upon cross-examination, the applicant conceded that he was uncertain about its future finances and had not considered insurance, parking facilities, boat maintenance and storage. He also conceded that the number of passengers he estimated to carry was just an estimate based on "a general feeling" from watching lake travel, and, according to the hearing examiner, did not adequately answer questions regarding wages and sufficiency of staff.[11] The examiner issued an order denying the application, and the Commission affirmed his findings and conclusions, thereby denying the application.

Four years later, in 1976, another applicant, Virgil M. and Frances M. McClosky, d/b/a Wilderness Boat Company, sought a certificate to operate passenger and freight ferry service between Chelan and Stehekin, stopping at intermediate points. Lake Chelan Boat Company again protested the application. In 1975, and well into 1976, the applicant provided service for passengers, their baggage and some freight without seeking authority from the Commission. The McCloskys testified before a hearings examiner that they applied for a certificate so they could advertise their schedule. They claimed ignorance of having to obtain authority from the Commission before they could operate ferry service, although they were told previously by a Commission investigator that their operations were unlawful.

On March 23, 1977, the hearings examiner issued his findings of fact, conclusions of law, and proposed order denying the application. He found "many confusions and contradictions" in the

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[10] *In re Application of Harlan J. Eggleston, d/b/a Stehekin Ferry,* Order Denying Application, Order S.B.C. No. 290, Hearing No. SBC-135 (Feb. 1954).

[11] *In the Matter of the Application of North Cascades Marine Travel, Inc.,* Examiner's Proposed Order Denying Application, Order S.B.C. No. 356, Hearing No. B-260 (June 1972).

testimony and different balance sheets filed in the two sessions of the hearing, and that he could not ascertain facts as to the financial condition of the applicants with any degree of certainty. Although the applicants claimed they carried insurance, they produced no insurance policy for the period up to the hearing dates and an insurance witness for the applicants later conceded that the policy had expired. Moreover, the hearing examiner heard expert testimony that the applicant's boat was unsafe for operation on the lake during certain weather conditions.

The testimony made clear that while Lake Chelan Boat Company did not fully satisfy some passengers' expectations, no one denied that its service was at all times dependable and reasonable. The Commission, in affirming the hearing examiner, commented on the economics of ferry service on the Lake: "Free enterprise as expressed by two witnesses . . . would render the established boat company a much weaker enterprise endangering its ability to serve; and while it has a large, safe and costly vessel, it would lose any opportunity to break even financially, thus greatly weakening the service to the people on the lake. All of the witnesses admitted it is vital to the area."[12]

1981 to present

In October 1983, the Commission approved the transfer of S.B.C. Certificate No. 34 from Lake Chelan Boat Company to Lake Chelan Recreation, Inc. d/b/a Lake Chelan Boat Company, the company that holds the certificate today. Though Mr. Jack Raines, president of Lake Chelan Recreation, Inc., had two partners in the business when Certificate No. 34 was transferred to Lake Chelan Recreation, Inc., within two years he became sole owner of the business.

In 1997, Mr. James Courtney d/b/a Stehekin Boat Service, filed an application with the Commission for a certificate of public convenience and necessity to operate a commercial ferry service between points on Lake Chelan. Lake Chelan Boat Company protested the application because the authority requested overlapped its own under Certificate No. 34. As always, the burden of proof was upon the applicant to prove that the existing certificate holder had failed or refused to furnish reasonable and adequate service or had failed to provide the service described in its certificate or tariffs, to prove the existence of public necessity and convenience for additional ferry service in an area already being served, to prove financial ability and resources to run a new ferry operation for at least twelve months, and to provide safe service for all passengers.

The UTC held a prehearing conference in Olympia, followed by a public hearing in Chelan at which 18 witnesses testified. On June 22, 1998, a Commission administrative law judge entered an initial order denying the application, finding that the applicant did not meet its burden of proof on any points. On August 3, 1998, the UTC issued a 28-page order denying review and affirming the initial order point by point.

[12] *In re Application of Virgil M. and Frances M. McClosky, d/b/a/ Wilderness Boat Co.,* Proposed Order Denying Application, Order S.B.C. No. 362, Hearing No. B-262 (March 1977).

The Commission found lack of evidence to show that Lake Chelan Boat Company failed to provide reasonable and adequate service and lack of evidence of any unmet need for service on the lake. Instead, some testimony indicated support of the Applicant's proposal based on the idea that the proposed service would be "Stehekin-based" and "firm belief in competition." "Speculation that some overnight Stehekin visitors might find Applicant's proposed scheduled useful, and testimony by several Stehekin residents that they might sometimes prefer, and use, Applicant's proposed service is not adequate evidence."[13] In fact, "substantial competent evidence" was found to show that the company provided reasonable and adequate service to meet existing and foreseeable needs of travelers on Lake Chelan.

Regarding proof of financial fitness, the Commission determined that Stehekin Boat Service failed to demonstrate that it was financially fit and financially able to operate the proposed service for at least twelve months, in part because "Applicant's ridership and revenue forecasts and other financial estimates were inaccurate, incomplete, and highly speculative. As well, the Applicant does not suggest the addition of its service will materially expand, or expand at all, current market demand for service. [It's] financial analyses and general business plan depend on taking business from Lake Chelan Boat Company."[14]

Ten years later, in late 2008, Mr. Clifford Courtney of Stehekin contacted UTC Executive Director and Secretary David Danner to describe various possible scenarios of boat transportation service and to ask various questions about services that he might provide that would not be subject to Commission regulation. Mr. Danner, on behalf of the Commission's staff, responded, giving his opinion that the possible services Mr. Courtney described would require a certificate.

III. COMMISSION JURISDICTION OVER COMMERCIAL FERRIES

Legal framework

Certificate requirement and exemptions - By statute, every person who wishes to operate a passenger vessel in Washington waters "for the public use for hire between fixed termini or over a regular route" must first obtain a certificate from the Commission "declaring that public convenience and necessity require such operation."[15] The Commission may order any person operating without a certificate to cease and desist,[16] and if necessary, the Commission may enforce its order by petitioning the superior court for an injunction.[17]

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[13] *In the Matter of the Application of James Courtney d/b/a Stehekin Boat Service,* Commission Decision and Order Denying Review; Affirming and Adopting Initial Order, S.B.C. Order No. 549, Hearing No. B-78659 (Aug 1998).

[14] Id.

[15] RCW 81.84.010.

[16] RCW 81.04.510.

[17] RCW 81.04.260, RCW 34.05.578.

Before granting a certificate, the Commission must find that the person or entity applying for the certificate is financially able to provide the service.[18]

Various exemptions apply, some of which are explicit in the statute, and some of which are implied. Explicit exemptions include vessels under five tons gross,[19] and vessels primarily engaged in transporting freight.[20] The implicit exemptions include what might be termed "private carriers" and "excursions." Because the statutory language only requires a certificate when a vessel is operated "for the public use," the Commission has not required a certificate for services provided under private charter party agreements.[21] Similarly, boat tours or excursions that do not provide transportation either "between fixed termini" or "over a regular route" are also excluded from regulation.

The Commission advises caution when looking to the Commission's rule on exemptions from the certificate requirement.[22] The reason is that the rule reflects a now-expired statutory scheme. In 1995, the legislature expanded the commercial ferry certificate requirement to include "excursions" (*i.e.*, a boat trip in which all passengers depart from, and return to, the same point), and also adopted an elaborate set of exemptions for certain types of excursions.[23] For example, one of the exemptions was for excursions operating in the waters of San Juan County with 49 or fewer passengers.[24] This excursion certificate requirement, including its exemptions, was repealed (by a sunset provision) effective January 1, 2001.[25] Consequently, a vessel operator describing its service as an "excursion" is only exempt to the extent that it avoids providing passenger transportation "between fixed termini" or along a "regular route."

Rate and service regulations - Once granted a certificate for the provision of commercial ferry service, the operator's rates and services are subject to regulation by the Commission.[26] This means that the operator must file with the Commission a tariff reflecting its fares and terms of service and must charge only in accordance with that tariff.[27] If the operator wishes to change its rates or terms, it must file an amendment to its tariff on 30 days notice to the Commission and the public.[28] The Commission may audit the company's books and records and if the Commission is not satisfied that the rates reflected in the tariff are fair, just, reasonable and

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[18] RCW 81.84.020(2).

[19] RCW 81.04.010(12).

[20] RCW 81.84.010(1).

[21] *But see Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n, et al.*, 176 Wash. 486, 30 P.2d 233 (1934) (enjoining an alleged charter party arrangement under which members of an association of passengers desiring automobile ferry service between points already served by a certificated passenger-only ferry).

[22] *See* WAC 480-51-022 (exempt vessels and operations).

[23] Laws of 1995, ch. 361.

[24] *Id.* § 3.

[25] *Id.* § 4.

[26] RCW 81.28, RCW 81.04.

[27] RCW 81.28.040, 080.

[28] RCW 81.28.050.

sufficient, the Commission may suspend the operation of the tariff amendments and initiate an adjudication to determine the rates and terms of service.[29]

The Commission may revoke an operator's certificate if the operator fails to provide the service described in its tariff or if it fails to comply with the statutes and rules governing commercial ferry service.[30]

Protection against competition - Certificated commercial ferries enjoy considerable protection from competition as long as they continue to provide satisfactory service and comply with regulations. If a person applies for a certificate to initiate a new ferry service on a route or in an area already served by an incumbent certificate holder, the incumbent must be afforded notice and an opportunity to be heard.[31] More importantly, the Commission may not grant a certificate to operate in an area already served by an existing certificate holder, unless the existing certificate holder has failed or refused to furnish reasonable and adequate service, or the existing certificate holder does not object.[32] This statutory protection from competition applies not only against other private operators, but also against competition from new publicly-owned ferry services. Public agencies initiating service on the same route or between districts already served by a certificate holder must first acquire the rights granted under the certificate.[33]

Rationale for regulation

The combination of statutory protection from competition, on the one hand, and stringent regulation of rates and terms of service, on the other, has historically been adopted for industries believed to have characteristics of a "natural monopoly."[34] Such industries typically have very high capital costs, benefit from economies of scale, and provide an indispensable service to the public. With respect to these industries, the legislature has made a judgment that the public's interest in reliable and affordable service is best served by a single, economically regulated provider whose owners can make the sizeable investments needed to initiate and maintain service without the threat of having customers drawn away by a competing provider.[35] Other industries regulated under this model in Title 81 RCW are solid waste (garbage) collection companies under RCW 81.77, and auto transportation (fixed terminus bus) companies under RCW 81.68. The rate and service regulations that apply to these industries are intended to provide a surrogate for the pricing discipline that would be exerted by a competitive marketplace.

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29 RCW 81.04.130.

30 RCW 81.84.060.

31 RCW 81.84.020.

32 *Id.*

33 RCW 81.84.010(3).

34 *See*, Charles F. Phillips, Jr., *The Regulation of Public Utilities*, pp. 49-73 (3rd Ed. 1993).

35 *See, Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n, et al.*, 176 Wash. 486, 489-91, 30 P.2d 233 (1934).

Options for regulation within existing framework

Although the statutory framework favors a single, economically regulated provider, the Commission has some discretion as to how strictly it chooses to protect an incumbent provider from potential competitors. There are three ways for the Commission to allow some limited competition with an incumbent provider's service: (1) by defining an incumbent's protected geographic territory in a narrow fashion, (2) by concluding that the incumbent has failed to meet a public need that the applicant proposes to meet, or (3) by declining to require a certificate for certain types of boat transportation services that are arguably private rather than for public use. Any such conclusion must be supported by expert testimony in an adjudicative hearing. Applying these theories on Lake Chelan, it seems unlikely that under existing law any of these theories could be relied upon to authorize competing services on Lake Chelan.

Defining the incumbent's protected geographic territory - Shortly after the 1911 enactment of the incumbent provider protections of RCW 81.84.020, the Washington Supreme Court explained the type of factual inquiry it expected the Commission to make when determining whether an applicant's proposed service is "between districts and/or into any territory already served by an existing certificate-holder." Referring to the Commission's predecessor, the Department of Public Works, the court said:

> The department has power to grant a certificate of necessity under certain conditions. Under certain other conditions, the department "shall not have power to grant a certificate." The question, what is territory already served, is a question of fact. Before that fact can be determined, it requires consideration of economic conditions, ofttimes involving expert testimony; a consideration of the kinds, means, and methods of travel; the question of population warranting additional facilities for transportation, or the possibilities of the additional means of transportation increasing the population so as to ultimately make the venture a success.[36]

In *State ex. rel. Puget Sound Nav. Co. v. Dept. of Public Works, et al.*, 165 Wash. 444, 6 P.2d 55 (1931), the court upheld a department order granting an application for a new certificate for a ferry route across Puget Sound. Despite the fact that the applicant's proposed terminus on the west side of Puget Sound, Port Ludlow, was already served by an incumbent certificate holder, the agency nonetheless concluded that the applicant's proposed service was not "between districts or into territory already served." The record at the hearing before the department apparently contained extensive analysis to support the conclusion that the new route and the competing route served distinct markets, despite the fact that the proposed route and the existing route shared the Port Ludlow terminus on the west side of Puget Sound and the two carriers' respective eastside termini, Ballard and Edmonds, were separated by a 10 mile trip by highway. The court reasoned:

> Because a large, extensive, and populous territory is being served by a single ferry, such ferry does not thereby necessarily have a monopoly upon the whole of

[36] *Puget Sound Nav. Co. v. Dept. of Public Works*, 152 Wash. 417, 421-22, 278 P. 189 (1929).

> such territory to the extent that it must be held to be serving that territory to the exclusion of the establishing of some new ferry service at some other place therein advantageous to the public.[37]

Thus, while the Commission has some leeway to define separate markets based on economic testimony, the court's willingness to uphold the Commission's finding appears predicated on the existence of a "large, extensive and populous territory" containing distinct markets and large population centers, including Seattle and Everett, on at least one end of the proposed route. By comparison, it seems doubtful whether any economic analysis could convincingly be advanced that the Lake Chelan Boat company, which appears to serve all available docking locations at both ends of the lake, has failed to serve some portion of a "large and populous territory."

Determining whether that the incumbent has failed to meet a public need that the applicant proposes to meet - Another way for the Commission to grant a certificate to an applicant that proposes to compete with an incumbent certificate holder is for the Commission to find that "the existing certificate holder has failed or refused to furnish reasonable and adequate service." No such finding regarding a commercial ferry has ever resulted in an appellate decision. However, in *Pacific Northwest Transportation Services, Inc. v. Washington Utilities and Transportation Comm'n*, 91 Wash. App. 589, 959 P.2d 160 (1989), the court upheld a Commission determination based on similar language in RCW 81.68 pertaining to auto transportation (bus) companies. The auto transportation statutes allow the Commission to grant a certificate over the protest of an incumbent provider only when the incumbent "will not provide service to the satisfaction of the Commission." The *Pacific Northwest Transportation Services* case concerns a challenge to a Commission order granting a certificate to operate a new bus service between Thurston County and Sea-Tac Airport with no intermediate stops in Pierce County. The application was protested by a certificate holder that already served between Thurston County and Sea-Tac, but whose route included intermediate stops at a hotel in Tacoma as well as door-to-door stops in Pierce County. The incumbent argued that a direct service between Thurston County and the airport, as proposed by the applicant, was not economically feasible. However, the incumbent presented no evidence in support of the contention. The Commission concluded:

> Absent convincing evidence that it is not economically feasible to provide direct, expedited service between the Olympia area and Sea-Tac Airport, the Commission will conclude that Capital Aeroporter's failure to offer such service makes its service not to the satisfaction of the Commission.[38]

On this basis, the Commission granted the certificate over the incumbent's protest and the court upheld the Commission's order. Based on this case, it appears that the Commission could grant a certificate for a competing ferry service if there were convincing evidence that the incumbent

[37] *Id.* at 452.

[38] *Id.* at 593.

was failing to meet a need for a particular kind of service (e.g., direct versus local service) and the incumbent was unable to present evidence showing that the proposed service was not economically feasible. However, unlike in this single case involving bus service in an urban or suburban environment, the geography of Lake Chelan and the economics of year-round passenger ferry service along a fifty-mile (one way) route with few potential docking locations may offer little practical opportunity for different types ferry service on Lake Chelan (such as express versus local, or "door-to-door" versus fixed terminus).

Determining whether a ferry is operated "for the public use" – Still another way in which the Commission could potentially allow some degree of "competition" with the services of an existing certificate holder concerns its interpretation of the phrase "for the public use" in RCW 81.84.010(1):

> No commercial ferry may hereafter operate any vessel or ferry *for the public use* for hire between fixed termini or over a regular route upon the waters within this state, including the rivers and lakes and Puget Sound, without first applying for and obtaining from the commission a certificate declaring that public convenience and necessity require such operation …..

Only common carriers – i.e., those who offer their services for public use – are required to obtain a certificate and submit to economic regulation by the Commission. Private carriers are excluded from regulation.

In transportation industries in which market entry is restricted, there have often been attempts by business owners or groups dissatisfied with the services of the public carrier to offer a private alternative to the regulated public service. One common scenario involves a hotel or resort providing transportation services for the exclusive use of its guests, either with its own vehicles or by arranging a "private charter."[39] Another involves a third party (such as a travel agent) assembling a "private" group for the purpose of "chartering" a means of transportation.[40] The

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[39] *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 60 L.Ed. 984, 36 Sup. Ct. 583 (1916) (holding that taxicab company that contracted with hotel to provide exclusive service to the guests of the hotel nonetheless came within regulatory statute applicable to common carriers for the conveyance of persons for hire); *Terminal Taxicab* was cited with favor on this point in *McDonald v. Irby*, 74 Wash. 2d at 436 (holding that owner of airport parking facility that also transported its parking customers to the airport terminal by van was a "common carrier" despite argument that it was primarily engaged in parking business); *Las Vegas Hacienda, Inc. v. Civil Aeronautics Board*, 298 F.2d 430 (9th Cir. 1962) (resort hotel that furnished air transportation to and from another city that in a manner that was only incidental to the promotion and operation of the resort hotel was, nonetheless, properly determined to be within regulatory statute applicable to "carriage by aircraft of persons . . . as a common carrier for compensation or hire."); *M&R Investment Co., Inc. v. Civil Aeronautics Board*, 308 F.2d 49 (9th Cir. 1962) (Hotel-casino that sold "tours" to the public, including flights between Los Angeles and Las Vegas exclusively its guests was engaged in "carriage by aircraft of persons . . . as a common carrier for compensation for hire" and subject to regulation as such).

