

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of JAMES AND CLIFFORD COURTNEY DOCKET TS-151359 For a Declaratory Order on the Applicability of Wash. Rev. Code 81.84.010(1) and Wash. Admin. Code 480-51-025(2)

ORAL ARGUMENT, VOLUME I Pages 1 - 71 ADMINISTRATIVE LAW JUDGE GREGORY J. KOPTA

9:06 A.M. OCTOBER 21, 2015

Washington Utilities and Transportation Commission 1300 South Evergreen Park Drive Southwest Olympia, Washington 98504-7250

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OLYMPIA, WASHINGTON; OCTOBER 21, 2015 9:06 A.M. -000-

JUDGE KOPTA: Let's be on the record in Docket TS-151359 encaptioned "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 480-41-025(2)."

My name is Gregory Kopta, I am the administrative law judge who will be presiding over this proceeding. With me on the bench are Chairman David Danner and Commissioners Philip Jones and Anne Rendahl.

We are here to take oral argument on the petition. It is a legal oral argument, so we are asking for those who -- the petitioners and those who have filed comments in writing to address the legal issue of -- that is presented in the petition.

Before we -- well, let's take appearances first, beginning with the petitioners.

MR. BINDAS: Michael Bindas, I am appearing on behalf of the petitioners, James and Clifford Courtney.

JUDGE KOPTA: And for Staff?

MR. BEATTIE: Julian Beattie, Assistant

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1 Attorney General, representing Commission Staff.
 2 JUDGE KOPTA: And for Arrow Launch?
 3 MR. WILEY: David Wiley, representing
 4 Arrow Launch Service, Inc.
 5 JUDGE KOPTA: And does Lake Chelan
 6 Recreation want to make an appearance?
 7 They are on the bridge line, as I understand
 8 it.
 9 MS. ENGSTROM: Correct, we are on the
 10 bridge line to assist, if any information is needed.
 11 JUDGE KOPTA: All right. Thank you.
 12 Before we get started, there is an issue that
 13 the Chairman and Commissioner Rendahl wanted to raise
 14 and so I will turn that to Chairman Danner.
 15 CHAIRMAN DANNER: Thank you very much.
 16 Thanks, everyone, for being here.
 17 The issue I wanted to raise is about the issue
 18 of my prior participation in this matter. It is no
 19 secret that there is material in the record involving
 20 correspondence that I had with the Courtneys some time
 21 ago, while I was executive director of this agency. I
 22 wanted to make the offer that if any party has an
 23 objection to my continued participation as Chairman,
 24 and one of the few people who will make a decision in
 25 this case, that you raise that objection now, I would

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1 stand down. If you don't have an objection, then I
 2 would just like the record to show that you have
 3 waived that objection.
 4 MR. BINDAS: Thank you, Chairman Danner.
 5 We have no objection to your continued participation
 6 in the matter.
 7 CHAIRMAN DANNER: All right. Thank you
 8 very much.
 9 Ms. Rendahl?
 10 COMMISSIONER RENDAHL: Similarly, my
 11 name is in the record as well. I happened to be the
 12 Assistant Attorney General representing Staff in the
 13 matter before the Commission in the late '90s. That
 14 is Exhibit B to James Courtney's declaration.
 15 Similarly, I just want to make sure, although
 16 I was not in a decision-making role at that time, that
 17 there is no objection to my continued participation on
 18 this matter.
 19 MR. BINDAS: Thank you, Commissioner
 20 Rendahl. Likewise, we do not object to your continued
 21 participation.
 22 COMMISSIONER RENDAHL: Thank you.
 23 JUDGE KOPTA: And other parties, any
 24 objections?
 25 Staff?

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1 MR. BEATTIE: Staff has no objection to
 2 the continued participation of either Commissioner
 3 Rendahl or Chairman Danner.
 4 JUDGE KOPTA: Thank you.
 5 And Arrow Launch?
 6 MR. WILEY: None, Your Honor.
 7 JUDGE KOPTA: All right. We looked at
 8 the petition and the comments. I think we are fairly
 9 well informed as to what the issue is. Mr. Bindas, I
 10 will let you go first. Obviously, you have not had a
 11 chance to respond to the comments that have been made.
 12 Certainly, this is an opportunity for you to do that,
 13 as well as to respond to questions from the Bench.
 14 If you would like to make an opening
 15 statement, please do.
 16 MR. BINDAS: Thank you, Judge Kopta,
 17 Chairman Danner, members of the Commission.
 18 A couple of points of clarification.
 19 Actually, I should start by -- as I must, by making a
 20 reservation under England versus Louisiana State Board
 21 of Medical Examiners, both apprising the Commission of
 22 the federal action in the Eastern District of
 23 Washington, of which I'm sure it is well aware, but
 24 also reserving our right to have that matter
 25 adjudicated in a federal forum. As you know, it is a

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1 federal constitutional issue and we have a right to
 2 have that adjudicated in the federal court, and
 3 therefore, we are reserving that right and requesting
 4 that you do not address or resolve that federal
 5 constitutional matter in today's proceedings. So I
 6 just wanted to get that on the record.
 7 Another point of clarification, Judge Kopta,
 8 if I may. It hasn't been made clear in the notice we
 9 received for the oral argument whether the Commission
 10 is treating this or has converted it to an
 11 adjudicative proceeding. I assume that is the case,
 12 but obviously that could impact our -- the various
 13 options we have on appeal, both -- including
 14 specifically our ability to take a direct appeal, or
 15 seek direct appeal to the court of appeals, rather
 16 than seek judicial review first in the superior court.
 17 So I want to make clear on the record whether or not
 18 this is being handled as an adjudicative proceeding.
 19 JUDGE KOPTA: Fair question. At this
 20 point it is not an adjudicative proceeding. We are
 21 proceeding under the statute that governs petitions
 22 for declaratory orders, which is why we extended the
 23 time for Commission action. The Commission could, as
 24 one of its alternatives, decide that it wants to
 25 conduct an adjudication if it feels that there are