[40] *Horluck Transportation Co. v. Eckright,* 56 Wash. 2d 218, 352 P.2d 205 (1960) (enjoining a voluntary association or "club" of individuals that collectively owned a bus from operating between fixed termini without an auto transportation certificate under RCW 81.68 on the grounds that the law requires a certificate for transportation of persons for compensation between fixed termini); *Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552 (9th Cir. 1972) (a "social club" whose real business was selling tours and air transportation on chartered aircraft was required to have a certificate as an air carrier with the Civil Aeronautics Board); *Iron Horse Stage Lines, Inc. v. Public Utility Commission of Oregon,* 125 Or. App. 671, 866 P.2d 516 (1994) (holding that as long as the group of passengers contracting for "private" carriage is assembled by a third party agent, even if the

only court case concerning the limits of this sort of arrangement under the commercial ferry statutes is *Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n*, 176 Wash. 486, 30 P.2d 233 (1934). In the *Kitsap* case, residents of Bainbridge Island unhappy with the services of the incumbent certificate holder approached a second ferry company to enter into a charter party agreement for the use of an automobile ferry to carry members of their "private" association between Manitou Beach, on Bainbridge Island, and Seattle. Membership in the association was not restricted in any manner and there was only a nominal membership fee. The court enjoined the "charter" as a public ferry service infringing on the statutory right of the incumbent to be protected from competition unless it fails or refuses to provide reasonable and adequate service.

Despite the *Kitsap* case, there may be flexibility within the law for the Commission to take an expansive interpretation of the private carrier exemption from commercial ferry regulation. For example, the Commission might reasonably conclude that a boat service offered on Lake Chelan (and elsewhere) in conjunction with lodging at a particular hotel or resort, and which is not otherwise open to the public, does not require a certificate under RCW 81.84. However, if such an interpretation were shown to significantly threaten the regulated carrier's ridership, revenue, and ability to provide reliable and affordable service, the Commission could also decide not to adopt that interpretation. In other words, the decision could be similar to a determination under RCW 81.84.010(2) as to whether the Commission should forbear from regulating a commercial ferry service that does not "serve an essential transportation purpose and is solely for recreation." Under that provision, the Commission must determine that "the proposed service would not adversely affect the rates and services of any existing certificate holder."

Obligation to ensure service if the certificate holder declines to provide service

There is no legal obligation for state or local governments to provide ferry service if an investor-owned, regulated service provider declines to provide service. The regulatory scheme depends on the initiative of private investors to provide the service. As an inducement or encouragement for the private investment, the law affords a limited protection against competition as long as the private provider continues to provide a satisfactory public service. However, the fares charged and the terms of service are subject to regulation.

As suggested above, if a would-be ferry operator believes that a certificated commercial ferry is not providing service that is sufficient in terms of frequency, convenience, capacity, or other criteria, that person can apply for a competing certificate and thereby force the carrier to come forth with evidence as to why it is not feasible for the carrier to provide the service.[41] The burden of proof is on the competing applicant to show that the incumbent's service is not sufficient.

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only purpose for assembling as a group is to take a trip on the carrier's bus, the carrier is deemed to be engaged in private carriage.)

[41] *See, Pacific Northwest Transportation Services, Inc. v. Washington Utilities and Transportation Comm'n*, 91 Wash. App. 589, 959 P.2d 160 (1998).

Similarly, if the Commission believes that a commercial ferry service is inadequate or insufficient, it is empowered to conduct a hearing to determine what constitutes adequate and sufficient service, and may then order the carrier to provide that service.[42] However, it is a fundamental tenant of constitutional law that the Commission cannot require a carrier to provide a service on which it is unable to earn a reasonable return.

IV. DESCRIPTION OF CURRENT FERRY SERVICE ON LAKE CHELAN

Description of Current Service

Summer Service - During the summer months, the Lake Chelan Boat Company runs two boats from the city of Chelan to Stehekin – the Lady of the Lake II (Lady II) and the Lady Express. Tables 1 and 2 show the relevant schedules. Both boats depart from the company's docks in Chelan and travel up-lake to Lucerne (Holden Village) and Stehekin. Passengers whose ultimate destination is Stehekin make up 76 percent of the company's customers during the summer months.

The Lady II is the largest vessel in the company's fleet. Launched in 1976, the Lady II can accommodate up to 285 passengers with a crew of four. The Lady II is also the only boat in the company's fleet that makes intermediate flag stops along the lake.[43] Flag stop customers are typically campers and cabin owners (see Appendix 1 for complete route map).

Lady II Itinerary; Summer Schedule

May 1 through October 15 Daily	
Leave Boat Company Dock	8:30am
Fields Point	9:45am
Prince Creek	11:00am
Lucerne (Port of Holden)	11:45am
Moore Point	12:15pm
Arrive Stehekin	12:30pm
90 Minute Layover in Stehekin	
Leave Stehekin	2:00pm
Moore Point	2:15pm
Lucerne (Port of Holden)	2:30pm
Prince Creek	3:15pm
Fields Point	4:45pm
Arrive Boat Company Dock	6:00pm

Table 1; Lady II Summer Schedule (current tariff)

The Lady Express provides non-stop service between Chelan and the final destinations of Lucerne and Stehekin. The Lady Express cruises at about twice the speed of the Lady II and

[42] RCW 81.28.240.

[43] A *flag stop* refers to an on-demand stop selected by a passenger or passengers to be either dropped off or picked up.

completes the trip up-lake in two hours. The boat can accommodate 150 passengers with a crew of three. It was added to the fleet in 1990 after a $1 million investment by the company.

Lady Express Itinerary; Summer Schedule

May - Saturday & Sunday only June 1 through September 21 - Daily	
Leaves Boat Company Dock	8:30 am
Fields Point	9:20 am
Arrive Stehekin	11:00 am
60 Minute Layover in Stehekin	
Leave Stehekin	12:00 pm
Lucerne (Port of Holden)	12:20 pm
Fields Point	1:45 pm
Arrive Boat Company Dock	2:45 pm

Table 2; Lady Express Summer Schedule (current tariff)

Winter Service – Table 3 below contains the company's winter schedule. The only boat that operates after October 15 is the Lady Express. In the winter, the Lady Express provides service to the ports of Lucerne and Stehekin, on certain days of the week, and with no flag stops. In March, the Lady Express resumes daily service. Customers of the company during the winter are primarily Stehekin residents, who comprise between 80 to 90 percent of passengers in those months. About a third of all of the full-time residents of Stehekin are National Park Service (NPS) employees and their dependents. Because most of the lodging in Stehekin is closed for the winter, very few tourists venture to Stehekin in these months. Passengers traveling to Lucerne in the winter are almost entirely – about 98 percent – Holden Village visitors and staff. During the winter, the company makes only about 15 percent of its annual revenue from passenger fares.

Lady Express Itinerary; Winter Schedule

October 16 - October 31 - Mon, Wed, Fri, Sat, Sun Nov 1 - Mar 14 - Mon, Wed, Fri, Sun Mar 15 - Apr 30 - Daily Service	
Leave Boat Company Dock	10:00 am
Fields Point	10:50 am
Lucerne	12:00 pm
Arrive Stehekin	12:30 pm
60 Minute Layover in Stehekin	
Leave Stehekin	1:30 pm
Lucerne (Port of Holden)	1:50 pm
Fields Point	3:10 pm
Arrive Boat Company Dock	4:00 pm

Table 3; Lady Express Winter Schedule (current tariff)

Lady Cat – The Lady Cat is a reserve boat in the company's fleet with a passenger capacity of 49 and a crew of two. It is a high-speed catamaran capable of making the 51-mile voyage to Stehekin in a little over an hour. The Lady Cat was in service from 1999 to 2005, at first making

two runs a day from Chelan to Stehekin and later only one run a day prior to going out of service. The company discontinued service due to dwindling passenger counts that made operation of three boats uneconomical.

Freight and Mail Service – Besides passengers, the company carries freight and mail, revenues from which comprise about 10 percent of the company's annual revenue. The company has a contract with the United States Postal Service to transport mail between Chelan and the uplake destinations of Lucerne and Stehekin. The mail contract was renewed in July 2009 and is in effect through June 2013. The annual value of the contract is $68,025.[44]

Freight for the last four years has averaged almost 1,800 tons per year. The company does not provide barge service. (Unregulated barge service is available on the lake to transport large items like vehicles and building supplies.) Combined, freight and mail comprise only about 11 percent of the company's total annual revenue.

One interesting aspect of freight service provided by the company for up-lake residents (including Stehekin) is grocery delivery.[45] When up-lake residents need grocery items, they send a list and signed blank check with the down-lake boat. The Safeway in Chelan fills the order and the company sends an employee pick up the boxed orders daily. In the summer, the company averages five or six orders per week, with more during the holidays.

Passenger Data – As required by state regulation, WAC 480-51-100, the company provides the Commission with an annual report that includes data on customer counts. It also provides data regarding its operations as part of the rate-setting process. From this data, it is possible to determine ridership by month and destination.

Figure 4 below illustrates total company capacity adjusted for changing time schedules and number of boats in service. Since 2004, capacity has been reduced by 11 percent in response to reduced demand. As Figure 4 illustrates, there is enough boat capacity remaining to handle additional passengers if increased ridership materializes.

Figure 5 illustrates capacity used by month. As expected, during the winter months only between 40 and 50 percent of capacity is used.

[44] Ray Luke, Acting Manager, Transportation Contracts, Seattle Branch Area Office, United States Postal Service.

[45] Lake Chelan Boat Company, Tariff Item 170

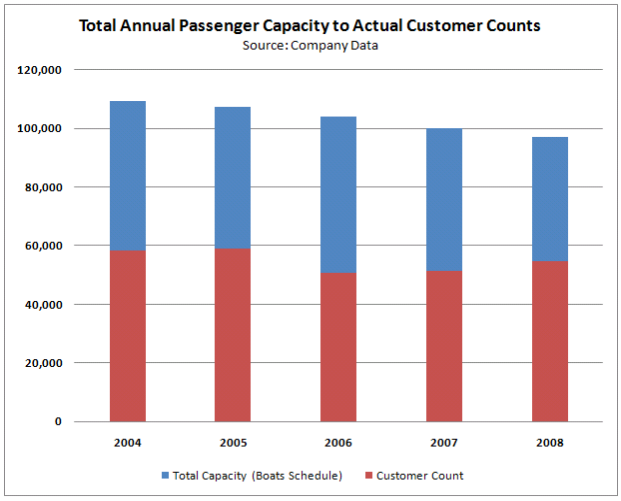

Figure 4; Passenger Capacity to Customer Counts

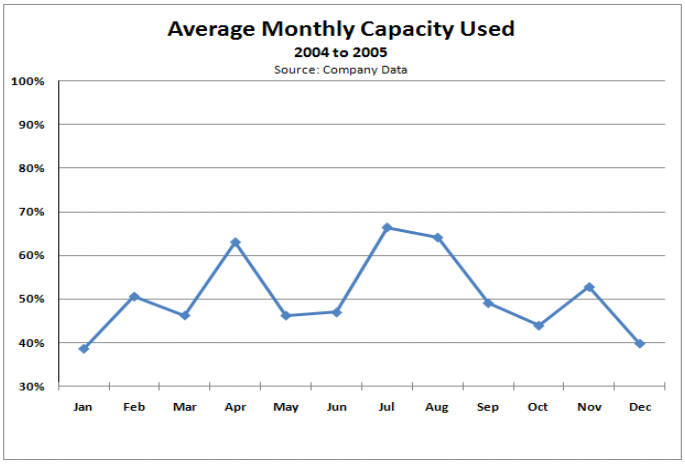

Figure 5; Average Monthly Capacity Used

Financial Data – The average annual revenue for the company since 2004 is just under $1.5 million with 80 percent revenue generated from fares (the remaining 20 percent of revenues are generated by freight and other services such as parking, food, and souvenirs). Fuel, labor, and vessel depreciation comprise about 75 percent of the costs to provide service on the lake. Fuel costs alone comprise about 22 percent of the company's expenses.[46] The Lady II and the Lady Express both consume over 200 gallons of diesel each in making the round trip up and down the lake.

From the data on passenger counts, capacity and finances, it appears that the company is challenged by relatively high fixed costs. Changing the configuration of the fleet with different boats is not a feasible option considering the large up-front capital costs and the company's

[46] In the company's most recent UTC rate proceeding, in Docket TS-090381, the commission on May 28, 2009, issued a "complaint against rates" to allow the commission to review the company's rate structure. That matter is pending.

significant investment in its existing fleet. Table 4 shows the company's round trip fare history.[47] Figure 6 and Table 4 provide a comparison between fares and actual company financial performance.

Boat & Destination			Round Trip Fare History			
			2004	2005	2006 & 2007	2008 to present
Lady II Summer & Lady Express Winter	Stehekin		$28.00	$32.00	$38.00	$39.00
	Lucerne		$25.00	$29.00	$33.75	$35.50
	Commuter		$21.00	$24.00	$28.50	$31.20
Lady Express Summer	Stehekin	Regular	$47.00	$51.00	$57.00	$59.00
		Commuter	$35.30	$38.25	$42.75	$47.20
Lady Cat (service ended 2006)	Stehekin	Regular	$92.00	$96.00	$105.00	n/a
		Commuter	$69.00	$72.00	$84.44	n/a

Table 4; Lake Chelan Recreation, Inc. Fare History

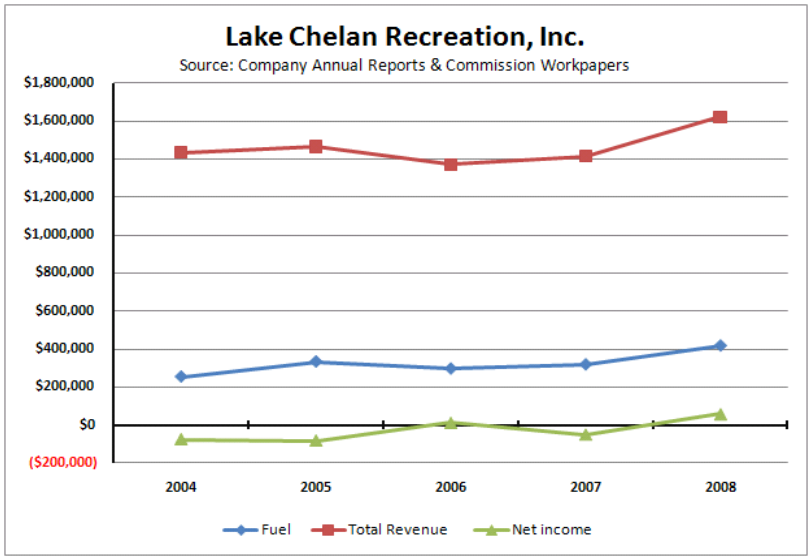

Figure 6; Lake Chelan Recreation, Inc. Financial Data

Potential Factors Affecting Future Ferry Operations

It is difficult to predict future demand for ferry service on Lake Chelan. However, because so much of the ferry business, both passenger and freight, is related to up-lake land-based activity, we discuss possible activities involving the NPS and Holden Village.

[47] While comparisons of passenger fares among different kinds of transportation services are difficult in this unique environment, one useful comparison may be the Internal Revenue Service's mileage reimbursement rates. If Lake Chelan were a paved road, at $.55 per mile, a round trip from Chelan to Stehekin by car would be reimbursed at $56.10.

The Lake Chelan National Recreation Area (LCNRA) is one of three units that make up the North Cascades National Park Complex. The other units are the North Cascades National Park and Ross Lake Recreation Area. More than 90 percent of the North Cascades National Park Complex sits within the protected lands of the Stephen Mather Wilderness, created by the Washington Park Wilderness Act of 1988 (Public Law 100-668). The Act excluded from the wilderness area a 100-foot corridor for the road that started at Stehekin Landing and went along the Stehekin River Valley for 23 miles, providing limited vehicle access to trails and campgrounds in that portion of the wilderness. According to the NPS, about 1,300 people a year access the upper portions of the road for camping and hiking.[48]

The community of Stehekin itself is inside the 62,000-acre LCNRA and more than a third of its year-round residents are NPS employees. According to the NPS, the LCNRA received almost 43,000 visitors in 2008. These visitors primarily traveled to the LCNRA on the Lake Chelan Boat Company's vessels. As Figure 7 illustrates, there is a downward trend in the number of visitors to LCNRA (about 10,000 fewer since 1995).

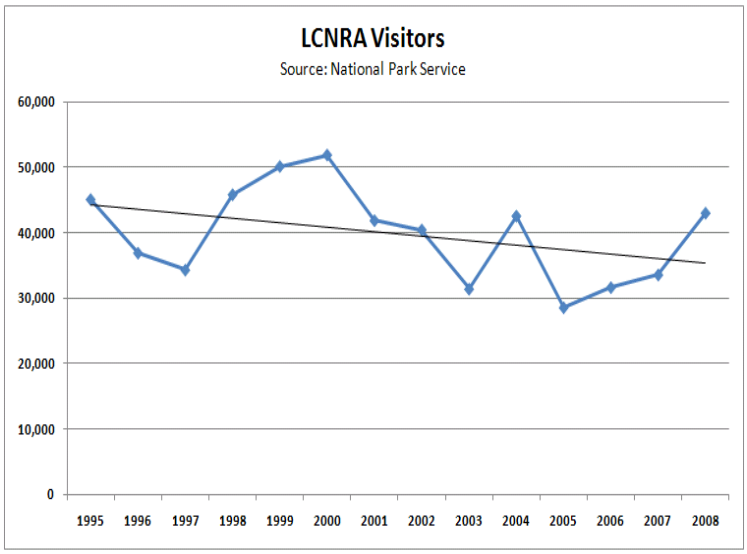

Figure 7; LCNRA Visitors

In 2003 and 2006, major flooding along the river severely damaged large sections of the upper Stehekin Valley Road, making it impassable to vehicles. The NPS decided that it would not rebuild the road due to the expense and environmental damage that would result.[49] This decision by the NPS, while controversial to some, is not expected to have a significant impact on Lake Chelan Boat Company's operations as access to the upper valley is still possible on foot for hikers and campers.

[48] National Park Service website, http://nps.gov/noca

[49] See National Park Service Project website at http://parkplanning.nps.gov/projectHome.cfm?parkID=327&projectId=15383

Since 2004, travel spending, according to the NPS, has remained constant in the LCNRA/ Stehekin area at about $1.3 million annually. Annual travel spending for LCNRA/Stehekin comprises 0.42 percent of the total spending in Chelan County.[50]

Future Activity at Holden Village – In 1939, the Howe Sound Mining Company completed construction of its company town that would house 450 workers and their families. The town was named after James Henry "Harry" Holden, who first made mining claims in the Railroad Creek Valley in 1896. In 1961, the mining company turned the site and town over to the Lutheran Church, which converted it into a retreat through a special use permit with the National Forest Service (NFS).