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1 facts that need to be developed through an evidentiary
 2 hearing.
 3 At this point we are looking strictly at the
 4 legal issue that has been presented in the petition
 5 and are hearing arguments on that today, and would
 6 anticipate, as the statute requires, that the
 7 Commission will make a determination within the time
 8 frame that we have established in the notice.
 9 MR. BINDAS: Thank you.
 10 And one final point of clarification. I
 11 assume I will have an opportunity in today's argument
 12 to reply to any of the comments made by the other
 13 parties; is that correct?
 14 JUDGE KOPTA: That is correct.
 15 MR. BINDAS: Thank you.
 16 Good morning, Judge Kopta, members of the
 17 Commission. Again, Michael Bindas for petitioners Jim
 18 and Cliff Courtney.
 19 As you know, we petitioned the Commission back
 20 in September of 2014 for a declaratory order on the
 21 question of whether a public convenience and necessity
 22 certificate is required for boat transportation on
 23 Lake Chelan that is limited to customers of a specific
 24 business or group of businesses.
 25 As you also know, Commission Staff, the

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1 incumbent ferry provider on Lake Chelan, as well as
 2 Arrow Launch Service filed comments in response to
 3 that, taking issue with our petition. Ultimately, the
 4 Commission, after reviewing that comment, determined
 5 that we had not included sufficient detail in our
 6 application or in our petition. We therefore filed a
 7 second petition, which is the one at issue today. In
 8 that petition, we responded to the request for more
 9 detail by proposing five scenarios, all involving
 10 transportation on Lake Chelan for customers of a
 11 specific business or group of businesses. I will
 12 briefly kind of reiterate what those five proposals
 13 are and then go into a bit of argument as to why we do
 14 not believe a public convenience and necessity
 15 certificate is required for any of those services.
 16 The services range in breadth, beginning with
 17 perhaps the most narrow, and that is boat
 18 transportation service for customers with a lodging
 19 reservation at Stehekin Valley Ranch, which is a
 20 lodging facility owned by petitioner Cliff Courtney
 21 and his wife. This service would be limited solely to
 22 those who have a preexisting reservation for lodging
 23 with Stehekin Valley Ranch.
 24 The second proposal, as I am sure you are
 25 aware, is also attuned to Stehekin Valley Ranch, but

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1 not solely for lodging guests, but also those who have
 2 a reservation for some of the outdoor
 3 recreational-type activities that the Lodge also
 4 offers. Commonly, these folks who participate in
 5 these activities are lodging customers of the Ranch,
 6 but not always. This proposal would enable Stehekin
 7 Valley Ranch to offer transportation for those with a
 8 lodging reservation or those who have a preexisting
 9 reservation for one of these other activities, such as
 10 kayaking or horseback riding, which are both offered
 11 at Stehekin Valley Ranch.
 12 The third proposal would include both those
 13 customers, the lodging or activities customers of the
 14 ranch, but also customers of -- or of others --
 15 businesses, Stehekin-based businesses owned by the
 16 Courtney family. Cliff's son owns Stehekin
 17 Outfitters, which operates camping, guided hikes,
 18 other outdoor recreational-type activities up in that
 19 area. Jim and Cliff's brother, Craig, and his wife,
 20 Roberta, own another lodging business as well, a
 21 restaurant and bakery in Stehekin. Under this
 22 proposal, transportation could be provided for
 23 customers of any of those family-owned businesses by
 24 the Courtney family.
 25 The fourth proposal would broaden that a bit

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1 more to Stehekin -- customers of any Stehekin
 2 business, provided that the business agreed to use the
 3 reservation booking system that Stehekin Valley Ranch
 4 already uses, so that a customer, when they are
 5 securing a reservation for some activity or service
 6 with that business, could also, through the same
 7 transaction, or a separate transaction, but through
 8 the same reservation system, purchase transportation
 9 for their ability to get to Stehekin to access that
 10 service or activity that they have purchased. Again,
 11 it would be limited to customers with an existing
 12 reservation for some service offered by a
 13 Stehekin-based business.
 14 Finally, the fifth proposal that we have
 15 outlined is one in which the Courtneys would provide
 16 transportation by charter agreement for customers of a
 17 travel company that puts together travel packages for
 18 people visiting the Stehekin area. The travel company
 19 would provide the opportunity, when it's -- when it's
 20 selling these packages, to book transportation. It
 21 would provide a manifest of all of those customers who
 22 have requested transportation to the Courtneys, who
 23 would then provide transportation for those customers
 24 by charter agreement with the travel company.
 25 So those are the five proposals that we have

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1 outlined. Again, the common denominators in each of
 2 these proposals is that they are boat transportation
 3 on Lake Chelan that is restricted to customers of a
 4 specific business or a group of businesses, they could
 5 share these common factors.

6 We believe it is pretty clear that none of
 7 these proposed services require a public convenience
 8 and necessity certificate. We believe that for three
 9 basic reasons, which we have laid out in detail in our
 10 petition.

11 Simply put, No. 1, the relevant statutory
 12 language does not cover any of these services because
 13 a certificate is required for a service that is, among
 14 other things, open to the public -- for public use for
 15 hire. None of these proposed services would be for
 16 the public use, rather, they would be restricted
 17 specifically and only for customers with a preexisting
 18 reservation at one of these businesses, either
 19 Stehekin Valley Ranch or one of the other businesses
 20 at issue in one of the other proposals. So these
 21 would not be open to the public.

22 Second, history and case law make clear that
 23 services of this type are not considered public
 24 ferries or common carriers. Historically, as we note
 25 in our petition, a public ferry was one that was open

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1 to all and it was bound to take all passengers who
 2 came. That would not be the case with any of these
 3 proposals. The only people who could use these
 4 services would be those who have already purchased and
 5 have a preexisting reservation for a service offered
 6 by one of these businesses. These early cases, and
 7 history also, makes clear that transportation for
 8 one's own customers is not a public ferry, even when a
 9 fare may be charged.

10 The third reason we don't believe that any of
 11 these proposals require a certificate is because the
 12 UTC does not require a certificate for comparable
 13 services in other contexts, for example, nonwaterborne
 14 context. The UTC exempts from -- passenger
 15 transportation regulations persons operating hotel
 16 busses, it exempts private carriers who provide
 17 transportation that is incidental to some other
 18 business that they own or operate, it exempts
 19 arrangements between transportation companies and
 20 airlines to provide transportation for airline
 21 passengers or for flight crews to and from hotels.
 22 And even in the waterborne context, it does not
 23 require a certificate for charter agreements. That is
 24 specifically exempt and under the regulatory
 25 framework. All of those exemptions are comparable to

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1 one or more of the proposed services that are outlined
 2 in our petition.

3 For these three reasons, because the plain
 4 text of the statutory framework is not required,
 5 because history and case law make clear that this type
 6 of service is not a public ferry, and because the
 7 Commission exempts comparable services in other
 8 context, we do not believe that a certificate should
 9 be required here.

10 I would be happy to expand on any of these
 11 points or to answer any questions that the
 12 Commissioners or Judge Kopta may have.

13 COMMISSIONER RENDAHL: Mr. Bindas, Anne
 14 Rendahl. So because you saw my name in the case from
 15 1998, I have had some experience with transportation
 16 before the Commission. I just want to make sure I
 17 understand how you are framing this argument.

18 Would you agree with me that there are certain
 19 categories for determining transportation and whether
 20 a certificate would be required, and those would be
 21 either common carriage, charter-party carriage,
 22 excursion service, private carriage, or specific
 23 statutory or rule-based exemptions?

24 MR. BINDAS: I'm not quite sure,
 25 Commissioner Rendahl, what the -- I am familiar that

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1 those things are addressed in either governing
 2 statutes or regulations. I'm --

3 COMMISSIONER RENDAHL: That's the range
 4 of what the possibilities exist in figuring out
 5 whether you are required to have a certificate.
 6 Common carriage, which just sort of covers the whole;
 7 then there is charter-party and excursion, which are
 8 identified in rule, in this chapter, and also common
 9 classifications in transportation law; there is
 10 private carriage, which you have mentioned; and then
 11 there is specific exemptions, which you have
 12 mentioned.

13 Are there any other options that you can think
 14 of that we need to look at?

15 MR. BINDAS: I think -- I assume this
 16 would fall under the first item you mentioned about
 17 common carriage, but, I mean --

18 COMMISSIONER RENDAHL: For public for
 19 hire.

20 MR. BINDAS: Okay. Yes, I was going to
 21 say if -- if that would encompass defining those terms
 22 for the public use for hire, then yes, I think that
 23 would probably -- I would want to think about that,
 24 but I -- it seems to me that those would be the
 25 various openings that the Commission would have to

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1 operate within in determining whether a certificate is
 2 required or not for this type of service.
 3 COMMISSIONER RENDAHL: Okay. So would
 4 you agree that there are no specific statutory
 5 exemptions in 81.84, RCW 81.84, for this particular
 6 service, nothing listed, like there are in other
 7 chapters?
 8 MR. BINDAS: The --
 9 COMMISSIONER RENDAHL: For this
 10 particular service that you are providing.
 11 MR. BINDAS: Well, certainly the charter
 12 exemption in --
 13 COMMISSIONER RENDAHL: That's --
 14 MR. BINDAS: -- the regulations
 15 governing ferries specifically.
 16 COMMISSIONER RENDAHL: But that's a
 17 different category. I am talking about specific --
 18 aside from charter, aside from excursion, aside from
 19 private, no specific exemptions like the hotel
 20 transportation for auto transportation companies?
 21 MR. BINDAS: There is the recreational
 22 service exemption. However, in order to avail oneself
 23 of that exemption -- I'm looking for the language on
 24 that right now.
 25 COMMISSIONER RENDAHL: But you haven't

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1 claimed that recreational use exemption here in your
 2 petition.
 3 MR. BINDAS: We have not because, from
 4 what I recall, in order to claim that exemption one
 5 would have to prove that there would be essentially no
 6 impact on the incumbent ferry and that this -- and
 7 that to me is akin to or very near to the actual
 8 showing you must make in order to obtain a public
 9 convenience and necessity certificate.
 10 We have not outlined that or highlighted that
 11 exemption in our petition, but it is an indication
 12 that the Commission has looked at services of that
 13 nature as not falling within the framework of the
 14 public convenience and necessity requirement. It
 15 appears, though, that to avail oneself of that
 16 exemption, one would have to proffer testimony, expert
 17 testimony by an economist, presumably, and make the
 18 types of showings that one would have to make for --
 19 COMMISSIONER RENDAHL: So that --
 20 MR. BINDAS: -- a certificate.
 21 COMMISSIONER RENDAHL: -- is a -- the
 22 legislature directed us to do that. That is not a
 23 rule that we established on our own, correct?
 24 MR. BINDAS: I don't know the
 25 legislative history of that particular --

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1 COMMISSIONER RENDAHL: Well, it's a
 2 statute.
 3 This isn't excursion service that you are
 4 proposing either, so we are focusing on, is it common
 5 carriage, private carriage or charter-party.
 6 MR. BINDAS: I believe that those would
 7 be the -- the ways in which you could view the
 8 proposed services, in the light of which you could
 9 look at the proposed services, yes.
 10 COMMISSIONER RENDAHL: Okay. And so for
 11 your fifth example, your fifth proposed scenario, you
 12 say that's charter. So the definition of charter
 13 under the rules governing ferries, WAC 480-51-020(14),
 14 says it's hiring a vessel with a captain and crew by a
 15 person or group for the purpose of the transportation.
 16 How, in this case, does individuals contacting
 17 a travel agency to have -- to be able to travel to
 18 Stehekin, when they are doing it individually, how
 19 does that constitute a charter?
 20 MR. BINDAS: All of these individuals
 21 would be going through the travel company, which would
 22 in turn contract with the Courtneys for the charter
 23 services. It would be the person contracting for
 24 carriage or conveyance of persons or property. So it
 25 would not be -- you are correct that it would not be

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1 each individual customer entering into a charter
 2 agreement with the Courtneys, but rather those
 3 customers, through the travel company, arranging for
 4 the charter service.
 5 COMMISSIONER RENDAHL: So you are saying
 6 the travel company would arrange the charter on a
 7 daily basis, potentially, during the peak months, with
 8 the transportation service that would be owned by the
 9 Courtney brothers?
 10 MR. BINDAS: That's an accurate
 11 description, with the caveat that nowhere have we
 12 take -- I don't think we have indicated how
 13 frequently. I'm not sure that this would be a daily
 14 service.
 15 COMMISSIONER RENDAHL: But it could be
 16 in the peak days of the summer.
 17 MR. BINDAS: It could be, but not
 18 necessarily would it be. But I agree that it is
 19 not -- that specific point is not addressed in the
 20 petition one way or the other.
 21 COMMISSIONER RENDAHL: And so how does
 22 that distinguish from the Kitsap County Transportation
 23 Manitou Agate Beach case that is listed in a footnote
 24 in your petition? Can you distinguish those -- that
 25 fact pattern from what's in that Washington case?