Holden Village, or Holden, hosts an average of 6,000 guests and staff each year. All travel there on the Lake Chelan Boat Company's vessels. Holden accounts for 23 percent of the company's passengers and 7 percent of the total cargo tonnage hauled each year.

By 2011 or 2012, the NFS and Rio Tinto/Intalco, the successor to the mine's original owner, expect to begin remediating the mine site where Holden is now located. During the two years that heavy construction is expected at the remediation site, Holden will remain open and host workers from the project along with their own staff, who will be working on renewing the village's infrastructure. The project manager said he expects Lake Chelan Boat Company will not see any negative impacts to freight or passenger activity due to this activity.

Views of Stakeholders

As part of this study, the Commission sought public comment regarding regulation of commercial ferry service on Lake Chelan. UTC staff compiled a mailing list of 50 people, including the president of Chelan Recreation, Inc., individuals who had commented on previous filings by the ferry company, local business owners, a director at Holden Village, city, state and county officials, and interested residents of the Lake Chelan area.

On Sept. 17, 2009, UTC staff mailed a letter to the list describing the study and report required by the Legislature. Recipients were notified of opportunities to comment at community meetings scheduled at Stehekin and Chelan, as well as the opportunity to submit written comments to the UTC. In addition, staff publicized opportunities to provide oral and written comments through a media advisory sent Oct. 9, 2009, to 20 radio stations and newspapers in the Lake Chelan/Wenatchee area. Staff prepared the following questions to assist people in formulating their comments:

1. Value provided from regulating exclusive operating rights, rates and service
    a. What are the advantages and disadvantages to UTC regulation of ferry service on Lake Chelan?
    b. What alternatives exist to UTC regulated ferry service on Lake Chelan?

[50] Washington State Department of Commerce, Washington State County Travel Impacts 1991-2008, September 2009 shows Chelan County travel spending growing at an average rate of 6.8 percent per year.

2. Satisfied or not with the existing status quo

    a. If you could change anything about the ferry service on Lake Chelan, what would it be and why?

    b. What is it about the ferry service on Lake Chelan that you would want to see remain the same and why?

The Commission held two public meetings. The first took place at the community hall in Stehekin at 11:00 a.m., Oct. 19, 2009. The second took place in city council chambers in Chelan the same evening. The Commission accepted written comments until Nov. 6, 2009. Seventy-two people provided comments.

Comments came from people representing six geographical areas:

- Stehekin;
- Holden Village;
- Up-lake (areas and properties along the lake between Chelan and Stehekin that are inaccessible by road);
- Manson;
- Outside the general Lake Chelan area; and
- Chelan.

Advantages and disadvantages to UTC regulation of ferry service on Lake Chelan. Residents of Stehekin offered differing viewpoints on ferry regulation. Many supported the notion of an additional boat serving the lake. Several others said they would prefer all ferry service on the lake to be regulated. According to one Stehekin resident:

> We fear that if transportation on Lake Chelan were cut loose from state oversight and regulation, the public service element would dwindle. Schedules, fares, baggage and freight rules all would be determined with both eyes on the dollar instead of with one eye on the common good.

Many people who expressed the need for competition did not say whether they thought the service should be regulated.

In Stehekin, some persons argued strongly for deregulation and competitive boat services. One said he has a 40-foot boat that can carry up to 20 passengers. He said the residents in Stehekin and along the lake have diverse needs and require a variety of services to meet those needs. He said;

> I would recommend for consideration that Lake Chelan be deregulated, letting it be a free enterprise area that will thrive in the future.

Another proponent for deregulated services said the current service is inadequate and is depriving Stehekin of potential business. He said:

> This system not only hampers the ability of the one certificated operator to run efficiently or make wise market-driven decisions, but it also excludes any competition which is the refining fire of the free market system.

He said he believes it is the U.S. Postal Service contract that currently keeps winter service running, not regulation. He continued:

> I do not believe the state of Washington or any subdivision thereof needs to regulate the schedules or fees…, demand will regulate the schedule and competition will regulate the price and the degree of excellence.

He said that running a smaller boat out of Stehekin will not hurt the current company, and that

> By deregulating the lake the present company can be relieved of excessive regulation and become more agile in the marketplace and thrive in a competitive market if it will rise to the challenge.

The NPS sent written comments expressing concern about whether there could be more than one viable ferry service on the Lake. The NPS uses the boat to get to and from Stehekin. Its employees and their dependents account for about 34 of the approximately 75 year-round Stehekin residents, and many seasonal employees and volunteers. The NPS is responsible for the recreation areas that are a major reason for tourists to travel to Stehekin.

The NPS said "there is value in having regulated services on Lake Chelan" and that regulation "ensures some level of consistent service by which NPS can coordinate visitor activities." It said:

> [it is] unclear to us that there is sufficient business and demand to support more than one sustainable, financially viable commercial ferry operation. We are concerned that a change in the current situation would not ensure reliable, dependable year-round service to Stehekin. Until an analysis satisfactorily demonstrates otherwise, the NPS believes regulation of these services is necessary to ensure visitor, park and NPS employee needs are met.

The Public Works manager of Holden Village spoke at the community meeting in Stehekin and sent written comments. He expressed skepticism about whether the demand for ferry service could support two ferry services. Stating that Holden Village accounts for at least 25 percent of the company's ridership, he recommended that the Commission consider future needs on the lake, and talked about a mine cleanup effort that is scheduled for 2011–2014, at an estimated cost of $80 to $140 million. Holden Village will remain open during the mine cleanup and will also be conducting renovations of some of its buildings in 2018–2019.

Regarding regulation and competition, he wrote:

> Holden Village believes that competition is healthy and can result in improved services. Our caution with ESB 5894 is that Holden could be potentially the most negatively affected by the consequences of competition. It is easy to imagine that poorly regulated, competition could pick the low hanging fruit and not provide the scale of services Holden, in particular, needs, or can at least take advantage of at an affordable cost year round. Further, if competing services reduce the profitability of the service for the larger carriers, it can be speculated that they could improve their profitability by reducing off season service (or eliminate it) or increase their off season rates.

Regarding disadvantages of regulated boat services, he said:

> Competition is limited, adjustment to service markets may not be done quickly and adjustments may not be considered if there is no competitive pressure.

The NFS commented that Lake Chelan provides access to hundreds of thousands of acres of national forest and national park lands that are accessible only by boat or float plane. Holden Village operates under a special use permit on national forest land and is one of the main gateways to wilderness areas in the Chelan Valley and to trails that connect to the Lake Wenatchee area and the Mount Baker-Snoqualmie National Forest. NFS employees travel on the lake to provide resource management activities including trail building, trail maintenance, fire fighting, and weed control. The NFS expressed concern that deregulating boat service on the lake could put it in a position of regulating the use of its docks, and said:

> Our mission is to manage the natural resources on the public lands and not to be regulating public transportation. That is a role that is best handled by state or county governments.

The Commission received comments from a number of people outside the Lake Chelan area, who travel to or have traveled to Stehekin via the ferry. A few of these people mentioned that they would like all boat service on the lake to be deregulated. Two said they want competition, and all ferries operating on the lake should be regulated.

An employee of the boat company said that adding boat services on the lake would cut into everyone's ability to be profitable, drive rates up, and reduce services. The president of the boat company said that a mix of regulated and unregulated boats on the lake would require active enforcement to ensure that the unregulated boats only served the ports it would be allowed to serve. He added that before boat service on Lake Chelan became regulated, there were many passenger boats that provided service and failed. Since being regulated, he said, "It has remained a dependable service."

Alternatives to existing UTC-regulated ferry service on Lake Chelan. Several people from different areas suggested an exemption to regulation, similar to one that applies to some ferries in San Juan County.[51] The Public Works manager of Holden Village said some options to consider include a special district or county service, or state ferry service. A Stehekin resident asked whether the Link Transit system that serves Chelan and Douglas counties had been considered as a potential regulatory agency for the ferry service.

If you could change anything about the ferry service on Lake Chelan, what would it be and why? Many Stehekin residents said they would like to have a boat based in Stehekin. The main reason they gave is that the winter schedule makes it necessary for Stehekin residents to spend an extra

[51] The commenters' reference apparently is to WAC 480-51-022 (4) (a) that exempts from the application of the rules in chapter 480-51 WAC, excursion services that: "*Originate and primarily operate at least six months per year in San Juan County waters and use vessels less than sixty-five feet in length with a United States Coast Guard certificate that limits them to forty-nine passengers or less.*" The term "excursion service" is defined in WAC 480-51-020 (13) as: "*carriage or conveyance of persons for compensation over the waters of this state from a point of origin and returning to the point of origin with an intermediate stop or stops at which passengers leave the vessel and reboard before the vessel returns to its point of origin.*" The commercial ferry service on Lake Chelan does not meet the definition of an excursion service.

day or two in Chelan for something as simple as a visit to a doctor or family member. Stehekin residents also mentioned the difficulty high school students (who must attend high school in Chelan) experience trying to come home to Stehekin on weekends. The current winter schedule requires students to leave school early on Friday and to miss school on Monday if they rely on the boat to commute home on weekends. Many Stehekin residents also said they are not pleased that the current winter schedule adds a day or two of travel time for visitors from outside the area.

Other suggestions included a desire for changes to tariff rules governing commuter discount ticket packages, greater accessibility for persons with disabilities, increased dock safety, and the ability to take pets into the passenger compartment of the boat.

Five up-lake property owners commented that they want flag stops in the winter. Three of them said allowing another boat to provide service would take care of the issue. One proposed a service charge for flag stops.

Six Manson residents commented that they want the boat to make a regular stop in Manson. Three said they thought allowing competition would accomplish this, though they did not say whether the service should be regulated.

Of the 29 out-of-area commenters, 20 said they had traveled to Stehekin on the ferry. Almost all said they would like to see more boat service on the lake, and many said regulated competition is needed. A few people mentioned that they would like all boat service on the lake deregulated.

What is it about the ferry service on Lake Chelan that you would want to see remain the same and why? The president of Lake Chelan Recreation said existing service is more than sufficient during all months, and that there is "over-service" in May, June, September and October. He said:

> The months with over-service are the months with the greatest potential for growth. During most of these months Stehekin businesses are open. During the other months, facilities are closed or offer very minimal services.

Regarding safety issues, he said the Lake Chelan Boat Company

> operates with the mindset that there is always a vessel at the dock (fueled and ready to go), and/or another vessel on the water running a schedule that could assist a vessel in distress.

Regarding the need for more boats to provide service to Stehekin in the winter, a boat company employee said Stehekin has not been open for winter activities in the 20 years he has worked for the company. He explained that the steel-hulled boat that is able to facilitate flag stops is not a good boat for the winter runs because it takes four hours each way, and would have to run in the dark; a safety issue.

A representative from the US Army Corps of Engineers said:

> Our agency uses the current transportation system when we have work in the Stehekin area. We would want the system to always have regularly scheduled safe public

transportation to Stehekin. The current system works well as far as scheduling for our needs.

V. DISCUSSION AND RECOMMENDATIONS

The question of whether and how to regulate commercial ferries on Lake Chelan has been before the Commission repeatedly since 1927. In each case, the Commission has sought to ensure that residents who rely on ferry service have access to safest, most regular, and most reliable service possible.

Under current law, the Lake Chelan Boat Company has an exclusive right to provide commercial ferry service on Lake Chelan. That right, in the form of a certificate issued by the UTC, cannot be revoked as long as the company provides "reasonable and adequate" service and complies with law and Commission regulations.

We have reviewed the comments submitted, the testimony taken at two public meetings, and the Commission's cases since 1927 addressing ferry service on Lake Chelan. We acknowledge that some customers of the Lake Chelan Boat Company, and some prospective customers, have legitimate desires for service levels above those now offered. These include:

- People who live along the lake and would like additional "flag stops";
- Residents in or near Manson who would like a regular stop at Manson, and
- Residents of Stehekin who, from time to time, seek to take advantage of services available only in the city of Chelan, and who would like to avoid the two or three-day trip to access those services.

We also acknowledge a lack of consensus as to whether ferry service on the lake should be deregulated, and as to whether accommodation should be made for an additional ferry service provider to operate there. While some Stehekin residents and visitors argue for minimal regulation, others there, including residents, the National Park Service (the up-lake area's largest employer), and the National Forest Service, as well as residents and employees of nearby Holden Village, argue for continued regulation to ensure the continuation of current service levels, which they say are reasonable and adequate, though perhaps not optimal.

As discussed above, whether a service is "reasonable and adequate" depends on a number of factors, including the company's potential customer base, its costs, its actual and potential revenues, and the service to be provided. The small population of the communities along Lake Chelan, the long distances involved, and the costs of commercial ferry operations all suggest that it is not possible at this time for the Lake Chelan Boat Company to increase services without a significant increase in rates or ridership or both.

Because the Commission would likely find the company under these circumstances to be providing "reasonable and adequate" service, it is likely not possible under current law to carve out room for another operator to provide the higher level of services some residents and prospective customers would want.

Moreover, as a matter of economics, it is not desirable to suggest a change in legislation or regulations that would allow other entrants into the Lake Chelan ferry market. It is unlikely that another commercial venture could operate profitably providing niche services without also taking customers from the incumbent ferry operator, thereby putting at risk the incumbent's ability to provide essential, albeit basic, services.

Specifically, we envision three scenarios in which competitors would operate.

Scenario 1: Niche services provided by competitors

In the first scenario, a competitor would be allowed to operate a niche service, for example, a summer-only or a holiday-only service. In this case, the new entrant would be at a competitive advantage over the incumbent, who is burdened with the obligation to operate year-round and provide basic, essential service, including service at times when ridership is low and not remunerative. This obligation is not shared by the new entrant. As a result, the incumbent would lose customers and revenues to the new entrant, but would have to continue to meet its obligations under its tariff.

To make up the lost revenue and still provide basic service, the incumbent would have to petition the UTC to raise fares for remaining customers or further reduce the number of trips. That would create its own set of problems. Higher rates would likely result in hardship for the incumbent's captive customers – those who require services not provided by the niche provider and for whom the incumbent's service is the only available option. NPS, NFS, and Holden Village officials all commented that they relied on the year-round, regularly-scheduled service. The likely effect of allowing additional companies to "cherry pick" the most lucrative parts of the incumbent's service offerings would be to raise costs or reduce the availability of the incumbent's remaining services for those without other service options. The incumbent could also see reduced discretionary travel, both among Stehekin residents who, deterred by costs, would make fewer trips to Chelan, and tourists, also deterred by costs, who would forego visits to Stehekin in favor of visits to more convenient locales.

Moreover, as we have seen with other kinds of regulated service, areas with small customer bases are at higher risk of seeing a "death spiral" of repeated rate increases (and service reductions) followed by reduced ridership followed by more rate increases (and more service reductions). Eventually, the incumbent may be forced to raise rates to a level above what its customers can bear and may cease operation entirely. While another provider may be willing to step in to provide year-round, regularly-scheduled service, it would face the same economics if faced with competition from niche providers.

Scenario 2: Full service by a second provider

In the second scenario, the UTC (or Legislature) would authorize a second service provider subject to the same obligations as the first. Because the UTC would set the rates and imposes the same minimum service requirements on both certificated ferry services, competition would largely be based on other factors, such as convenience of schedule, on-board amenities, good will or other intangibles.

This scenario would be uneconomical for both companies and their customers. First, the new entrant would have to duplicate the infrastructure of the incumbent, and these capital and operating costs would be reflected in rates. Unless ridership were to double, an assumption we would not be willing to make given the distances involved and small population of the up-lake communities, both companies would see ridership below what the incumbent currently serves. Under this scenario, revenues for both companies would be insufficient to cover expenses, even with significant rate increases for both companies. One or the other company would cease operations, and face high stranded costs in doing so. It is unlikely the UTC would find the certification of a second provider in this scenario to be in the public interest.

As discussed above, the UTC has never granted a certificate to an applicant proposing competitive commercial ferry service. However, the Commission did once grant a certificate to an auto transportation applicant proposing to compete with an incumbent certificate holder on the grounds that "the existing certificate holder has failed or refused to furnish reasonable and adequate service." That facts of that case were unique, and in our minds, distinguishable from those on Lake Chelan. There, the incumbent made no attempt to provide evidence that it was economically unfeasible to provide the service proposed by the new applicant. That case involved airport bus service, for which the smaller start-up costs and lower operating costs mean a considerably lower risk that customers would be left without any service if a provider ceased operations. The companies operated in a highly-populous and growing urban and suburban territory, where both companies had potential to increase ridership.

By contrast, the geography of Lake Chelan and the economics of year-round passenger ferry service along a fifty-mile (one-way) route with few potential docking locations may offer little practical opportunity for non-exclusive regulated ferry operations. While we are not prepared to evaluate the reasonableness or adequacy of the incumbent's service outside of a full evidentiary proceeding, at first blush we believe the conditions on Lake Chelan are far different from those present in the airport bus case.

Scenario 3: Full deregulation

In the third scenario, the UTC would fully deregulate passenger ferry service on the lake and, as one commenter phrased it, let Lake Chelan "be a free enterprise area that will thrive in the future."

Economists and policy makers have debated the merits of regulating transportation services since the nineteenth century, and the discussion continues today. In 1921, the Washington State Department of Public Works, the predecessor agency to the current UTC, discussed the rationale for ferry regulation on Lake Chelan this way:

> Boat traffic in almost every part of the State of Washington is largely seasonal. A very large proportion of the traffic occurs during the summer months for the benefit of campers and tourists who desire to visit various points of interest and who ride the boats for the mere pleasure which it affords. There is a certain amount of traffic, however, which must be cared for by some carrier during the winter months and after the tourist and camping travel has ceased. If we were to permit companies to come upon the routes of the boat lines who furnish year-round service and skim off the cream of the business during the summer months when the traffic is heavy and the operation of the boats cheap and pleasant, it would result in bankrupting the boat lines that assume the duty of furnishing an all-year-round service.[52]

To this day, this rationale still underpins the UTC's continued regulation of transportation services.

In the 1970s and 1980s, economists and policy makers at the federal level advocated for the elimination of regulation of transportation services. They argued that deregulation would lead to a healthy competitive environment, with increased service offerings and pricing and service options. Congress responded by deregulating a number of transportation services, including airlines, intercity buses, and railroads.