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1 MR. BINDAS: I can, Commissioner
 2 Rendahl. In that case, for a nominal charge, members
 3 of the group or association collectively arrange for
 4 this charter-type service to operate essentially what
 5 was a ferry back and forth for them. It was not a
 6 situation where paying customers for services from
 7 some other business were given the option of including
 8 transportation by agreement with the Courtneys. The
 9 sole purpose in that case, in the Washington
 10 Supreme Court case, was to access transportation.
 11 There was some nominal fee for that, but the whole
 12 purpose was transportation.
 13 The whole purpose here would not be
 14 transportation to Stehekin, the purpose would be
 15 people going to Stehekin to do any number of things,
 16 for example, kayaking, hiking, camping, any number of
 17 these things. Of course, to do those things you have
 18 to get there. So this would be not the purpose of --
 19 the purpose of providing the transportation here would
 20 not be to provide transportation, the purpose would be
 21 to facilitate people to be able to do these activities
 22 that they want to be able to do in Stehekin. It just
 23 so happens the only way you can get there is by water.
 24 COMMISSIONER RENDAHL: So this seems to
 25 also bleed into this argument of private carriage.

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1 You mentioned in your petition the definition of
 2 private carriage for auto transportation companies.
 3 Are you aware there is also a definition in Chapter
 4 81.80 that governs motor carriers?
 5 This Commission used to regulate heavily
 6 freight trucking, it no longer does. There is a
 7 significant amount of case law, both at the federal
 8 level and the state level. I don't know if you have
 9 had a chance to look at any of that on private
 10 carriage and the meaning of incidental to that -- that
 11 whole category. Have you done any research in that
 12 area?
 13 MR. BINDAS: I have not done any
 14 research on the specifics of the term "incidental" as
 15 it is used in connection with trucking. No, I have
 16 not.
 17 COMMISSIONER RENDAHL: Okay. So the
 18 definition of private carrier in the realm of auto
 19 transportation, you cite in your petition -- and of
 20 course I can't find that right now, but would you
 21 agree that it is substantially similar? I am going to
 22 give you a definition from 81.80.010, which is the
 23 definitions, Subsection 9. It says, "A 'private
 24 carrier' is a person who transports by his or her own
 25 motor vehicle, with or without compensation, property

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1 which is owned or is being bought or sold by the
 2 person" -- obviously, this is in the context of
 3 transportation of property freight -- "or property
 4 where the person is a seller, purchaser, lessee or
 5 bailee and the transportation is incidental to and in
 6 furtherance of some other primary business conducted
 7 by the person in good faith."
 8 So now we are talking private carriage and the
 9 meaning of incidental to and in furtherance of some
 10 other primary business. And in looking at -- there's
 11 a commission case, a case involving the Commission,
 12 that was decided by the State Supreme Court, and
 13 that's Inland Empire Distribution Systems versus the
 14 UTC, at 112 Washington Second 278, and that was
 15 decided in 1989.
 16 In that case the supreme court decided -- and
 17 obviously you can't -- if you haven't read the case
 18 you can't opine on it necessarily, but that case
 19 looked at both Interstate Commerce Commission
 20 decisions and a UTC case in deciding what incidental
 21 to and in furtherance of some other primary business,
 22 what the meaning of that was. They decided that
 23 transportation -- if the transportation itself is
 24 discrete from the primary business, then it is not
 25 incidental.

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1 So assuming, for our purposes this morning,
 2 that that is correct, and that you have read the case,
 3 can you explain how in this case this transportation
 4 is separate and distinct, both in your fifth scenario,
 5 okay, and in the other four scenarios?
 6 MR. BINDAS: Well, certainly in the
 7 first two scenarios, there -- I don't think there
 8 could be any question that this would be incidental to
 9 and in furtherance of. Although, in furtherance of is
 10 not included in the exemption for -- for private
 11 carriers who provide incidental services. Certainly,
 12 that transportation would be incidental to and in
 13 furtherance of Stehekin Valley Ranch. I don't think
 14 that -- which is owned by Cliff Courtney. I don't
 15 think there could be any question that certainly those
 16 two proposals fit that description.
 17 COMMISSIONER RENDAHL: But would
 18 incidental, meaning it's not -- it's not substantial,
 19 right, it's -- it's incidental, it's part of the
 20 business. How can running a hotel or running a pastry
 21 shop or running a hiking or riding service in Stehekin
 22 be connected, or how can that transportation to it be
 23 incidental if any other company could provide that
 24 service?
 25 MR. BINDAS: Incidental -- it is

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1 incidental in the sense that in order to avail
 2 yourself of that business as a customer, you have to
 3 be able to get there. You cannot get there but for
 4 boat transportation across Lake Chelan.
 5 And so when you have an exemption for private
 6 carriers who provide motor transportation incidental
 7 to a business owned or operated by them, you are
 8 presumably exempting people to enable them to get
 9 customers to the business owned or operated by them.
 10 This is no different. You are -- the way you get to
 11 Stehekin Valley Ranch is across Lake Chelan. This is
 12 not a stand-alone transportation company for the sake
 13 of operating a stand-alone transportation company.
 14 This is a transportation service to enable people to
 15 access Stehekin Valley Ranch or one of these other
 16 businesses. It is absolutely incidental.
 17 COMMISSIONER RENDAHL: All right. So in
 18 terms of public -- it's open to the public, so
 19 anybody -- it's not like the Michigan case that you
 20 cite. It's not a -- it is a private resort, but
 21 anybody can go there who wants to make a reservation,
 22 correct? You would call up the travel company or you
 23 would call up -- you would put in your reservation on
 24 the website and there is nobody -- there is no
 25 distinguishing there who decides to sign up and apply