While it is not the purpose of this report to discuss the success or lack of success of those efforts, we do note a general consensus that deregulation has had the most adverse effect on smaller communities and rural areas, which lack economies of scale to attract risk capital or generate revenue sufficient to ensure profitability. One report stated, "While deregulation has created a class of beneficiaries, consumers in small towns and rural communities are not among them. Today, in many instances, they pay much higher prices for poorer service."[53] It cited research showing that in the five years following the Bus Regulatory Reform Act of 1982, more than 4,500 small towns lost service, while fewer than 900 gained it. In the decade after the Staggers Rail Act of 1990, more than 1,200 communities lost rail service.[54] Even the leading proponent of transportation deregulation, Alfred Kahn, warned against removing economic regulation of services to small towns, saying "I'm not sure I ever would have deregulated the buses because

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[52] *First Annual Report of the Department of Public Works of Washington* 216 (1921), supra note 5.

[53] Dempsey, *Flying Blind: The Failure of Airline Deregulation,* Economic Policy Institute (1990) at 37.

[54] Dempsey, at 79, n. 133.

the bus is a lifeline to many small communities for people just to get to the doctor or to the Social Security office."[55]

Like buses prior to deregulation, the ferry services provided by the Lake Chelan Boat Company provide a lifeline to the communities of Stehekin and Holden Village. Faced with the question posed in 1921 – would these communities be adequately served by unregulated passenger ferry operators? – the present Commission could not say with confidence that they would.

In the short term, it is conceivable, and perhaps likely, that during the busy summer months customers would enjoy the benefits of competition among boat operators, who would lower fares and improve service to make their offerings more attractive to potential customers. During these periods, tourism may even increase as prices fall.

But we agree with our predecessors that, just as the intercity bus operators did in the 1980s, ferry operators would cease all unprofitable activities. With no legal obligation to serve, they would reduce or eliminate services during the winter months, or during times when fuel prices are high, or during times when more attractive business opportunities arise for the use of their boats or docking facilities. Even if revenues during the summer months would allow the operators revenue to serve year-round, they could not be expected to do so if such activities were unprofitable and they were under no obligation to provide them. In any event, it is not clear that summer operations would subsidize winter service if the operators were to lose market share during those months to seasonal competitors.

Moreover, the issue of safety must be considered. Because the purchase, maintenance and operation of ferry service is a costly venture (the purchase of the Lady Express alone was a $1 million transaction) we doubt that the opportunity to provide ferry service on Lake Chelan will attract more than a few operators that the Commission would deem "fit, willing and able" to provide service under current standards. While one commenter mentioned the availability of a 40-foot that could carry 20 passengers, the operation of ferry service must also take into account proper training, adequate insurance, drug testing for crew members, the ability to handle freight, and legal agreements to access docks and landings.

For these reasons, the Commission does not recommend at this time any changes to the state laws dealing with commercial ferry regulation as it pertains to Lake Chelan. The current system ensures that basic, year-round passenger transportation is provided between Chelan and the communities of Stehekin and Holden Village, the residents of which have no reasonable alternatives to ferry service for travelling to other locales. [56]

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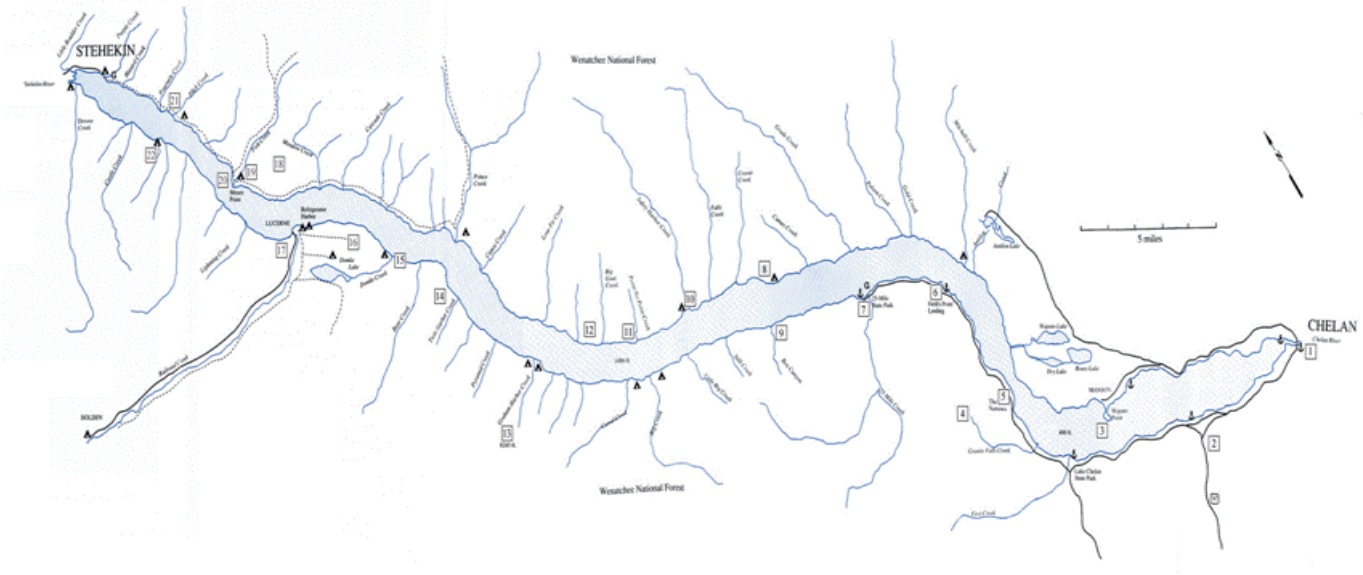
[55] *Id*., citing Kahn, Statement before the Aviation Subcommittee of the House Public Works and Transportation Committee on H.R. 11145, 8 (Mar. 6, 1978). *Aviation Regulatory Reform, Hearings before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong., 2d Sess. 124 (1978), at 6337.

[56] The commission also heard suggestions from commenters on possible ways the Lake Chelan Boat Company could improve customer service. These included changes to tariff rules governing commuter discount ticket

It may be that increased traffic in the future will enable the incumbent to provide more frequent service to customers and potential customers. The Commission should continue to monitor the company's operations on a periodic basis and make recommendations for such expanded service where appropriate.

packages, greater accessibility for persons with disabilities, increased dock safety, and the ability to take pets into the passenger compartment of the boat. The commission will explore these matters with the company.

Appendix 1, Lake Chelan Boat Company Route Map (includes flag stops)



Up Lake Mileage

7	Wapato Point	35	Point No Point
9	First Creek	31	Graham Harbor
11	Narrows	35	Prince Creek
16	Fields Point	37	Domke Falls
19	25 Mile Creek	43	Lucerne
22	Deer Point	48	Moore Point
26	Safety Harbor	51	Stehekin

EXHIBIT D

FOR

DECLARATION

OF

MICHAEL

BINDAS

LIST OF NAVIGABLE WATERS

SEATTLE DISTRICT

WATERWAY	YEAR OF DETERMINATION	BASIS OF DETERMINATION			PRESENTLY USED (1980)
		Historic Use	Ebb & Flow	In Use at Time of Report	
IDAHO:					
Clark Fork River	28 Apr 1932	X			
Kootenai River	9 Feb 1933	X			
Lake Pend Oreille	1932*	X			X
[illegible]l Oreille River	1932*	X			X
MONTANA:					
Kootenai River	9 Feb 1933	X			X
WASHINGTON:					
Bear River	28 Jan 1933	X	X	X	X
Black River	5 Feb 1932	X			
Cedar River	6 Feb 1932	X		X	X
Chehalis River	2 Apr 1932	X			X
Columbia River	1932*	X	X	X	X
Dakota Creek	29 Jan 1932	X	X	X	X
Dickey River	5 Feb 1932	X	X	X	X
Duwamish River	5 Apr 1932	X	X		X
Elwha River	1933*		X		X
Grays Harbor	1932*	X	X		X
[illegible]a Hamma River	8 Feb 1932	X	X	X	X
Hoh River	26 Apr 1932	X	X	X	X
Hoko River	29 Jan 1932	X	X	X	X
Hoquiam River	29 Jan 1932	X	X	X	X
Hoquiam River (East Fork)	29 Jan 1932	X	X	X	X
Humptulips River	1932*		X		X
Johns River	8 Feb 1932	X	X	X	X
Lake Chelan	14 Nov 1974	X		X	X

Incl 1

LIST OF NAVIGABLE WATERS

SEATTLE DISTRICT

WATERWAY	YEAR OF DETERMINATION	BASIS OF DETERMINATION			PRESENTLY USED (1980)
		Historic Use	Ebb & Flow	In Use at Time of Report	
Lake Sammamish	None				X
Lake Union	None				X
Lake Washington	None				X
[illegible]e Washington Ship Canal	None				X
Little Hoquiam River	28 Jan 1932	X	X	X	X
Naselle River	1932*	Unknown			
Nooksack River	27 Jan 1932	X			X
North Nemah River	11 Jan 1932	X	X	X	X
North River	1932*		X		X
Okanogan River	6 Jan 1932	X			
Palix River	29 Jan 1932	X	X	X	X
Pend Oreille River	1932*	X			X
Puyallup River	1932*		X		X
Pysht River	8 Feb 1932	X	X	X	X
Queets River	6 Feb 1932	X	X	X	X
Quillayute River	26 Jan 1933	X	X	X	X
Samish River	6 Feb 1932	X	X	X	X
Sammamish River	1932*	X			X
Sekiu River	28 Jan 1932	X	X	X	X
[illegible]agit River (including South Fork)	1932*	X			X
Skagit River (North Fork)	1932*	X			
Skokomish River	3 Feb 1932	X	X	X	X
Skykomish River	13 Apr 1932	X			
Snohomish River	1932*	X			X
Snohomish River (Union Slough)	1932*	X	X		X
Snohomish River (Steamboat Slough)	1932*	X	X		X

L I S T O F N A V I G A B L E W A T E R S

S E A T T L E D I S T R I C T

WATERWAY	YEAR OF DETERMINATION	BASIS OF DETERMINATION			PRESENTLY USED (1980)
		Historic Use	Ebb & Flow	In Use at Time of Report	
Snohomish River (Ebey Slough)	1932*	X	X		X
Snoqualmie River	26 Mar 1932	X		X	
Stillaquamish River	6 Apr 1933	X	X	X	X
Stillaquamish River (Hat Slough)	6 Apr 1933	X	X	X	X
Willapa Bay	1932*		X		X
Willapa River	1932*		X		X
Willapa River (North Fork)	1932*	Unknown			
Willapa River (South Fork)	1932*	Unknown			
Willapa River (Skidmore Slough)	1932*	X	X		X
Wishkah River	6 Feb 1932	X	X	X	X
Straits of Juan de Fuca and Georgia	None	X	X		X
Puget Sound	None	X	X		X

*NOTE: Approximate date based on list of navigable waters in OCE letter dated 9 February 1933, Subject: Navigability of Waterways, Seattle District

EXHIBIT E

FOR

DECLARATION

OF

MICHAEL

BINDAS

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JAMES COURTNEY and CLIFFORD COURTNEY, Plaintiffs, v. JEFFREY GOLTZ, et al., Defendants.	NO: 11-CV-0401-TOR ORDER GRANTING MOTION TO DISMISS

BEFORE THE COURT is Defendants' motion to dismiss for failure to state a claim (ECF No. 7). The Court heard oral argument on the motion on April 12, 2012. Michael E. Bindas and Jeanette Petersen appeared on behalf of the Plaintiffs, James Courtney and Clifford Courtney. Assistant Attorney General Fronda Woods appeared on behalf of the Defendants, Jeffrey Goltz, Patrick Oshie, Philip Jones, and David Tanner. The Court has reviewed the motions, the responses, the record and files herein and is fully informed.

BACKGROUND

This lawsuit is a challenge to certain Washington statutes and administrative regulations that require an operator of a commercial ferry to obtain a certificate of "public convenience and necessity" from the Washington Utilities and Transportation Commission ("WUTC") before commencing operations. Plaintiffs allege that these statutes and regulations, as applied to their proposed ferry services on Lake Chelan, violate their right "to use the navigable waters of the United States" under the Privileges or Immunities Clause of the Fourteenth Amendment. Defendants, all members of the WUTC, have moved to dismiss the Complaint for failure to state a claim on the ground that Plaintiffs do not have a Fourteenth Amendment right to operate a commercial ferry on Lake Chelan.

FACTS

The following facts are drawn from Plaintiff's Complaint and are accepted as true for purposes of this motion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Plaintiffs James Courtney and Clifford Courtney ("the Courtneys") live in Stehekin, Washington. Stehekin is a small, unincorporated community of approximately 75 residents located at the northwestern-most tip of Lake Chelan. Stehekin is a very isolated community: the only means of accessing the town are by boat, seaplane, or on foot. Most residents and visitors reach Stehekin via a ferry

operated by Lake Chelan Boat Company. At present, this is the only commercial ferry operating on the lake.

The Courtneys would like to establish a competing ferry service on Lake Chelan. They believe that a competing service is needed for two main reasons. First, they believe that a second ferry, based in Stehekin, would better serve the needs of Stehekin residents than the existing ferry based in Chelan.[1] Second, they believe that a second ferry would allow more tourists and visitors to reach Stehekin, thereby increasing patronage of Stehekin businesses—many of which are owned by the Courtneys. To date, however, the Courtneys have been unable to obtain the requisite certificate of "public convenience and necessity" from the WUTC or otherwise obtain permission to operate a ferry on Lake Chelan.

The Courtneys' efforts to establish a competing ferry service have taken several forms. First, in 1997, James Courtney submitted a formal application to the WUTC for a certificate of "public convenience and necessity" pursuant to RCW 81.84.010 and 020. The WUTC's evaluation of this application culminated in a two-day evidentiary hearing at which the WUTC took testimony from James

[1] The city of Chelan is located at the southeastern-most tip of Lake Chelan. The distance between Chelan and Stehekin is approximately fifty-five (55) miles by boat.

and others about (1) the need for an additional ferry; and (2) the financial viability of the proposed service.[2] The WUTC ultimately denied James's application, finding that the proposed service was not required by "the public convenience and necessity," and that, in any event, James lacked the financial resources to sustain the proposed service for twelve months. The WUTC further concluded that James had failed to carry his statutory burden of establishing that the incumbent carrier "ha[d] failed or refused to furnish reasonable and adequate service." *See* RCW 81.84.020(1).

Second, beginning in 2006, James attempted to establish an "on-call boat transportation service" based in Stehekin. Because James intended to use docks owned by the United States Forest Service in conjunction with this service, he

[2] Before issuing a certificate of "public convenience and necessity," the WUTC is required to determine that an applicant "has the financial resources to operate the proposed service for at least twelve months" and to evaluate "[r]idership and revenue forecasts; the cost of service for the proposed operation; an estimate of the cost of the assets to be used in providing the service; a statement of the total assets on hand of the applicant that will be expended on the proposed operation; and a statement of prior experience, if any, in such field by the applicant." RCW 81.84.020(2).

applied to the Forest Service for a "special use permit." The Forest Service subsequently contacted the WUTC to verify that James's proposed use of its docks would comply with state law. In October of 2007, WUTC staff advised the Forest Service that the proposed service was exempt from the statutory "public convenience and necessity" requirement. In March of 2008, however, WUTC staff reversed course and advised James directly that he would need to obtain a certificate before commencing his on-call service.

Four months later, in July of 2008, WUTC staff reversed course once again and advised James that the on-call service would be exempt from the certificate requirement. The Forest Service, recognizing the apparent confusion among the WUTC staff, subsequently requested an "advisory opinion letter" on the issue from Defendant David Danner in August of 2009. For reasons that are unclear from the existing record, Defendant Danner declined to respond.

Also in 2008, Clifford Courtney contacted the WUTC and proposed two alternative boat transportation services. The first proposal was a "charter" service whereby Clifford would hire a private boat to transport patrons of his lodging and river rafting businesses between Chelan and Stehekin. The second proposal was a service whereby Clifford would "shuttle" his customers between Chelan and Stehekin in his own private boat.

In September of 2008, Clifford sent a letter to Defendant Danner seeking guidance about whether either proposed service would require a certificate of "public convenience and necessity." Defendant Danner responded that, in his opinion, both services would require a formal certificate. Specifically, Defendant Danner opined that even private boat transportation, offered exclusively to paying customers of Clifford's lodging and river rafting businesses, would be a service "for the public use for hire" for which a formal certificate was required pursuant to RCW 81.84.010. Defendant Danner did, however, inform Clifford that his opinion was merely advisory in nature and that Clifford was free to seek a formal ruling on the issue from the full Commission.

Frustrated by the WUTC's responses to their formal application and subsequent proposals, the Courtneys contacted the Governor of the State of Washington and several state legislators in February of 2009. The Courtneys explained the perceived need for a competing ferry service on Lake Chelan and urged their legislators to relax the ferry operator certification requirement. In response, the State Legislature directed the WUTC to study the appropriateness of statutes and regulations governing commercial ferry operations on Lake Chelan. Pursuant to this mandate, the WUTC studied the issue and delivered a formal report to the State Legislature in January of 2010. *See* Washington Utilities and Transportation Commission, *Appropriateness of Rate and Service Regulation of*

Commercial Ferries Operating on Lake Chelan: Report to the Legislature Pursuant to ESB 5894, January 14, 2010 (hereinafter "Ferry Report").[3]

In this report, the WUTC concluded, *inter alia*, that the existing ferry operator was providing satisfactory service and that no modification of the existing regulations was therefore necessary. The WUTC did, however, discuss the potential for "limited competition" by private carriers within the confines of the existing statutory and regulatory framework:

> There are three ways for the Commission to allow some limited competition with an incumbent provider's service: (1) by defining an incumbent's protected geographic territory in a narrow fashion, (2) by concluding that the incumbent has failed to meet a public need that the applicant proposes to meet, or (3) by declining to require a certificate for certain types of boat transportation services that are arguably private rather than for public use.

Ferry Report at 12. Although the WUTC believed that it was "unlikely that . . . any of these theories could be relied upon to authorize competing services on Lake Chelan," it nevertheless concluded that,

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[3] Available at: http://www.wutc.wa.gov/webdocs.nsf/d94adfab95672fd98825650200787e67/b18a8709b0fbaba2882576b100799b46/$FILE/Appropriateness%20of%20Rate%20&%20Service%20Regulation%20of%20Commercial%20Ferries%20Operating%20on%20Lake%20Chelan_2010.pdf

> [T]here may be flexibility within the law for the Commission to take an expansive interpretation of the private carrier exemption from commercial ferry regulation. For example, the Commission might reasonably conclude that a boat service offered on Lake Chelan (and elsewhere) in conjunction with lodging at a particular hotel or resort, and which is not otherwise open to the public, does not require a certificate under RCW 81.84.[010].

Ferry Report at 15.

On October 19, 2011, the Courtneys filed this lawsuit challenging Washington's regulation of commercial ferry activity under the Fourteenth Amendment to the United States Constitution. The Courtneys' Complaint alleges that the applicable statutes and administrative regulations, as applied to their attempts to establish a competing ferry service on Lake Chelan, violate their right to "use the navigable waters of the United States" under the Privileges or Immunities Clause. The Courtneys have specifically limited their causes of action to their rights under the Fourteenth Amendment's Privileges or Immunities Clause and have expressly disclaimed reliance upon the Commerce Clause or any other constitutional provision. Accordingly, the court will limit its analysis to whether the Courtneys have stated a claim for relief under 42 U.S.C. § 1983 or 28 U.S.C. § 2201 *et seq*. for violations of a right guaranteed by the Privileges or Immunities Clause of the Fourteenth Amendment.

DISCUSSION

A motion to dismiss pursuant to Federal Rule of Evidence 12(b)(6) "tests the legal sufficiency of a [plaintiff's] claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive such a motion, a plaintiff must allege facts which, when taken as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation and citation omitted). In order for a plaintiff asserting a cause of action under 42 U.S.C. § 1983 to satisfy this standard, he or she must allege facts which, if true, would constitute a violation of a right guaranteed by the United States Constitution. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Similarly, a plaintiff seeking declaratory relief under 28 U.S.C. § 2201 must allege facts which, if true, would violate federal law. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950) (holding that Declaratory Judgment Act did not expand subject-matter jurisdiction of federal courts). As discussed below, Plaintiffs' Complaint fails to satisfy these standards.

A. The "Right to Use the Navigable Waters of the United States"

The Courtneys have asserted two related causes of action. First, they allege that the State of Washington's ferry licensing laws infringe upon their right to provide a commercial ferry service open to the general public on Lake Chelan. Second, they claim that these same laws infringe upon their right to provide a *private* ferry service for patrons of their Stehekin-based businesses. Plaintiffs

contend that their right to provide these services is guaranteed by the Fourteenth Amendment's Privileges or Immunities Clause, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1.

In support of their claims, the Courtneys note that the Supreme Court has specifically delineated "[t]he right to use the navigable waters of the United States" as one of the "privileges or immunities" guaranteed to citizens of the United States under the Fourteenth Amendment. *See Slaughter-House Cases*, 83 (16 Wall.) 36, 79-80 (1872). Defendants apparently do not dispute that *Slaughter-House* established a Fourteenth Amendment right "to use the navigable waters of the United States." Defendants argue, however, that this right does not extend to operating a commercial ferry service because regulation of such services has traditionally been reserved exclusively to the individual states.

At the outset, it is important to note that no federal court has ever directly examined the "right to use the navigable waters of the United States" referenced by the Supreme Court in *Slaughter-House*. Given the absence of applicable precedent, this Court must attempt to define the "right to use the navigable waters of the United States" before determining whether, on the facts alleged in the Complaint, the right could have been violated. The logical starting point for this analysis is the *Slaughter-House* decision itself.

In *Slaughter-House*, the Supreme Court was asked to decide whether a Louisiana statute which granted to a single corporation the exclusive right to operate a centralized slaughterhouse—to which all merchants were required to bring their animals for slaughter—violated the Thirteenth or Fourteenth Amendments. 83 (16 Wall.) at 66-67. Before embarking on that task, Justice Miller, writing for a 5-4 majority, emphasized that the Court's consideration of the newly-adopted Thirteenth and Fourteenth Amendments must be informed by the history and purpose of their adoption. *Id.* at 67-68, 71-72. According to Justice Miller, "the one pervading purpose" of these amendments at the time of their adoption was to ensure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.* at 71.

With the history and purpose of the amendments thus established, the Court proceeded to consider whether the Louisiana statute violated the Privileges or Immunities Clause of the Fourteenth Amendment. At the outset, the Court drew a crucial distinction between rights and privileges created by *state* citizenship and rights and privileges created by *United States* citizenship. *See id.* at 72-77. Specifically, the Court noted that the Fourteenth Amendment protects only "privileges or immunities of citizens of the *United States*" and that these rights are

separate from the "Privileges and Immunities" guaranteed to *state* citizens referenced in Article IV. *Id.* at 78.

According to the *Slaughter-House* majority, the "privileges or immunities" referenced in the Fourteenth Amendment are a narrow category of rights "which ow[e] their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. The "Privileges and Immunities" referenced in Article IV, by contrast, are a broad category of "fundamental" rights conferred by *state* citizenship, such as "protection by the government . . . the right to acquire and possess property of every kind, and [the right] to pursue and obtain happiness and safety." *Id.* at 76, (emphasis omitted). Notably, the Court further emphasized that the latter category of rights "embraces nearly every civil right for the establishment and protection of which organized government is instituted." *Id.* (citing *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870)).

After drawing this crucial distinction between rights conferred by state citizenship and rights conferred by United States citizenship, the Court concluded that the right asserted by the petitioners—*i.e.*, the right to operate competing slaughterhouse facilities[4]—was not a privilege of United States citizenship. *Id.* at

[4] The majority carefully noted that the Louisiana statute did not "deprive[] a large and meritorious class of citizens . . . of the right to exercise their trade," but merely required all butchers "to slaughter at a specified place and to pay a reasonable

79. Rather, the Court concluded that this was an economic right conferred by *state* citizenship—a right that must yield to the lawful exercise of the state's "police power." *Id.* at 62, 78. Accordingly, the Court held that the Louisiana statute did not implicate the "privileges or immunities" protected by the Fourteenth Amendment. *Id.* at 80.

Before concluding its analysis of the "privileges or immunities" issue, however, the *Slaughter-House* majority took an unusual step: it enumerated certain rights which, though not implicated by the challenged statute, might nevertheless be protected under the Fourteenth Amendment.

> Having shown that the privileges and immunities relied [upon by the petitioners] are those which belong to the citizens of the States as such, and that they are left to the State governments for security and protection, and not by [the Fourteenth Amendment] placed under the

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compensation for the use of the accommodation furnished to him at that place." 83 U.S. (16 Wall.) at 60-61. Accordingly, the Court framed the right at issue not as the right to butcher animals in general, but rather the right of to operate competing slaughterhouse *facilities*. *Id.* at 61 ("[I]t is not true that [the statute] deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit . . . [i]t is, however, *the slaughter-house privilege*, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.") (emphasis added).

> care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.
>
> But lest it should be said that no such privileges and immunities are to be found . . . we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws.

Id. at 78-79. The Court then proceeded to list several examples of rights that could potentially be guaranteed by the Fourteenth Amendment. One such example was "[t]he right to use the navigable waters of the United States, however they may penetrate the territory of the several States." *Id.* at 79.

B. Plaintiffs' First Cause of Action: Operation of a Commercial Ferry Service Open to the Public

Given the limited holding of the *Slaughter-House* case, this Court cannot definitively conclude that the Fourteenth Amendment does in fact protect "the right to use the navigable waters of the United States." Because the *Slaughter-House* majority merely "venture[d] to suggest" a number of rights that could be protected under the Fourteenth Amendment—ostensibly to prevent the Privileges or Immunities Clause from becoming a legal nullity—there is reason to question whether "the right to use the navigable waters of the United States" is truly a *recognized* Fourteenth Amendment right. The fact that no federal court has ever directly examined the "right" further reinforces this uncertainty.

Nevertheless, even if the right does in fact exist, the court Cannot conclude that the right extends to operating a commercial ferry open to the public on Lake Chelan. At the Courtneys' urging, the Court has thoroughly reviewed the history and purpose of the Fourteenth Amendment's Privileges or Immunities Clause. The Courtneys are correct that the overarching purpose of the clause at the time of the Fourteenth Amendment's adoption was the protection of the rights of newly-freed slaves following the Civil War. *See Slaughter-House*, 83 (16 Wall.) at 71 (noting that the "one pervading purpose" of the Thirteenth, Fourteenth and Fifteenth Amendments was "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him").

There is less support, however, for the Courtneys' assertions that the Privileges or Immunities Clause was designed to protect quintessentially *economic* rights. While it is certainly likely that the oppression of former slaves in the wake of the Civil War resulted in adverse economic consequences, there is little to suggest that Congress viewed the Privileges or Immunities Clause as the primary vehicle through which former slaves would achieve economic equality. Indeed, the Courtneys' focus on the economic underpinnings of the clause appears to give short shrift to the "one pervading purpose" of the Thirteenth, Fourteenth and Fifteenth Amendments: to eliminate *all* forms of institutional oppression of former slaves. *Id.* at 71.

Moreover, the Courtneys' assertion that they have a Fourteenth Amendment right to operate a ferry business on Lake Chelan is inconsistent with the *Slaughter-House* decision itself. Like the right to operate competing slaughterhouse facilities at issue in *Slaughter-House*, the right to operate a competing commercial ferry service on Lake Chelan appears to derive from *state* citizenship rather than United States citizenship. *Cf. Saenz v. Roe*, 526 U.S. 489, 502-03 (1999) (holding that Fourteenth Amendment Privileges or Immunities Clause protects the right to travel between states). Notwithstanding *Slaughter-House*'s suggestion that the right to "use" the navigable waters of the United States derives from United States citizenship, the holding of the case counsels that using such waters *in the manner the Courtneys have proposed—i.e.*, to operate a competing commercial ferry business—is one of the "fundamental" rights conferred by state citizenship. *See id.* at 76 (holding that "the right to acquire and possess property of every kind" originates from state citizenship and is therefore not protected under the Privileges or Immunities Clause of the Fourteenth Amendment)[5]; *McDonald v. City of*

[5] The Court also notes that the *Slaughter-House* majority tacitly approved of an exclusive ferry franchise by declining to address a portion of the Louisiana statute which granted the slaughterhouse operator an exclusive right to run ferries on the Mississippi River between its several buildings on both sides of the river. *See* 83 U.S. (16 Wall.) at 43. The minority approved of an exclusive ferry franchise more

Chicago, __ U.S. __, 130 S. Ct. 3020, 3030-31 (2010) (declining to revisit *Slaughter-House*'s narrow interpretation of the rights protected under the Privileges or Immunities Clause). Accordingly, the Court finds that the Courtneys do not have a Fourteenth Amendment right to operate a commercial ferry service open to the public on Lake Chelan.[6]

C. Plaintiffs' Second Cause of Action: Operation of a Private Ferry Service to Patrons of Stehekin-Based Businesses

1. *Standing*

Article III of the United States Constitution limits the jurisdiction of federal courts to cases or controversies between litigants with adverse interests. U.S.

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explicitly: "It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others." *Id.* at 88 (Field, J., dissenting). However, the court expresses no opinion as to the legality of an exclusive ferry franchise at this time.

[6] The Court expresses no opinion about whether the right to use the navigable waters of the United States extends to "using" such waters for private transportation services incidental to a land-based business.

Const. art. III, § 2, cl. 1. The overarching purpose of this provision is to prevent federal courts from rendering advisory opinions in the absence of an actual dispute. *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968). Consistent with this mandate, litigants in federal court must establish the existence of a legal injury that is both "concrete and particularized [and] actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (plurality opinion) (internal quotation marks and citations omitted). To satisfy this requirement in an action for declaratory and injunctive relief, a litigant must allege facts which "show a very significant possibility of future harm." *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Accordingly, "[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *Stoinoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983).

Here, the Courtneys' second claim does not present an actual case or controversy under Article III. The Courtneys' second claim is based on Clifford Courtney's proposal to the WUTC in 2008 for one of two alternative boat transportation services. The first proposal was a "charter" service whereby Clifford would hire a private boat to transport patrons of his lodging and river rafting businesses between Chelan and Stehekin. The second proposal was a service whereby Clifford would "shuttle" his customers (lodging and river rafting patrons) between Chelan and Stehekin in his own private boat.

As the Courneys acknowledge in their complaint, the WUTC has never definitively ruled that their proposed "private" ferry service would in fact require a certificate of public convenience and necessity under RCW 81.84.010. While the Court commends the Courtneys for their good-faith efforts to resolve this issue with the WUTC over the past several years, it cannot ignore the fact that (1) the WUTC has given directly conflicting opinions about whether a certificate would be required; and (2) neither the WUTC nor any other state adjudicative body has ever officially ruled on the matter. Accordingly, the Court finds that it lacks subject-matter jurisdiction to entertain the Courtneys' second cause of action at this time. *San Diego Gun Rights Comm.*, 98 F.3d at 1126; *Stoinoff*, 695 F.2d at 1223.

2. *Ripeness*

Even if the Court had subject-matter jurisdiction, however, it would nevertheless decline to consider the Courtneys' second claim on prudential ripeness grounds.[7] In light of the lingering uncertainty about whether the

[7] During oral argument, counsel for the Plaintiffs correctly noted that the Courtneys are not required to exhaust their administrative remedies before filing a § 1983 claim. *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496, 516 (1982). The lack of an exhaustion requirement, however, does not relieve the Courtneys of their obligation to establish that their claim presents a ripe controversy. *See McCabe v.*

Courtneys would be required to obtain a certificate of public convenience and necessity to operate a private ferry service, the court concludes that further consideration of the constitutionality of the challenged statutes at this juncture would be premature. *See Renne v. Geary*, 501 U.S. 312, 323-24 (1991) (postponing ruling on whether provision of the California constitution violated the First Amendment where provision did not clearly apply to petitioners and where "permitting the state courts further opportunity to construe [the provision could] ... materially alter the question to be decided") (internal quotation and citation omitted). This conclusion is further reinforced by the WUTC's most recent pronouncement that "there may be flexibility within the law for the commission to take an expansive interpretation of the private carrier exemption from commercial ferry regulation." *See* Ferry Report at 15. In light of the WUTC's apparent willingness to consider an interpretation of the statute that would not implicate the

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Arave, 827 F.2d 634, 639 (9th Cir. 1987) ("While there is no requirement that administrative remedies be exhausted in cases brought under 42 U.S.C. § 1983, the claim must be ripe, and not moot, to be reviewed properly.") (internal citations omitted).

Fourteenth Amendment, the court concludes that the Courtneys' second claim is unripe for present adjudication.[8]

3. *Abstention*

Finally, even if the Courtneys' second claim was ripe for review, the Court would abstain from deciding the constitutional question presented under the "abstention doctrine" set forth in *Railroad Comm'n of Texas v. Pullman Co.*, 312

[8] The Court acknowledges that an as-applied challenge to RCW 81.84.010—which the Courtneys have asserted in this case—is more likely to present a ripe controversy than a facial challenge. *See, e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985) (articulating preference for deciding constitutional questions on the facts of a specific case rather than in the abstract). Nevertheless, when a § 1983 plaintiff asserting an as-applied challenge fails to seek a conclusive determination as to whether the challenged statute will in fact be applied in the manner asserted, a ripe controversy does not exist. *See Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379-80 (9th Cir. 1988) (dismissing as unripe an as-applied constitutional challenge under § 1983 where plaintiffs never formally applied for a special use permit, and, consequently, the defendant city never rendered a "final and authoritative determination as to how the [challenged land use] ordinance applied" to the plaintiffs' property).

U.S. 496 (1941). Under *Pullman*, a federal court must abstain from deciding a federal constitutional question when the resolution of that question hinges on competing interpretations of a state statute. *Id.* at 499-500. In such situations, the "last word" on the meaning of the state statute belongs to the state courts. *Id.* The reasons for this deference are twofold. First, deferring to a state court on a question of state law prevents a federal court's interpretation of a state statute from being "supplanted by a controlling decision of [the] state court" at a later time. *Id.* at 500. More importantly, however, this deference embodies a "scrupulous regard for the rightful independence of the state governments." *Id.* at 501.

As discussed above, Washington's ferry certification requirement applies to "commercial ferr[ies] . . . for the public use for hire." RCW 81.84.010. Whether this definition applies to the Courtneys' proposed "private" ferry service remains an open question. If the WUTC or the Washington State courts determine that the proposed service *does* qualify as a "commercial ferry . . . for the public use for hire," then enforcement of the certificate requirement could potentially violate the Courtneys' Fourteenth Amendment rights. On the other hand, if either entity determines that the proposed service *does not* qualify as a "commercial ferry . . . for the public use for hire," then the certificate requirement will not—indeed, cannot—be enforced against the Courtneys. In the latter scenario, the Courtneys' constitutional challenge to the certificate requirement is moot. Accordingly, the

court concludes that the Courtneys' second claim must be dismissed without prejudice to afford the WUTC or the Washington State courts an opportunity to resolve this unsettled question of state law. *Pullman*, 312 U.S. at 501.

ACCORDINGLY, IT IS HEREBY ORDERED:

Defendants' motion to dismiss (ECF No. 7) is **GRANTED**. Plaintiffs' first cause of action is **DISMISSED** with prejudice. Plaintiffs' second cause of action is **DISMISSED** without prejudice. The District Court Executive is hereby directed to enter this Order and furnish copies to counsel.

DATED this 17th day of April, 2012.

s/ Thomas O. Rice

THOMAS O. RICE
United States District Judge

EXHIBIT F

FOR

DECLARATION

OF

MICHAEL

BINDAS

No. _____

In The Supreme Court of the United States

JAMES COURTNEY AND CLIFFORD COURTNEY,

Petitioners,

v.

DAVID DANNER, IN HIS OFFICIAL CAPACITY AS CHAIRMAN AND COMMISSIONER OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In the *Slaughter-House Cases*, this Court held that one of the rights of national citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment is the "right to use the navigable waters of the United States." 83 U.S. (16 Wall.) 36, 79 (1873). Lake Chelan is such a body of water. Since 1929, however, the State of Washington has allowed only one ferry provider, a private company, to operate on the lake and has prohibited Petitioners James and Clifford Courtney from operating an alternative ferry. The Courtneys filed this action alleging that the monopoly of ferry service on Lake Chelan abridges their right to use the navigable waters of the United States in violation of the Privileges or Immunities Clause. In affirming the dismissal of the Courtneys' claim, the Ninth Circuit held that the clause protects only "a right to *navigate* the navigable waters of the United States" – not "to utilize those waters for a . . . specific professional venture" or "to operate a particular business using" them. Because the Courtneys' proposed use of Lake Chelan is "an activity driven by economic concerns," the Ninth Circuit concluded, it is not protected by the Privileges or Immunities Clause.