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1 for this and pay money, correct?
 2 MR. BINDAS: I can't speak specifically
 3 to that question. I assume there might be some
 4 situations in which Mr. Courtney might -- you know, if
 5 he had a patron who had previously been destructive or
 6 something like that at the Lodge, perhaps he would not
 7 welcome that person back. But barring any exception
 8 like that, yes, correct, a person could -- anyone who
 9 wanted to come to Stehekin and wanted lodging at that
 10 end of the lake could --
 11 COMMISSIONER RENDAHL: Who is willing to
 12 pay.
 13 MR. BINDAS: -- make a reservation, yes.
 14 COMMISSIONER RENDAHL: Okay. So it's in
 15 a sense open to the public, even though you are going
 16 to a specific hotel?
 17 MR. BINDAS: No, Commissioner Rendahl,
 18 it's not. It is not open to the public in the sense
 19 that that term or turn of phrase has been used in
 20 connection with common carriers or ferries. As the
 21 Futch versus Bohannon case makes clear, a ferry was
 22 something that was open to all and bound to take all
 23 who came.
 24 If Jim and Cliff were able to operate this
 25 transportation service, it would not be open to all

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1 and bound to take all who came. When they go down to
 2 Fields Point, they go down to Manson Bay and someone
 3 walks up and says, Hey, I would like a ticket to get
 4 on the ferry, they would absolutely be free and would
 5 turn that person away. It is not open to all and it
 6 will not take all who come. It will only take those
 7 persons who have a preexisting purchased reservation
 8 for some other service or some other activity. The
 9 whole purpose of this would be able -- would be to
 10 facilitate transportation to that preexisting
 11 purchased activity or service.
 12 COMMISSIONER RENDAHL: And how does that
 13 distinguish -- that case in Michigan distinguish from
 14 the supreme court case that Staff cites?
 15 MR. BINDAS: The supreme court case that
 16 Staff cites, first of all, is no way binding on the
 17 Commission. The issue there had to do with the
 18 District of Columbia Public Utilities Commission,
 19 which was created by act of Congress, therefore it was
 20 a matter of federal statutory interpretation, which is
 21 in no way binding on this Commission, nor is it
 22 binding on any state judicial forum in Washington.
 23 COMMISSIONER RENDAHL: But the supreme
 24 court jurisdiction -- I mean the supreme court's
 25 decisions generally are seen as applicable in a

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1 general scheme like this, of common carriage, correct?
 2 MR. BINDAS: I think that's incorrect,
 3 Commissioner Rendahl. But more importantly, the fact
 4 that -- there is the fact that it is nonbinding on any
 5 tribunal in Washington state, but more importantly,
 6 the Commission has already rejected the logic of that
 7 decision. Remember the service at issue there, or one
 8 of the services -- there were three different services
 9 at issue. The service at issue there was taxi
 10 transportation for customers of hotels. Well, this
 11 Commission has already exempted taxi service from its
 12 regulatory framework. This Commission has already
 13 exempted hotel shuttles from its regulatory framework.
 14 This Commission has already rejected the logic of that
 15 decision, as it --
 16 COMMISSIONER RENDAHL: I'm not sure --
 17 MR. BINDAS: -- should.
 18 COMMISSIONER RENDAHL: -- I would
 19 necessarily agree with that. I think in some
 20 circumstances that it doesn't -- it is providing a
 21 specific exemption for that specific service. I am
 22 not sure I would agree with you there.
 23 MR. BINDAS: The specific service at
 24 issue in that case was transportation for hotel
 25 guests. This Commission has exempted transportation

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1 for hotel guests. The Commission was right to do so,
 2 and the Commission, as I mentioned before, is no way
 3 bound to follow a decision interpreting a federal
 4 statute. This is a Washington state regulatory and
 5 statutory framework, that it is up to the Commission
 6 and to the courts of Washington State to interpret and
 7 apply.
 8 COMMISSIONER RENDAHL: Okay. I will let
 9 my colleagues ask some other questions, if they want
 10 to.
 11 CHAIRMAN DANNER: I would like to
 12 continue and hear from others.
 13 JUDGE KOPTA: Go ahead, Commissioner
 14 Jones.
 15 COMMISSIONER JONES: Just on that point,
 16 it's interesting to hear you say that U.S. Supreme
 17 Court decisions are not generally binding on this
 18 Commission. What basis do you have for that? Because
 19 in the energy area, and other areas, transportation, I
 20 don't think that's the case.
 21 MR. BINDAS: Commissioner Jones, with
 22 all due respect on the question of how the regulatory
 23 or statutory framework governing the District of
 24 Columbia, which is a federal enclave over which the
 25 federal courts have jurisdiction how their statutes

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1 govern, is in no way binding. Of course, Federal
 2 Supreme Court jurisprudence on federal constitutional
 3 issues, such as the interpretation and application of
 4 federal privileges or immunities clause, which is at
 5 issue in the federal proceeding, which we reserve the
 6 right to have adjudicated in a federal proceeding,
 7 that of course is binding.
 8 COMMISSIONER JONES: Okay.
 9 MR. BINDAS: But how the federal courts
 10 interpret federal statutes is in no way binding on --
 11 COMMISSIONER JONES: Okay. I think --
 12 MR. BINDAS: -- on this Commission.
 13 COMMISSIONER JONES: -- I understand
 14 your logic. I don't agree with it, but I understand
 15 it.
 16 I have read that terminal taxi case quite
 17 closely. I just want to quote at least one section
 18 from there. And you raise the hotel guest issue. I
 19 am just reading from one section of it, and this was
 20 written by Justice Holmes in 1916. He says, quote, We
 21 do not perceive that this limitation -- and by the
 22 limitation he was talking about reserving the service
 23 to hotel guests traveling from Union Station to the
 24 hotels -- We do not perceive that this limitation
 25 removes the, quote, public character of the service or

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1 takes it out of the definition of the act. So...
 2 MR. BINDAS: I would just point out
 3 again, Commissioner Jones, as I already have, that the
 4 Commission, in exempting hotel shuttles, has rejected
 5 that --
 6 COMMISSIONER JONES: Okay.
 7 MR. BINDAS: -- logic.
 8 COMMISSIONER JONES: Okay.
 9 I don't have any -- I have some other
 10 questions, but I would like to hear from Staff and
 11 some other parties first.
 12 JUDGE KOPTA: Before we turn to Staff, I
 13 do have one question for you, Mr. Bindas. Have you
 14 estimated the number of customers or potential riders
 15 in each of your scenarios that you would be serving?
 16 MR. BINDAS: We have not, Your Honor.
 17 JUDGE KOPTA: All right. Then let's
 18 hear from Commission Staff.
 19 MR. BEATTIE: Thank you, Judge Kopta,
 20 Commissioners.
 21 As the bench is well aware, the central
 22 question in this docket is whether each of the boat
 23 transportation services proposed by the Courtneys will
 24 operate, quote, for the public use for hire, end
 25 quote, as that phrase is used in RCW 81.84.010.

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1 In Staff's view, the phrase for the public use
 2 for hire simply means that the service is held out for
 3 sale to the general public. Here all five services
 4 proposed by the Courtneys clearly will be held out for
 5 sale to the general public. In each scenario, anyone
 6 who has the means and desire to visit Stehekin can
 7 book a ticket and board the boat. The absence of any
 8 substantial limitation on customer base makes this
 9 case an easy one. All five services will be held out
 10 for sale to the general public and will therefore
 11 operate for the public use for hire. Consequently, it
 12 is Staff's position that all five services will
 13 require a Commission-issued certificate.
 14 And so now I am happy to take questions.
 15 CHAIRMAN DANNER: So isn't it true,
 16 though, that, under the first scenario, that the only
 17 way that I could get on the boat is if I show that I
 18 have a confirmed reservation to Stehekin Valley Lodge?
 19 If I don't, I presume I am not allowed on the boat.
 20 If that's the case, isn't that a limitation on the
 21 definition of public?
 22 MR. BEATTIE: It is a limitation, but to
 23 echo the reading from the case that Commissioner Jones
 24 just did, that limitation is not sufficient to strip
 25 the operation of its essential public character.

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1 Again, anybody anywhere in the world can hop online,
 2 pick up the phone or e-mail the reservation company
 3 and book a ticket. There is no real substantial
 4 limitation on customer base.
 5 CHAIRMAN DANNER: Okay. So isn't that
 6 also true that anybody anywhere can get online and
 7 book a hotel room at the Hilton and therefore get a
 8 ride from the airport?
 9 MR. BEATTIE: Yes, that is true. And to
 10 anticipate where you are going with that, the reason
 11 that I believe that hotel buses are determined to be
 12 incidental and why that exemption exists is because
 13 the hotel also owns the bus. It is not a separate
 14 service that is used in connection with staying at the
 15 hotel, it is the hotel's service. It's just part
 16 of -- you pay your fare for the room and that includes
 17 getting picked up at the airport. In this case, it is
 18 two separate entities, the boat transportation service
 19 and then whatever you are going to do in Stehekin.
 20 CHAIRMAN DANNER: Okay.
 21 So I guess if I may turn to Mr. Bindas for a
 22 second, I would like to hear your response on that.
 23 Isn't it true that there is a distinction here?
 24 Because in your proposal, you would have a separate
 25 entity providing the service, there would be a

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1 separate charge for the boat service, unlike the
 2 hotel, which basically it is all included, you book
 3 your room, you get your ride.
 4 MR. BINDAS: I do not think that is a
 5 legitimate distinction for a couple of reasons,
 6 Chairman Danner. Number one, Cliff Courtney owns
 7 Stehekin Valley Ranch, Cliff Courtney would own this
 8 service. So there is --
 9 CHAIRMAN DANNER: Would Stehekin Valley
 10 Ranch own the service?
 11 MR. BINDAS: As we have -- well,
 12 Stehekin Valley Ranch is owned by Cliff Courtney.
 13 He --
 14 CHAIRMAN DANNER: Would the same
 15 business entity own both the vehicle and the hotel?
 16 MR. BINDAS: If you give me one moment,
 17 Chairman Danner, I would like to quote specifically
 18 from...
 19 (Pause in the proceedings.)
 20 MR. BINDAS: We have pled in
 21 Paragraph 74 that the boat transportation service
 22 would be owned by Cliff Courtney, and in 75, that
 23 Stehekin Valley Ranch is owned by Cliff Courtney. We
 24 have pled that there would be common ownership here.
 25 More importantly, however, if you look at the

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1 hotel bus exemption, there is nothing that requires
 2 ownership by the hotel, nor is there anything that
 3 prevents a hotel from charging a fare for that shuttle
 4 service. It simply says persons owning, operating,
 5 controlling, or managing hotel buses. It doesn't say
 6 the hotel must own the bus, it speaks more broadly of
 7 persons owning, operating, controlling, or managing
 8 those buses. Moreover, it says nothing about a fare.
 9 Staff has attempted to graft those conditions
 10 onto that exemption, but those conditions are nowhere
 11 in the exemption itself.
 12 CHAIRMAN DANNER: Right, but there is --
 13 you know, there is -- I think it is upon us to figure
 14 out what would be incidental. And so without having a
 15 clear definition of what is incidental, we have got to
 16 craft one. I mean, it's -- is something incidental?
 17 I mean, in some of your scenarios, any business
 18 relationship with a Courtney enterprise -- if I make a
 19 reservation to buy a maple bar and that gives me a
 20 ride up to Stehekin to get the maple bar, is that
 21 incidental?
 22 MR. BINDAS: The transportation is
 23 incidental because you have to be able to get to these
 24 businesses to use the services that they offer, it
 25 just so happens that in this particular context there