The question presented is:

Is the "right to use the navigable waters of the United States" recognized in the *Slaughter-House Cases* solely a right to navigate such waters or does it also encompass their use to operate a ferry or engage in other economic activity?

PARTIES TO THE PROCEEDING

James Courtney and Clifford Courtney are the Petitioners and were the appellants in the U.S. Court of Appeals for the Ninth Circuit. The appellants in the Ninth Circuit were Jeffrey Goltz, then-chairman and commissioner of the Washington Utilities and Transportation (WUTC); Patrick Oshie, then-commissioner of the WUTC; Philip Jones, commissioner of the WUTC; and David Danner, then-executive director of the WUTC, in their official capacities. Since the appeal was undertaken, Oshie has resigned from the WUTC, Danner has been appointed its chairman, and Steven King has been appointed its executive director. Accordingly, and pursuant to Rule 35.3, the Respondents in this Court are David Danner, chairman and commissioner; Jeffrey Goltz, commissioner; Philip Jones, commissioner; and Steven King, executive director, in their official capacities.

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PETITION FOR WRIT OF CERTIORARI

James ("Jim") Courtney and Clifford ("Cliff") Courtney respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 736 F.3d 1152 and appears in the Appendix ("App.") at App. 1-29. The opinion of the district court is reported at 868 F. Supp. 2d 1143 and appears at App. 30-51.

JURISDICTION

The court of appeals entered its judgment on December 2, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Privileges or Immunities Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Reproduced at App. 52-155 are the relevant

Washington statutes and regulations, which: (1) impose a certificate of public convenience and necessity requirement for ferry service, Wash. Rev. Code § 81.84.010(1); Wash. Admin. Code § 480-51-025(1); and (2) govern the application process for such a certificate, Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; *id.* §§ 480-07-300 to -498; *id.* §§ 480-07-800 to -885.

STATEMENT OF THE CASE

There is widespread uncertainty in the lower courts over the nature and scope of the rights of national citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment. The result has been judicial paralysis: an unwillingness to rely on the clause, even to protect those rights of national citizenship that this Court expressly recognized in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

This case involves one such right: the "right to use the navigable waters of the United States." *Id.* at 79. For seventeen years, Petitioners Jim and Cliff Courtney have tried to exercise that right to operate a ferry on Lake Chelan, a 55-mile-long lake that the federal government has declared a navigable water of the United States. The State of Washington, however, imposes a "certificate of public convenience and necessity" requirement for ferry service on the lake. This requirement – which gives an existing ferry provider the power to veto new competition – has

resulted in a monopoly of ferry service that the same company has held since 1929. The state has prohibited all other applicants, including the Courtneys, from operating on this navigable water of the United States.

Relying squarely on *Slaughter-House*, the Courtneys challenged this scheme and the resulting monopoly under the Privileges or Immunities Clause. But in a decision that evinces the uncertainty and paralysis plaguing the lower courts, the Ninth Circuit affirmed the dismissal of their claim. It insisted that, with one limited exception, the clause does not protect "economic rights," App. 19 n.15, and it therefore concluded that the "right to use the navigable waters of the United States" is merely "a right to *navigate*" them – not to use them for a "professional venture." App. 17. Because the Courtneys' proposed use is "an activity driven by economic concerns," the court concluded, they could not state a claim. App. 18-19.

This Court should grant certiorari to begin resolving the widespread uncertainty over the nature and scope of rights protected by the Privileges or Immunities Clause and to determine whether this Court's jurisprudence tolerates the Ninth Circuit's exceedingly narrow interpretation of the clause.

A. Lake Chelan

Lake Chelan is a narrow, 55-mile-long lake in the North Cascades.[1] The city of Chelan lies at its southeast end; the unincorporated community of Stehekin, at its northwest end. Stehekin is a popular summer destination that draws Washington residents and visitors from outside the state. Stehekin and much of the northwest end of the lake are part of the Lake Chelan National Recreation Area (LCNRA). App. 4-5.

No roads lead to Stehekin or the LCNRA; both are accessible only by boat, plane, or foot. Lake Chelan thus provides a critical means of access to Stehekin and the LCNRA. The lake is a "navigable water of the United States." As the Corps of Engineers recognized in making that designation, the lake is presently, has been in the past, and may in the future be used for interstate commerce. App. 5; Compl. ¶¶ 17-20.

B. Ferry Regulation On Lake Chelan

Regulation of ferry service on Lake Chelan began in 1911, when Washington enacted a law addressing ferry safety issues and requiring reasonable fares. The law did not impose significant barriers to entry, and by the early 1920s, at least four ferries competed

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[1] The facts are taken from the Ninth Circuit's opinion, App. 1-29, and from the allegations in the Courtneys' complaint (ECF No. 1), which are assumed true, as this case was resolved on a motion to dismiss. *Haddle v. Garrison*, 525 U.S. 121, 125 (1998).

on the lake. In 1927, however, the Washington legislature eliminated competition by prohibiting anyone from offering ferry service without first obtaining a certificate declaring that the "public convenience and necessity" ("PCN") required it. App. 5.

Today, a PCN certificate is required to "operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state." Wash. Rev. Code § 81.84.010(1) (App. 52). An applicant must prove that its proposed service is required by the "public convenience and necessity," that it "has the financial resources to operate the proposed service for at least twelve months," and, if the territory is already served by a ferry, that the existing certificate holder: "has not objected to the issuance of the certificate as prayed for"; "has failed or refused to furnish reasonable and adequate service"; or "has failed to provide the service described in its certificate." *Id.* §§ 81.84.010(1), .020(1)–(2) (App. 52-53).

The Washington Utilities and Transportation Commission ("WUTC") notifies the would-be ferry provider's competitors – that is, "all persons presently certificated to provide service" – of the application. Wash. Admin. Code § 480-51-040(1) (App. 153-54). These existing providers, in turn, may file a protest with the WUTC. Wash. Admin. Code §§ 480-51-040(1) (App. 153-54); 480-07-370(1)(f) (App. 79). The WUTC then conducts an adjudicative proceeding, in which any protesting ferry provider may participate as a

party. Wash. Admin. Code §§ 480-07-300(2)(c), -305(3)(g), -340(3) (App. 58, 60, 67-68). The proceeding is akin to a civil lawsuit and involves discovery, motions, an evidentiary hearing, post-hearing briefing, and oral argument. Wash. Admin. Code §§ 480-07-375 to -498 (App. 79-128). The applicant bears the burden of proof on every element for a certificate.

This process is extraordinarily expensive. Because of its complexity and adjudicative nature, the applicant must hire an attorney or other professional, such as a transportation consultant, and may also require an economic expert. Compl. ¶ 39. As discussed below, even with this help, the application is sure to be denied.

C. Consequence Of The PCN Requirement

The WUTC identifies "protection from competition" as the "[r]ationale" for the PCN requirement, App. 20; Comp. ¶ 41, and history demonstrates that it operates in a protectionist manner. In October 1927, the year the PCN requirement was imposed, the state issued the first – and, to this day, only – certificate for ferry service on Lake Chelan. Since 1929, the certificate has been held by Lake Chelan Boat Company. At least four other applications have been made, but in each instance, Lake Chelan Boat Company protested and the state denied a certificate. App. 7 & n.2; Compl. ¶¶ 23, 42-43.

D. The Courtneys' Efforts To Provide An Alternative Service

Jim and Cliff Courtney are fourth-generation residents of Stehekin. They and their siblings have several businesses in the community, including a pastry shop, the Stehekin Valley Ranch (a ranch with cabins and a lodge house), and Stehekin Outfitters, which offers river outings and horseback riding. App. 5; Compl. ¶¶ 51, 53.

For years, Jim and Cliff listened as their customers complained about the inconvenience of Lake Chelan's lone ferry. Because of the infrequent runs the ferry makes and the times at which it makes them, many visitors must arrive a day early and stay overnight in Chelan to catch an early-morning boat to Stehekin. And day trips to Stehekin and the LCNRA are impracticable, because three hours is the most a visitor can spend there without staying overnight. Compl. ¶¶ 44-49.

Since 1997, Jim and Cliff have initiated four significant efforts to provide an alternative and more convenient service. They have been thwarted by the PCN requirement at every step.

First, in 1997, Jim applied for a certificate to operate a Stehekin-based ferry. Lake Chelan Boat Company protested the application. In August 1998, after a two-day hearing, the WUTC denied a certificate, finding that Lake Chelan Boat Company had not failed to provide "reasonable and adequate service" and that Jim's proposed service might "tak[e]

business from" the company. App. 7; Compl. ¶¶ 57-67. Jim incurred approximately $20,000 in expenses for the application. *Id.* ¶ 68.

Second, in 2006, Jim pursued a Stehekin-based, on-call boat service that he believed fell within a "charter service" exemption to the PCN requirement. Because many of the docks on the lake are federally-owned, he applied to the U.S. Forest Service for a permit to use them. Before it would issue the permit, the Forest Service sought to confirm that Jim's proposed service was, in fact, exempt. The Forest Service's district ranger wrote to the WUTC's executive director to get his opinion, and the Forest Service staff advised Jim that "[o]nce [the district ranger] has [the WUTC's] formal decision that no cert[ificate] is needed, . . . he will sign your permit." The WUTC's executive director, however, declined to provide an opinion and Jim was unable to launch the service. App. 7-8; Compl. ¶¶ 70-82.

Third, in 2008, while Jim was trying unsuccessfully to launch an on-call service, Cliff wrote to the WUTC's executive director describing certain other services he might offer and asking whether they would require a certificate. The first involved chartering a boat for patrons of Courtney-family businesses and offering a package with transportation on the chartered boat as one of the guests' options. The second involved Cliff's purchasing a boat and carrying his own patrons. The WUTC's executive director opined that both services would require a certificate. App. 8-9; Compl. ¶¶ 83-91.

Finally, Cliff contacted the governor and state legislators in early 2009 and urged them to eliminate or relax the PCN requirement. The legislature directed the WUTC to study and report on the regulatory scheme governing ferry service on Lake Chelan. The report, issued in 2010, recommended that there be no "changes to the state laws dealing with commercial ferry regulation as it pertains to Lake Chelan." App. 9; Compl. ¶¶ 92-94.

E. The Courtneys' Challenge To The PCN Requirement And The District Court's Dismissal

On October 19, 2011, Jim and Cliff filed this action in the Eastern District of Washington seeking declaratory and injunctive relief against the members and executive director of the WUTC, in their official capacities. Their complaint, brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-2202, asserted that Washington's PCN requirement, as it applies to the operation of a ferry on Lake Chelan that is open to the public, abridges their "right to use the navigable waters of the United States" – a right the *Slaughter-House Cases* held the Privileges or Immunities Clause protects. 83 U.S. (16 Wall.) 36, 79 (1873).[2]

[2] The Courtneys asserted a second claim, challenging the PCN requirement as it applies to a boat transportation service solely for patrons of specific businesses. This claim, over which the lower courts exercised *Pullman* abstention, App. 22-29, is not at issue in this petition.

Significantly, the Courtneys did not challenge any health and safety regulations, such as vessel inspection or insurance requirements.

The WUTC moved to dismiss the complaint, and the district court granted the motion on April 17, 2012. App. 30-51. The district court opined that, despite this Court's decision in *Slaughter-House*, "there is reason to question whether the 'right to use the navigable waters of the United States' is truly a *recognized* Fourteenth Amendment right." App. 43. It further concluded that the Privileges or Immunities Clause was not "designed to protect quintessentially *economic* rights." App. 44. Finally, it determined that even if the right to use the navigable waters of the United States is protected, it does not encompass the right "to operate a commercial ferry service open to the public." App. 46.

F. The Ninth Circuit's Decision

The Courtneys appealed the district court's order. On December 2, 2013, the Ninth Circuit affirmed the dismissal of their claim. App. 1-22.

Like the district court, the Ninth Circuit questioned whether the Privileges or Immunities Clause truly protects the right to use the navigable waters of the United States. It "assume[d]," however, "that the examples of rights deriving from national citizenship set forth by the Supreme Court in the *Slaughter-House Cases* are not mere dicta." App. 15.

The Ninth Circuit then emphasized the uncertainty over the meaning of this Court's "reference to a 'right to use the navigable waters of the United States'" in *Slaughter-House*. App. 14. It noted that the "phrase . . . has yet to be interpreted by a single federal appellate court in the privileges or immunities context," and that, therefore, "the boundaries of the term 'use' have not been established." *Id.*

Drawing on its own Privileges or Immunities Clause jurisprudence, as well as non-Privileges-or-Immunities cases concerning ferries and a reference to "navigable waters" in the Northwest Ordinance, the Ninth Circuit adopted its own interpretation. Equating the term "use" with "navigate," it held that "a reasonable interpretation of the right to 'use the navigable waters of the United States,' and the one we adopt, is that it is a right to *navigate* the navigable waters of the United States." App. 17.

In so holding, the Ninth Circuit employed an extremely narrow interpretation of the Privileges or Immunities Clause. First, it insisted that the rights the clause protects – even "the rights incident to United States citizenship enunciated in the *Slaughter-House Cases*" – must be "narrowly construed." App. 19. Second, it drew a dichotomy between economic and non-economic rights of national citizenship and maintained that, with one exception – the right to travel at issue in *Saenz v. Roe,* 526 U.S. 489 (1999) – the clause protects only the latter. The Ninth Circuit viewed the absence of any other decisions from this Court protecting "economic rights" under the clause

as a "limitation" on a lower court's ability to protect such rights:

> *Saenz v. Roe* represents the Court's only decision qualifying the bar on Privileges or Immunities claims against the power of the State governments over the rights of [their] own citizens. . . . [*Saenz*] was limited to the right to travel[,] and . . . [t]he Court has not found other economic rights protected by [the Privileges or Immunities C]lause. We have made clear that this limitation on the Privileges or Immunities Clause remains in effect.

App. 19 n.5 (alterations in original; internal quotation marks and citations omitted).

With the Privileges or Immunities Clause and the "right to use the navigable waters of the United States" so narrowed, the Courtneys could not state a claim. "[I]t is clear that the Courtneys wish to do more than simply navigate the waters of Lake Chelan," the Ninth Circuit observed; "they claim the right to utilize those waters for a very specific professional venture." App. 17. "[T]he driving force behind this litigation," the court stressed, "is the Courtneys' desire to operate a particular business using Lake Chelan's navigable waters – an activity driven by economic concerns" – and a "narrow constru[ction]" of the rights protected by the clause is "particularly" warranted "with respect to regulation of intrastate economic activities." App. 18-19. Thus, the court concluded that "even if the Privileges or Immunities Clause recognizes a federal right 'to use the navigable

waters of the United States,' the right does not extend to protect the Courtneys' use of Lake Chelan to operate a commercial public ferry." App. 12.

REASONS FOR GRANTING THE PETITION

Although much of the debate and uncertainty surrounding the Privileges or Immunities Clause concerns whether the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), were correctly decided, there is equal uncertainty over the meaning of the decision itself. For although *Slaughter-House* clearly held that the clause protects only rights derived from national citizenship, the nature and scope of those rights have remained something of a mystery.

The "principal source of confusion" is the "ambiguous definition" and "list of federal privileges or immunities" set forth in *Slaughter-House*. Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 Minn. L. Rev. 102, 109-10, 137 (2009). The uncertainty engendered by the decision survived (and, in some ways, was compounded by) this Court's subsequent decisions in *Saenz v. Roe,* 526 U.S. 489 (1999), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Although *Saenz* and *McDonald* are very different in one sense (*Saenz* involved a federal privilege; *McDonald* did not), they are very similar in another: both declined to provide substantive definition or

explication of the rights protected by the Privileges or Immunities Clause.

The result has been widespread uncertainty in the lower courts over the nature and scope of rights protected by the clause. This uncertainty, in turn, has resulted in judicial paralysis. Despite the clause's apparent vitality (evidenced by this Court's reliance on it in *Saenz*), lower courts refuse to rely on the clause or develop a jurisprudence under it until this Court clarifies what role – if any – the clause may play in modern constitutional jurisprudence. Rather than enforce the clause, these courts have denied relief by: construing the rights recognized in *Slaughter-House* extraordinarily narrowly, *e.g.*, *Pollack v. Duff*, ___ F. Supp. 2d ___, No. 10-0866, 2013 WL 3989089, at **6-7 (D.D.C. Aug. 6, 2013); and refusing to even consider whether the clause might protect rights other than those recognized in *Slaughter-House*, *e.g.*, *Chavez v. Arte Publico Press*, 204 F.3d 601, 608 (5th Cir. 2000). Why? Because "the Supreme Court has provided no guidance." *Id*.

The Ninth Circuit's decision reflects this uncertainty and paralysis. It involves one of the rights of national citizenship specifically enumerated in *Slaughter-House*: the "right to use the navigable waters of the United States." 83 U.S. at 79. In reducing this right to a mere "right to *navigate*" such waters, App. 17, the Ninth Circuit employed an exceedingly narrow interpretation of the Privileges or Immunities Clause, one far narrower than *Slaughter-House* requires or even allows. Specifically,

it (1) insisted that the rights of national citizenship recognized in *Slaughter-House* must be "narrowly construed" and (2) held that, with one exception, those rights must be construed as *non*-economic rights. App. 19 & n.5. *Slaughter-House*, however, imposes neither limitation, and the suggestion that economic rights are excluded from the clause's protection cannot be squared with this Court's protection of such a right in *Saenz*.

The Privileges or Immunities Clause must mean *something*, which is precisely why *Slaughter-House* enumerated a list of rights within the scope of its protection. The Ninth Circuit's decision, however, seems determined to limit the clause to near meaninglessness. Whether the clause is truly so hollow is an important question of federal law that should be, and can only be, settled by this Court.

This Court should accordingly grant certiorari to begin resolving the widespread uncertainty over the nature and scope of rights protected by the Privileges or Immunities Clause and to determine whether the Ninth Circuit's substantial narrowing of *Slaughter-House* is warranted. This case is the perfect vehicle for doing so, largely because of what this case is not: an attempt to overrule *Slaughter-House*. In *McDonald*, this Court was asked to overrule *Slaughter-House*. Here, on the other hand, it is asked to clarify and enforce a right recognized in *Slaughter-House*. Thus, the many concerns this Court expressed about revisiting the clause in *McDonald* are not present here.