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1 is a 55-mile-long lake in between the customers and
 2 the businesses. So just as someone is able to provide
 3 incidental road transportation to get customers to
 4 their business, this is the same incidental
 5 transportation to get customers to those businesses.
 6 It just so happens that in this case, like I said, it
 7 is a 55-mile-long lake, not a short drive across town.
 8 CHAIRMAN DANNER: But isn't any
 9 transportation intended to get a person from Point A
 10 to Point B and possibly back to A? It's -- unless the
 11 purpose of the transportation is to look out the
 12 window and see the scenery, it seems that the
 13 transportation is intended to take a person from
 14 someplace to another place.
 15 So let's say I own a casino in Las Vegas and I
 16 decide that gives me the right to operate airlines,
 17 and I decide I am going to basically run airfare, and
 18 all you have to do is step into my casino, play a game
 19 and leave, and we have given you market-based air
 20 service to Las Vegas. Is that -- in your mind, would
 21 that be incidental?
 22 MR. BINDAS: That's -- I can't answer
 23 that question right now, Chairman Danner, because of
 24 the fact that at that point you are dealing with
 25 interstate commerce, you are dealing with a whole --

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1 you know, I don't know what the statutes in --
 2 CHAIRMAN DANNER: Okay. So the casino
 3 is not in Las Vegas, it is in Tulalip.
 4 MR. BINDAS: Then would a shuttle from
 5 the airport to the casino be incidental? It might be.
 6 I don't --
 7 CHAIRMAN DANNER: Well, would the
 8 airplane from the Tri-Cities be incidental?
 9 MR. BINDAS: Again, if I'm not
 10 mistaken -- and I'm far outside of my league at this
 11 point, but if I'm not mistaken, air carriage is
 12 regulated by the federal government, even when it's
 13 within -- wholly within interstate, you know, a Pasco
 14 to Spokane flight.
 15 CHAIRMAN DANNER: But my point is, we
 16 are trying to figure out what -- what's incidental and
 17 when does it become a more tenuous relationship or a
 18 pretext so that the transportation is actually the
 19 goal here and not the end service?
 20 MR. BINDAS: Well --
 21 CHAIRMAN DANNER: And that's -- that's
 22 what we are trying to figure out.
 23 MR. BINDAS: Sure. Well, certainly in
 24 the lodging scenario, you have already drawn that
 25 line. You have said that if it's -- if the service is

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1 for the purpose of getting someone to a lodging
 2 facility we are going to exempt it, at least when it
 3 is on the road. The question now is when it is on
 4 navigable water in the United States.
 5 You have already essentially agreed that that
 6 is incidental, or at least that that is something that
 7 does not fall within the public convenience and
 8 necessity requirement. You have also -- you have also
 9 an exemption for transportation that is incidental to
 10 some other business, and there is no -- in that
 11 exemption there is no limitation on that. I think the
 12 way to look at this is again simply at the idea or the
 13 notion that to get -- to access any of these
 14 businesses, one has to be able to get there.
 15 The whole purpose for these proposals is not
 16 to operate some stand-alone transportation company,
 17 it's to facilitate people from -- in order to -- for
 18 them to patronize these businesses in Stehekin. And
 19 so in that sense, they are -- it is absolutely
 20 incidental to those businesses, as evidenced by the
 21 fact that you have to be a paying reserved customer at
 22 any one of those businesses in order to get the
 23 transportation in the first place. This is not
 24 transportation for the purpose of transportation, it
 25 is transportation for the purpose of getting guests to

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1 a business so that they can access the goods and
 2 services that those businesses offer.
 3 CHAIRMAN DANNER: So now going back to
 4 the Inland Empire case that Commissioner Rendahl
 5 cited. You had a company that was offering storage
 6 services. The court adopted the UTC's decision at
 7 that time, this was in 1989, and said, Here
 8 transportation is discrete and different from storage.
 9 Transportation is not incidental storage but is a
 10 separate transaction. Any transportation company is
 11 able to provide the service with equal facility.
 12 Transportation here does not constitute private
 13 carriage under RCW 81.80.
 14 It can't be just transportation is used in the
 15 course of any business, there has to be some kind of
 16 relationship here, and so there would have to be some
 17 distinction between storage, hotel, and some of these
 18 other activities. Again, what -- what that is I'm
 19 going to be struggling with because I am trying to
 20 figure out what incidental means.
 21 MR. BINDAS: Well, we all -- we
 22 certainly know that it includes lodging, as evidenced
 23 by the fact that you have exemptions for hotel buses,
 24 for airline passengers and crews to get to and from
 25 hotels. There has already been a determination made,

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1 perhaps implicit, but that when it comes to lodging,
 2 that --
 3 (Interruption in the proceedings.)
 4 MR. BINDAS: I would submit that that
 5 determination has already been made, at least with
 6 respect to lodging. And you are right, that defining
 7 incidental beyond that is not done in the exemption.
 8 However, I think the commonality here of all these
 9 services is that unlike the -- you know, perhaps the
 10 transportation and storage industries, which might be
 11 looked at as kind of separate, discrete industries,
 12 people go to Stehekin Valley Ranch to visit.
 13 It's a -- it's, you know, essentially tourism or
 14 recreation. I do think that that is the spirit of the
 15 hotel bus exemption. I do think that is the spirit of
 16 the exemption for airline passengers to get to and
 17 from hotels, it is in order to facilitate this type of
 18 business in lodging and kind recreational travel.
 19 Certainly, that is the reason these people in all five
 20 scenarios are going to Stehekin to begin with.
 21 I think the Commission has looked in the past
 22 at that type of transportation as perhaps different
 23 from hauling goods from a wholesaler to a retailer or
 24 something like that.
 25 CHAIRMAN DANNER: All right. Thank you.

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1 Mr. Beattie, do you want to comment?

2 JUDGE KOPTA: Before we do that, let me

3 caution the people on the bridge line. Please don't

4 put your phones on hold. Oftentimes there is music on

5 hold and that's what we hear. I would ask that if you

6 no longer want to listen to what's going on here, that

7 you hang up and dial back in, if that's what you want

8 to do. Please do not put your phones on hold.