Slaughter-House itself recognized that this Court would be called upon in future cases to further define the rights of national citizenship protected by the Privileges or Immunities Clause. 83 U.S. at 78-79. This is such a case. Jim and Cliff Courtney respectfully ask this Court to grant a writ of certiorari.

I. *Slaughter-House*, *Saenz*, And *McDonald* Have Engendered Widespread Uncertainty Over The Nature And Scope Of The Rights Of National Citizenship Protected By The Privileges Or Immunities Clause

This Court's decisions have engendered widespread uncertainty over what role, if any, the Privileges or Immunities Clause can play in protecting rights of national citizenship. This uncertainty originated in the *Slaughter-House Cases*, the seminal decision interpreting the clause, in which the Court proffered an ambiguous definition and list of the rights of national citizenship. This Court's subsequent decisions in *Saenz v. Roe* and *McDonald v. City of Chicago* declined to clarify the ambiguity, and the result has been substantial confusion over the nature and scope of those rights.

1. *Slaughter-House* adopted what is commonly regarded as a "narrow interpretation" of the Privileges or Immunities Clause. *McDonald*, 130 S. Ct. at 3029 (plurality). At issue was the constitutionality of a Louisiana law that forced New Orleans butchers to conduct slaughtering operations out of a single

slaughterhouse. The plaintiffs asserted that the law abridged the "right to exercise their trade" – a right protected, they claimed, by the Privileges or Immunities Clause. *Slaughter-House*, 83 U.S. at 60, 66.

This Court began its analysis by discussing the concerns that motivated the clause's framers – concerns that focused largely on the economic deprivations being inflicted on the newly-freed slaves. "Among the first acts of legislation adopted by several of the [Southern] States" after abolition, the Court noted, "were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property." *Id.* at 70. The Court catalogued some of the abuses suffered by the freedmen: (1) "[t]hey were in some States forbidden to appear in the towns in any other character than menial servants"; (2) "[t]hey were required to reside on and cultivate the soil without the right to purchase or own it"; and (3) "[t]hey were excluded from many occupations of gain." *Id.* "These circumstances," the Court observed, "forced upon the statesmen who had conducted the Federal government . . . through the crisis of the rebellion, and who supposed that by the thirteenth . . . amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection." *Id.* "They accordingly passed . . . the fourteenth amendment. . . ." *Id.*

With the framers' motives established, the Court discussed the nature of the rights the Privileges or

Immunities Clause protects. In so doing, it "dr[ew] a sharp distinction between the rights of federal and state citizenship," *McDonald*, 130 S. Ct. at 3028, and held that the clause protects only the former: rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws," *Slaughter-House*, 83 U.S. at 79.[3] Despite the framers' concern for the economic condition of the freedmen, the Court held that the open-ended, natural right to economic liberty advanced by the plaintiffs was not protected by the clause, as it derives from state, not national, citizenship. *Id.* at 74-79.

The Court recognized that it would have to clarify the rights of national citizenship protected by the clause as future cases "ma[d]e it necessary to do so." *Id.* at 78-79. It nevertheless enumerated some of those rights. Most were, at least in part, economic in nature. They included:

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[3] This Court would not have to revisit *Slaughter-House*'s holding if it grants certiorari. As discussed below, the Courtneys' claim assumes *Slaughter-House* was correctly decided and simply seeks to enforce one of the rights of national citizenship it recognized. That said, the Courtneys, like most observers, believe *Slaughter-House* was wrong in its narrow view of the set of rights protected by the Privileges or Immunities Clause. *See* Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001) ("Virtually no serious modern scholar – left, right, and center – thinks that [*Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment.").

- "free access to [the nation's] seaports, through which all operations of foreign commerce are conducted";
- the right "to come to the seat of government to . . . transact any business [a citizen] may have with it";
- "access . . . to the subtreasuries [and] land offices"; and
- the "right to use the navigable waters of the United States."

Id. at 79-80 (internal quotation marks and citation omitted).

2. *Slaughter-House* engendered immediate confusion about the scope of the Privileges or Immunities Clause. As Gerard Magliocca – biographer of John Bingham, the clause's principal architect – explained, the opinion provided an "ambiguous definition" of the rights of national citizenship, and the "list of federal privileges or immunities" set forth in the opinion was the "principal source of confusion." Magliocca, *supra*, at 109-10, 137. In fact, soon after the decision, John Norton Pomeroy, one of the era's preeminent constitutional scholars, stressed the need for the Court to clarify that aspect of its opinion:

> The decision made in the Slaughter-House Case[s] can hardly be regarded as final in giving a construction to the [Fourteenth] [A]mendment. . . .
>
> . . . [T]he questions which remain open all resolve themselves into this one: What

> particular rights and capacities are embraced within the privileges and immunities which belong to United States citizens?

John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* § 767 (Houghton, Mifflin & Co. 8th ed. 1885).

The uncertainty that followed the decision was substantially compounded by the length of time that lapsed before this Court relied on the Privileges or Immunities Clause in resolving a case. In fact, with one short-lived exception,[4] it would be 126 years before the Court relied on the clause. During that time, the clause was written off as "almost a dead letter." Case Note, *Constitutional Law – Privileges and Immunities* – Colgate v. Harvey, 15 Ind. L. Rev. 448, 449 (1940).

3. The eulogies for the clause, however, were premature, for in 1999 this Court "reawaken[ed]" its "privileges or immunities jurisprudence after more than a century of dormancy." Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 182 (1999). In *Saenz v. Roe*, the Court held that California's cap on welfare benefits for newly-arrived citizens violated

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[4] In 1935, the Court relied on the clause to invalidate a Vermont tax statute in *Colgate v. Harvey*, 296 U.S. 404 (1935), but it overruled *Colgate* five years later in *Madden v. Kentucky*, 309 U.S. 83 (1940).

the Privileges or Immunities Clause, as it abridged one of the rights of national citizenship enumerated in *Slaughter-House*: the right to "'become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State.'" 526 U.S. at 503 (quoting *Slaughter-House*, 83 U.S. at 80).[5] This right, *Saenz* held, is a component of the broader right to travel, which "embraces the citizen's right to be treated equally in her new State of residence," including in the receipt of welfare benefits. *Id.* at 504-05.

"For those who may have thought that the Privileges or Immunities Clause of the Fourteenth Amendment was emptied of all content by the *Slaughter-House Cases*," Professor Tribe observed, *Saenz* was "a much-needed corrective reminder." Tribe, *supra*, at 129. The Court's decision suggested two significant things about the clause. First, it still has vitality. Second, even though *Slaughter-House* held that the clause does not protect the right to economic liberty per se, the rights of national citizenship that it *does* protect are, at least in part, economic rights. *See* Tim A. Lemper, *The Promise and Perils of "Privileges or Immunities*," 23 Harv. J.L. & Pub. Pol'y 295, 318-19 (1999) ("Justice Stevens's historical analysis in *Saenz* firmly roots the Fourteenth Amendment Privileges or Immunities Clause in a

[5] This right is from the same list that contained the "right to use the navigable waters of the United States." *See Slaughter-House*, 83 U.S. at 79-80.

tradition of economic and property rights."). "[T]he right of free movement," after all, is "basic to any guarantee of freedom of opportunity," *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring), and welfare benefits are inherently economic in nature, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("The administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings.").

Yet in clarifying that the Privileges or Immunities Clause is not a dead letter – that is, in holding that it protects at least *one* (seemingly economic) right of national citizenship – *Saenz* raised new questions. *See Merrifield v. Lockyer*, 547 F.3d 978, 983 (9th Cir. 2008) (noting *Saenz* "reopened a debate that many had considered foreclosed by the *Slaughter-House Cases*"). As with *Slaughter-House*, the questions concerned the nature and scope of rights protected by the clause, as *Saenz* "d[id] not address this issue head-on." Douglas G. Smith, *A Return to First Principles?* Saenz v. Roe *and the Privileges or Immunities Clause*, 2000 Utah L. Rev. 305, 330 (2000). Rather than "define 'privileges or immunities,' it merely held that the right to travel is encompassed by that definition." Gregory S. Wagner, Comment, *A Proposal for the Continued Revival of the Privileges or Immunities Clause of the Fourteenth Amendment: Invalidate the Alcohol Direct Shipment Laws*, 9 Geo. Mason L. Rev. 863, 886 (2001).

4. Eleven years later, in *McDonald v. City of Chicago*, this Court had the opportunity to dispel

some of the uncertainty that followed *Saenz*. But because *McDonald* involved an issue very different than the rights enumerated in *Slaughter-House*, the Court did not take the opportunity to clarify how those rights should be applied.

McDonald concerned whether and how the Second Amendment right to keep and bear arms is incorporated against the states. Petitioners' counsel in the case maintained that it is incorporated through the Privileges or Immunities Clause rather than the Due Process Clause, the traditional source of this Court's incorporation doctrine. 130 U.S. at 3028. Specifically, they argued that the right "is among the 'privileges or immunities of citizens of the United States' and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter-House Cases* should now be rejected." *Id.* (citation omitted).

This Court declined the invitation to overrule *Slaughter-House*. It recognized that "many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation," *id.* at 3029, but Justice Alito, writing for a four-justice plurality, saw "no need to reconsider that interpretation here." *Id.* at 3030 (plurality). The incorporation question, after all, could be resolved on settled due process grounds. *Id.* at 3030-31 (plurality). The plurality accordingly "decline[d] to disturb the *Slaughter-House* holding," *id.* at 3031, although it, like Justice Stevens in dissent, acknowledged the debate and confusion that

Slaughter-House had engendered. *See id.* at 3029-30; *id.* at 3089 (Stevens, J., dissenting).

Justice Thomas concurred in the judgment but would have held that "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause." *Id.* at 3059 (Thomas, J., concurring). He viewed the case as "an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it." *Id.* at 3063 (Thomas, J., concurring).

Although *McDonald* clarified one aspect of the Privileges or Immunities Clause debate – that this Court is not prepared to overrule *Slaughter-House* – it did little to dispel the uncertainty over what role, if any, the clause should play in modern jurisprudence. The plurality and Justice Stevens seemed to recognize that "the full scope of the Privileges or Immunities Clause is unclear." Christian B. Corrigan, Comment, McDonald v. City of Chicago: *Did Justice Thomas Resurrect the Privileges or Immunities Clause from the Dead? (and Did Justice Scalia Kill it Again?)*, 60 U. Kan. L. Rev. 435, 458 (2011). But after the decision, it was no more apparent whether the clause would "draw continued discussion" in future cases, *id.*, or, rather, whether the "revival" begun in *Saenz* "ha[d] finally run its course." Jeffrey D. Jackson, *Be Careful What You Wish For: Why* McDonald v. City of Chicago*'s Rejection of the Privileges or Immunities Clause May Not be Such a Bad Thing for Rights*,

115 Penn. State L. Rev. 561, 603 (2011). In short, things were just as, if not more, uncertain in the wake of *McDonald* than they were in the lead-up to it.

II. The Uncertainty Over The Rights Protected By The Clause Has Left Lower Courts In A State Of Judicial Paralysis

The widespread uncertainty resulting from *Slaughter-House*, *Saenz*, and *McDonald* has flummoxed lower courts, which are left wondering what, if any, rights the Privileges or Immunities Clause actually protects. In the meantime, citizens are being denied the ability to invoke the clause even to protect those rights that *Slaughter-House* recognized.

1. Some courts – granted, few – view the clause as a vibrant and important source of constitutional protection. Shortly after *Saenz*, for example, the United States Bankruptcy Court for the Southern District of Georgia maintained that *Saenz* had "resuscitated" the clause and that it thus "remains a vital source of individual freedom and protection." *In re Wilson*, 258 B.R. 303, 310 (Bankr. S.D. Ga. 2001). The court went on to hold that the right to avail one's self of the bankruptcy laws is a right of national citizenship protected by the clause. *Id.* at 309-10; *see also In re Willis*, 230 B.R. 619, 623 (Bankr. E.D. Okla. 1999) ("The Bankruptcy Code has a vast number of privileges and immunities which are enforceable through the Fourteenth Amendment.").

Most courts, however, take a far more pessimistic view of the clause's continued vitality and evince a kind of judicial paralysis: a refusal to touch the clause or develop any jurisprudence under it until this Court provides further guidance. The Fifth Circuit, for example, declined to even resolve whether the right to "acquire and enforce a copyright" is a right of national citizenship protected by the clause, explaining that any "attempt to piggyback on *Saenz,* where the Supreme Court . . . provided no guidance for its 'modern' interpretation of the clause, asks more of this court than it should give." *Chavez*, 204 F.3d at 608. And in *Merrifield v. Lockyer*, the Ninth Circuit explained that unless a case involves the precise right to travel at issue in *Saenz*, a litigant may not rely on the clause for relief: "Given the *Slaughter-House Cases* limitation on the Privileges or Immunities Clause of the Fourteenth Amendment, we cannot grant relief based upon that clause unless the claim depends on the right to travel." *Merrifield*, 547 F.3d at 984.

Even in cases that arguably *do* involve the right to travel, the tendency has been to interpret the scope of that right extremely narrowly and simply dismiss the claim out of hand. For example, in *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990), the Third Circuit refused to consider whether the clause might protect a right to travel intrastate, reasoning that, if protected at all, it must be through substantive due process:

> As the [Supreme] Court grew increasingly willing to discover unenumerated rights

> within the Fourteenth Amendment itself in the decades following *Slaughter–House*, it relied exclusively on the Due Process Clause. Plaintiffs therefore cannot rely on the Fourteenth Amendment Privileges and Immunities Clause, which has remained essentially moribund since *Slaughter–House* as the source of an implied fundamental right of intrastate travel.

Id. at 264 (footnote omitted).

Similarly, in *Pollack v. Duff*, the United States District Court for the District of Columbia addressed a challenge to a geographical restriction on applicants for certain jobs with the Administrative Office of the United States Courts. *See* ___ F. Supp. 2d at ___, 2013 WL 3989089*,* at *7. Relying on *Saenz*, the plaintiff alleged that the restriction abridged her right to travel. *Id.* at **6-7. The court rejected the claim because it did not fall squarely within the scenarios discussed in *Saenz*. *Id.* The court acknowledged that "*Saenz* . . . did not limit the components of the right to travel to the three examples it listed," yet the court refused to adopt an "'expansive'" interpretation of that right. *Id.* at *7; *see also Lines v. Wargo*, 271 F. Supp. 2d 649, 661 (W.D. Pa. 2003) (rejecting magistrate judge's finding of Privileges or Immunities violation: "[W]hile the majority opinion in *Saenz* is now binding precedent, Justice Rehnquist's dissent illustrates that there has been disagreement even as to which constitutional provisions are implicated by

the type of 'right to travel' claim presented in this case.").

In short, while some courts today view the Privileges or Immunities Clause as a viable protection for rights of national citizenship, most either: (1) refuse to rely on it absent further direction from this Court; or (2) recognize that it might have some minimal utility for protecting, at most, one limited aspect of the right to travel. Justice Gregory Kellam Scott lamented this judicial paralysis when *Romer v. Evans* was before the Colorado Supreme Court. *See Evans v. Romer*, 882 P.2d 1335, 1351-56 (Colo. 1994) (Scott, J., concurring). Justice Scott would have held Colorado's Amendment 2 unconstitutional under the Privileges or Immunities Clause because it abridged the right to petition the government, *id.* at 1351 – another right that *Slaughter-House* said is protected by the clause. 83 U.S. at 79 (listing the "right to . . . petition for redress of grievances" among those the clause protects). Other members of the court, however, were unwilling to rely on the clause. Justice Scott stated plainly the nub of the problem: "Courts have been reluctant to develop a working constitutional analysis under the Privileges or Immunities Clause since the *Slaughter-House Cases*. . . ." *Romer*, 882 P.2d at 1355 (Scott, J., concurring).

III. The Ninth Circuit's Decision Reflects The Widespread Uncertainty And Resulting Judicial Paralysis

The Ninth Circuit's decision in this case reflects the widespread uncertainty over the rights protected by the Privileges or Immunities Clause and the judicial paralysis that uncertainty has caused. In fact, the decision narrows *Slaughter-House*'s already narrow interpretation of the clause to the point of near meaninglessness. Thus, while this Court's jurisprudence suggests there is still work for the clause to do, the Ninth Circuit's decision ensures it will do none, unless and until this Court says otherwise.

1. In holding that the "right to use the navigable waters of the United States" is merely "a right to *navigate* the navigable waters of the United States," App. 17 – not to use them to operate a ferry or engage in other "economic activities," App. 19 & n.5 – the Ninth Circuit's decision substantially narrows the nature and scope of rights protected by the Privileges or Immunities Clause. It does so in two ways.

First, the decision insists that even "the rights incident to United States citizenship enunciated in the *Slaughter-House Cases*" must be "narrowly construed." App. 19. *Slaughter-House*'s interpretation of the Privileges or Immunities Clause, however, was narrow because it construed the set, or class, of rights protected by the clause – not the individual rights within that set – narrowly. *See McDonald*, 130 S. Ct.

at 3060 (Thomas, J., concurring) ("This Court's precedents . . . define the relevant collection of rights quite narrowly."); *State v. Cooper*, 301 P.3d 331, 334 (Kan. Ct. App. 2013) ("The *Slaughter-House Cases* decision has since been commonly construed as confining the Privileges or Immunities Clause to a narrow set of federal rights. . . ."). Nothing in *Slaughter-House* suggests that the rights of national citizenship that *do* fall within the clause's ambit must be construed narrowly.

Second, the Ninth Circuit's decision draws a dichotomy between economic and non-economic rights of national citizenship and maintains that, with one exception – the right to travel at issue in *Saenz* – the clause protects only the latter. According to the Ninth Circuit, the absence of any other decisions from this Court protecting "economic rights" under the clause is a "limitation" that precludes lower courts from recognizing such rights:

> *Saenz v. Roe* represents the Court's only decision qualifying the bar on Privileges or Immunities claims against the power of the State governments over the rights of [their] own citizens. . . . [*Saenz*] was limited to the right to travel[,] and . . . [t]he Court has not found other economic rights protected by [the Privileges or Immunities C]lause. We have made clear that this limitation on the Privileges or Immunities Clause remains in effect.

App. 19 n.5 (alterations in original; internal quotation marks and citations omitted).

In other words, the Ninth Circuit construes this Court's pre- and post-*Saenz* silence as an affirmative restriction on the ability of litigants to invoke, and courts to rely on, the Privileges or Immunities Clause to protect rights of national citizenship that happen to be economic in nature. It provides no explanation, however, as to *why* the clause would protect an economic right in one, and only one, instance. It likewise makes no effort to deal with the overwhelming historical record, discussed in *Slaughter-House*, *see* 83 U.S. at 70, that demonstrates the Fourteenth Amendment's congressional sponsors, as well as the ratifying public, "saw the 'privileges or immunities' clause as protecting . . . economic . . . rights." David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695, 698 (2009). To suggest the clause was *not* designed to protect economic rights – even if only those derived from national citizenship – is to deny history.

2. With the scope of the Privileges or Immunities Clause so narrowly confined, the Ninth Circuit had no trouble dispensing with the Courtneys' claim. Recognizing that "the boundaries of the term 'use'" in *Slaughter-House*'s "right to use the navigable waters of the United States" have "not been established," App. 14, the court applied its narrow view of the clause, along with an inaccurate and incomplete[6]

[6] The court, for example, ignored the distinction this Court has twice drawn between a state's legitimate "power to regulate"

(Continued on following page)

analogy to non-Privileges or Immunities Clause cases, to hold that the right to "use" is merely a right to "navigate." App. 17. The Courtneys could not state a claim under that construction of the right, the court said, because they "wish to do more than simply navigate the waters of Lake Chelan." *Id.* "[T]hey claim the right to utilize those waters for a very specific professional venture," and a "narrow constru[ction]" of the rights protected by the Privileges

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the ferry business and the illegitimate "power to license, and therefore to exclude from the business." *Mayor of Vidalia v. McNeely*, 274 U.S. 676, 680 (1927); *see also City of Sault Ste. Marie v. Int'l Transit Co.*, 234 U.S. 333, 339-40 (1914). It ignored case law explaining that "[t]he navigable waters of the United States, even when they lie exclusively within the limits of a state, are open to all the world" and "require[ ] no leave or license from a state." *People ex rel. Pa. R.R. Co. v. Knight*, 64 N.E. 152, 154 (N.Y. 1902), *aff'd*, 192 U.S. 21 (1904). It ignored this Court's holding that the Northwest Ordinance treated navigable waters as "highways equally open to all persons, without preference to any," and that it "prevent[ed] any exclusive use" or "monopoly" of them. *Huse v. Glover*, 119 U.S. 543, 547-48 (1886). It ignored the fact that two of the cases on which it relied – *Fanning v. Gregoire*, 57 U.S. 524 (1854), and *Conway v. Taylor's Executor*, 66 U.S. 603 (1862) – were effectively overruled. *See N.Y. Cent. & Hudson River R.R. Co. v. Bd. of Chosen Freeholders of Hudson Cnty.*, 227 U.S. 248, 261 (1913) (noting that the "theories" advanced in *Fanning* and *Conway* "are directly contrary to the ruling in . . . *Gloucester Ferry*," which "is now conclusive"). And it ignored Justice Bradley's observation in *Slaughter-House* that ferry monopolies were statutorily outlawed in England at the time of our Framing and that this proscription was "a part of th[e] inheritance which our fathers brought with them." *Slaughter-House*, 83 U.S. at 120 (Bradley, J., dissenting).

or Immunities Clause is "particularly" warranted when it comes to "intrastate economic activities" – that is, to "activit[ies] driven by economic concerns." App. 17, 18-19. Thus, "even if the Privileges or Immunities Clause recognizes a federal right 'to use the navigable waters of the United States,'" the court concluded, "the right does not extend to protect the Courtneys' use of Lake Chelan to operate a commercial public ferry." App. 12.

The Ninth Circuit's decision thus reduces the "right to use the navigable waters of the United States" to a right of recreational boating, and it ensures that the narrow set of rights of national citizenship recognized in *Slaughter-House* is effectively a null set. In short, it forecloses courts and litigants from relying in any meaningful way on the Privileges or Immunities Clause, "the central clause of Section 1" of the Fourteenth Amendment. Amar, *supra*, at 631 n.178.

IV. Only This Court Can Dispel The Uncertainty Resulting From *Slaughter-House* And Its Progeny, And This Case Is The Perfect Vehicle For Doing So

This Court should grant certiorari to clarify the uncertainty over the nature and scope of rights protected by the Privileges or Immunities Clause and resolve whether *Slaughter-House* and its progeny warrant – or even tolerate – the exceedingly narrow interpretation the Ninth Circuit gave those rights.

This case is the perfect vehicle for providing the "guidance for . . . interpretation of the clause" that lower courts are awaiting. *Chavez*, 204 F.3d at 608. Only with such guidance will those courts shed the paralysis that has beset them and "develop [the] working constitutional analysis under the Privileges or Immunities Clause" that Justice Scott called for in *Romer*. 882 P.2d at 1355 (Scott, J., concurring).

1. As noted above, ambiguity in *Slaughter-House* is the root cause of the uncertainty, and a writ of certiorari is appropriate to "resolve any ambiguity" in this Court's decisions – particularly those that "may not be models of clarity." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002). As also noted above, *Slaughter-House* itself recognized the need for this Court to clarify the nature and scope of rights protected by the clause in future cases. 83 U.S. at 78-79.

Saenz was one such case, but it was not enough. It spoke only to one specific right of national citizenship and provided no guidance concerning the nature or scope of other rights the clause protects. Granting certiorari would allow this Court to properly analyze the history of the clause – especially its Reconstruction origins – in order to explain the nature and scope of at least another of the rights protected by it. That historical analysis, unfortunately, did not take place in *Saenz*. *See Saenz*, 526 U.S. at 527 (Thomas, J., dissenting) ("Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence.").

The constitutional issues involved, moreover, are of the utmost importance. For while the Privileges or Immunities Clause is hardly the most invoked or, as interpreted by *Slaughter-House*, sweeping provision of the Constitution, it is "the central provision of the [Fourteenth] Amendment's § 1." Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 30 (2d ed. 1997). And although the rights of national citizenship that the clause protects may be few, those rights are of vital importance for ensuring that the full benefits of national citizenship are extended to all Americans, so that all Americans, in turn, can participate fully in the life – including the economic life – of the nation. The "scope of the Privileges or Immunities Clause," in short, is "a major question in constitutional law that should draw continued discussion." Corrigan, *supra*, at 458.

2. This case is the perfect vehicle for continuing that discussion, largely because of what it is not: *McDonald* redux. This Court gave several reasons for declining to reach the Privileges or Immunities issue in *McDonald*, including: (1) the lack of need to revisit the clause in that case; (2) stare decisis; (3) a lack of consensus concerning the clause's proper interpretation; and (4) fear of opening a Pandora's box. None of those concerns is present here.

Lack of need to revisit the clause. The primary reason this Court advanced for declining to reach the Privileges or Immunities issue in *McDonald* was that there was no need to reach it in that case, because the

Second Amendment could be incorporated through the already-recognized doctrine of substantive due process. *See McDonald*, 130 S. Ct. at 3030-31 (plurality). As Justice Scalia pointedly asked during oral argument, "[W]hy are you asking us to overrule 150, 140 years of prior law, when . . . you can reach your result under substantive due [process?]" Transcript of Oral Argument at 6:25–7:2, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

Here, on the other hand, there *is* a need to reach the Privileges or Immunities Clause, as it is that clause, *Slaughter-House* tells us, that protects the right to use the navigable waters of the United States. The Courtneys have been trying for nearly two decades to exercise that right, and the state-created monopoly on Lake Chelan has prevented them from doing so. Theirs is not some abstract, hypothetical complaint. It is a concrete, tangible injury – an injury redressable, if anywhere, in the Privileges or Immunities Clause.

Stare decisis. Another reason for this Court's reluctance to reach the Privileges or Immunities issue in *McDonald* was stare decisis. Simply put, the Court did not savor the prospect of up-ending a century and a half of precedent. *See, e.g.*, *id.* at 4:6-10 (statement of Roberts, C.J.) ("Of course, this argument is contrary to the Slaughter-House Cases, which have been the law for 140 years. . . . [I]t's a heavy burden for you to carry to suggest that we ought to overrule that decision."); *McDonald*, 130 S. Ct. at 3089 (Stevens, J., dissenting) ("The burden is severe for those who seek

radical change in such an established body of constitutional doctrine." (footnotes omitted)).

The Courtneys, however, are not asking this Court to up-end anything. To the contrary, they are asking the Court to *enforce* – not overrule – its precedent. Specifically, they are asking the Court to explain that one of the rights recognized in *Slaughter-House* has an economic dimension and that they have stated a claim for its abridgment. That is a far cry from *McDonald*, in which this Court was asked to overrule *Slaughter-House*.

Lack of consensus over proper interpretation of the clause. A third reason for this Court's reluctance to reach the Privileges or Immunities issue in *McDonald* was the lack of judicial and scholarly agreement over the clause's proper interpretation. As the plurality explained, there is no "consensus on that question among the scholars who agree that the *Slaughter-House Cases*' interpretation is flawed." *Id.* at 3030 (plurality); *see also id.* at 3089 (Stevens, J., dissenting).

That concern, again, is not present here. The Courtneys' claim assumes *Slaughter-House* was *correct* when it identified the "right to use the navigable waters of the United States" as among the rights protected by the Privileges or Immunities Clause. Should this Court grant review, it would only have to resolve whether that right is, at least in part, economic, such that it encompasses use of the navigable waters to run a ferry. That is a far narrower

question than the one in *McDonald*, and, as discussed above, there is a far greater consensus that the clause was understood to protect economic rights.

Opening a Pandora's box. A final reason for declining to reach the Privileges or Immunities issue in *McDonald* was that doing so might open a Pandora's box, unleashing a free-for-all in which judges would read all manner of previously unrecognized rights into the clause. In his dissent, for example, Justice Stevens worried that, because "'it has so long remained a clean slate, a revitalized Privileges or Immunities Clause holds special hazards for judges,'" whose "'proper task is not to write their personal views of appropriate public policy into the Constitution.'" *Id.* at 3089 (Stevens, J., dissenting) (citations omitted) (quoting J. Harvie Wilkinson, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 Harv. J.L. & Pub. Pol'y 43, 52 (1989)).

That concern, too, is absent here, because the Courtneys are invoking a right that this Court has already *said* is protected by the Privileges or Immunities Clause. This case is thus akin to *Saenz*, which involved a component of the right to travel that *Slaughter-House* had included, alongside the right to use the navigable waters of the United States, within the ambit of the clause. *Saenz* certainly did not open a Pandora's box; it was resolved 15 years ago and there has been no flurry of Privileges or Immunities litigation in the intervening decade and a half. The fact is, the clause, by virtue of *Slaughter-House*'s interpretation, protects only a narrow class of rights

and nothing this Court is likely to do on certiorari would change that fact.

3. In short, "[w]hile instances of valid 'privileges or immunities'" may be "but few," *Edwards*, 314 U.S. at 183 (Jackson, J., concurring), the right to use the navigable waters of the United States is one. And while the Courtneys "do not ignore or belittle the difficulties of what has been characterized . . . as an 'almost forgotten' clause[,] . . . the difficulty of the task does not excuse us from giving these general and abstract words . . . [the] specific content and concreteness they will bear as we mark out their application, case by case." *Id.* This case presents the perfect opportunity for marking out their application in a cautious, incremental way. This Court should take that opportunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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EXHIBIT G

FOR

DECLARATION

OF

MICHAEL

BINDAS

134 S.Ct. 2697, 82 USLW 3536, 82 USLW 3693, 82 USLW 3695
(Cite as: 134 S.Ct. 2697)

H

Supreme Court of the United States
James COURTNEY, et al., petitioners,
v.
David DANNER, Chairman and Commissioner of the Washington Utilities and Transportation Commission, et al.

No. 13–1064.
June 2, 2014.

Case below, 736 F.3d 1152.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

U.S.,2014
Courtney v. Danner
134 S.Ct. 2697, 82 USLW 3536, 82 USLW 3693, 82 USLW 3695

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EXHIBIT H

FOR

DECLARATION

OF

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES COURTNEY and CLIFFORD COURTNEY, Plaintiffs, v. DAVID DANNER, et al., Defendants.	No. CV-11-0401-TOR STATEMENT OUTLINING PLAINTIFFS' INTENTIONS REGARDING PURSUIT OF THEIR SECOND CLAIM

I. INTRODUCTION

Pursuant to this Court's March 13, 2014, order, Plaintiffs James and Clifford Courtney submit this statement outlining their intentions regarding pursuit of the second claim in their complaint.

II. BACKGROUND

The Courtneys' complaint asserted two claims under the Privileges or Immunities Clause of the Fourteenth Amendment: that as applied (1) to boat

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service on Lake Chelan that is open to the general public and (2) to boat service on Lake Chelan for customers or patrons of specific businesses or a group of businesses, Washington's public convenience and necessity (PCN) requirement abridges their right to use the navigable waters of the United States. This Court dismissed the first claim, with prejudice, for failure to state a claim. It dismissed the second claim, without prejudice, under the *Pullman* abstention doctrine. *Courtney v. Goltz*, 868 F. Supp. 2d 1143, 1152-53 (E.D. Wash. 2012).[1]

On December 2, 2013, the U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the Courtneys' first claim. *Courtney v. Goltz*, 736 F.3d 1152, 1162 (9th Cir. 2013). The Ninth Circuit concluded that the exercise of *Pullman* abstention was proper over the second claim but that this Court "should have retained jurisdiction over the case pending resolution of the state law issues, rather than dismissing the case." *Id.* at 1164. Accordingly, it vacated the dismissal and "remand[ed] the Courtneys' second claim with directions that the district court

[1] Since this Court's decision on Defendants' motion to dismiss, defendant Patrick Oshie has resigned from the Washington Utilities and Transportation Commission (WUTC), defendant David Danner has been appointed its chairman, and defendant Steven King has been appointed its executive director. Accordingly, and pursuant to Federal Rule of Civil Procedure 25(d), the defendants are now David Danner, chairman and commissioner; Jeffrey Goltz, commissioner; Philip Jones, commissioner; and Steven King, executive director, in their official capacities.

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enter an order retaining jurisdiction over the constitutional claim." *Id.* at 1165.

On March 3, 2014, the Courtneys petitioned the United States Supreme Court for certiorari. The petition concerned their first claim only. On March 13, while the petition for certiorari was pending, this Court entered an order: (1) "retain[ing] jurisdiction over the Courtneys' second constitutional claim pending an authoritative construction of the phrase 'for the public use for hire' by the WUTC or the Washington state courts"; (2) staying the case "pending a final disposition of [the Courtneys'] petition for a writ of certiorari by the United States Supreme Court"; and (3) directing the Courtneys to "submit a statement outlining their intentions with regard to initiating proceedings before the WUTC and/or in state court within thirty (30) days of any such disposition." *Courtney v. Goltz*, No. 11-CV-0401-TOR (E.D. Wash. Mar. 13, 2014) (order retaining jurisdiction and staying case). "This statement," the Court added, "shall include an anticipated timetable for (1) the filing of any other actions(s); and (2) the resolution of those proceedings." *Id.*

On June 2, 2014, the Supreme Court denied the Courtneys' petition for certiorari. *See Courtney v. Danner*, 82 U.S.L.W. 3695 (2014). Accordingly, the Courtneys now submit this statement concerning their intentions for pursuing their second claim.

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III. STATEMENT

The Courtneys' intention is to initiate state proceedings quickly, move deliberately and efficiently through the state system while preserving their second constitutional claim, and return to this Court immediately thereafter to pursue that claim. To that end, no later than September 30, 2014, the Courtneys will petition the Washington Utilities and Transportation Commission (WUTC) for a declaratory order as to whether the service at issue in their second claim requires a certificate of public convenience and necessity.

Although the Courtneys intend to move as expeditiously as possible through the state system, it is impossible to know how long the state proceedings will take and, therefore, how soon the Courtneys will be able to return to this Court. The timetable will turn in part on how quickly the WUTC acts on the Courtneys' petition, but also on the subsequent steps the Courtneys will take at the state level. Those subsequent steps will depend on how the WUTC disposes of their petition. The most likely possibilities are set forth below.

First, the incumbent ferry provider can prevent the WUTC from even issuing a declaratory order by withholding its consent to an order's issuance. *See* Wash. Rev. Code § 34.05.240(7); Wash. Admin. Code § 480-07-930(3). If the WUTC were to refrain from issuing a declaratory order, the Courtneys could—and likely

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would—file a declaratory judgment action in state court seeking judicial resolution of the underlying state question. Such a filing would occur no later than six months after the WUTC provides notice that it will not issue a declaratory order.

If, however, the WUTC *does* issue a declaratory order and the order indicates that a certificate of public convenience and necessity is required for the service at issue in the Courtneys' second claim, the Courtneys would then have the option of petitioning for judicial review in state court—a right they would likely exercise. *See generally* Rev. Code Wash. §§ 34.05.510–.574. Such a petition would be filed in superior court, within thirty days after service of the WUTC's final order. *See* Rev. Code Wash. §§ 34.05.514(1), .542(2). However, depending on whether the declaratory order proceedings before the WUTC had been conducted as adjudicative proceedings, *see* WAC § 480-07-930(4), the Courtneys could apply for direct review in the court of appeals. *See* Rev. Code Wash. § 34.05.518(1). Such an application would be filed within 30 days of the filing of their petition for judicial review. *See* § 34.05.518(2).

Finally, depending on the outcome of this first level of judicial review, the Courtneys could—and likely would—avail themselves of any subsequent level of appellate review available.

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IV. CONCLUSION

In light of the many uncertainties involved—for example, whether the WUTC issues a declaratory order; whether the declaratory order process is adjudicative; whether a direct appeal to the court of appeals is available and granted—it is impossible to know at this point what course, or how long, the Courtneys' state proceedings will take. The only certainty is that the Courtneys will petition for a declaratory order no later than September 30, 2014, and that, if necessary, they intend to return to this Court to pursue their second claim, over which this Court has retained jurisdiction, following the state proceedings.[2] The Courtneys will keep this Court reasonably apprised of the state proceedings as they progress.

Dated: July 1, 2014 Respectfully submitted,

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[2] Upon return to this Court, the Courtneys may seek to amend their complaint to add federal constitutional claims. To that end, and to preserve their second Privileges or Immunities Clause claim, they will make, in the state proceedings, a reservation under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2014, I electronically filed the foregoing STATEMENT OUTLINING PLAINTIFFS' INTENTIONS REGARDING PURSUIT OF THEIR SECOND CLAIM in the above-referenced case with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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I further certify that I have mailed by United States Postal Service the documents to the following non-CM/ECF participants: N/A.

s/ Michael E. Bindas
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