9 Thank you.

10 Mr. Beattie.

11 MR. BEATTIE: Thank you.

12 Just so we are clear, Staff's position is that

13 the Commission should not create an exemption in this

14 case for incidental services. No such exemption

15 currently exists either in statute or in rule. Again,

16 it is Staff's position that none should be created.

17 Certainly, you know, that position is

18 bolstered by the fact that there is a statutory maxim

19 that says, you know, the legislature basically knows

20 what it is doing. That's the crux of the maxim. The

21 legislature has created an exemption for incidental

22 use in the solid waste context, under Chapter 81.77.

23 We like to say that the legislature knows how to

24 create such an exemption and it has done so for solid

25 waste carriers that are merely incidental adjuncts to

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1 some other established private businesses. If the

2 legislature deemed such an exemption appropriate in

3 the commercial ferry context, it could have done so,

4 it could have created an exemption. It has not done

5 so.

6 And this is not simply a case where, you know,

7 we have a statute that's been on the books for

8 millions of years and the legislature just forgot

9 about it. You know, the very statute that we are

10 investigating this morning, 81.84.010, has, by my

11 count, been amended seven times since it was put into

12 its essential current form in 1927, including most

13 recently in 2009. This is not a statute that has been

14 just simply forgotten about. The legislature could

15 have created an exemption and they did not do so.

16 COMMISSIONER RENDAHL: Mr. Beattie,

17 there is no definition of private carriage in 81.84,

18 is there?

19 MR. BEATTIE: No, there is not. What we

20 have to do is determine whether the service would

21 operate for the public use for hire. And to the

22 extent that there are any implied exemptions, it is

23 because the proposed service would not fall within

24 that definition.

25 COMMISSIONER RENDAHL: Okay. And then

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1 wouldn't we have to look at -- in my questions to

2 Mr. Bindas, I was talking about the -- sort of these

3 categories of common carriage and specific statutory

4 exemptions which you note, excursion, charter, and

5 then private. Sometimes private is discussed in terms

6 of the statutory definition in case law and sometimes

7 it is just, as you said, implied, where it does not

8 fall within for public use.

9 In this case, the hotel bus exemption is in

10 the auto transportation statutes, right? It's not a

11 rule the Commission created, it's a statute.

12 MR. BEATTIE: I am familiar with that

13 exemption in its rule form, but I will -- I will

14 accept your statement that it is also in statute.

15 COMMISSIONER RENDAHL: So it's in

16 81.68.015 that restricts the application of the

17 chapter, and there's a number of various restrictions,

18 including those operated within the limits of cities

19 and towns, although, I think that may be going away as

20 well. But again, this is a legislative determination,

21 not something the Commission itself has decided,

22 right?

23 MR. BEATTIE: Yes.

24 COMMISSIONER RENDAHL: Okay.

25 So in looking at the charter question, because

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1 charter is -- is an option in 81.84. The petitioners

2 have identified two cases. One is the Iron Horse case

3 in Oregon and the other is the Butch case, I guess you

4 would say in Georgia -- no, I'm thinking of the

5 Meisner [phonetic] case. So Meisner is maybe more

6 private carriage and that they have limited to only

7 those people who buy tickets and that they can refuse

8 service to possible objectionable passengers.

9 First let's talk about the Meisner case. So

10 is this case applicable to Washington?

11 MR. BEATTIE: There are no cases that

12 are directly on point. The one that comes closest is

13 the Manitou Beach case, which you have already

14 mentioned. But cases that simply do not apply the

15 exact statutory language that we are dealing with are,

16 in Staff's opinion, of limited value. The history of

17 ferry regulation dates back, you know, more than a

18 century, and it -- you know, elements of the common

19 law of common carriage have come into play at various

20 times.

21 What we are dealing with is not a common law

22 question, but a statutory question, of whether the

23 services proposed fall within the statutory definition

24 or the statutory meaning of the phrase for the public

25 use for hire.

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1 My answer to your question is no, that case is
 2 not applicable.
 3 COMMISSIONER RENDAHL: Okay.
 4 And on the question of the Iron Horse case,
 5 and that's a question of charter. Again, that's an
 6 Oregon case. It had to do with arranging for service
 7 to the Willamette Pass ski area. Can you distinguish
 8 that case from the fifth scenario in the -- in terms
 9 of creating a travel -- having a travel agency that
 10 somehow establishes a charter of people to go to
 11 Stehekin?
 12 MR. BEATTIE: Commissioner Rendahl, I'm
 13 afraid I can't distinguish it to the detail you
 14 might -- that might be to your liking because I'm not
 15 very familiar with the facts of that case. Staff's
 16 position in this case, why Scenario 5 is not a
 17 charter, is simply because individuals can book
 18 individual fares.
 19 Now, I think the Manitou Beach case comes the
 20 closest to being helpful on Scenario 5 because in that
 21 case, really the message there was that, you know, you
 22 can't pull the wool over the regulators' eyes. You
 23 can't have an end run around the certificate
 24 requirement just by laundering it through a travel
 25 company. In essence, it is still individual

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1 passengers booking public transportation up to
 2 Stehekin and back. So Scenario 5 is not a true
 3 charter.
 4 COMMISSIONER RENDAHL: Okay.
 5 MR. BEATTIE: And it falls within the
 6 definition of for the public use for hire.
 7 COMMISSIONER RENDAHL: Okay.
 8 COMMISSIONER JONES: Commissioner
 9 Rendahl?
 10 COMMISSIONER RENDAHL: I'm done.
 11 COMMISSIONER JONES: I had a few
 12 questions on Proposal No. 5, if that's okay. I'm
 13 going to start with Mr. Bindas and then go to
 14 Mr. Beattie. I think it is an interesting scenario
 15 that you propose. Just a few questions of
 16 clarification.
 17 Who would own -- so the boat transportation
 18 service would be opened by Cliff and Jim Courtney?
 19 MR. BINDAS: Commissioner Jones, that's
 20 true with respect to Services 3 through 5.
 21 COMMISSIONER JONES: Okay.
 22 MR. BINDAS: However, Cliff Courtney
 23 would be the owner of Services 1 and 2.
 24 COMMISSIONER JONES: And then tell me
 25 how that works. Who owns the Stehekin-based travel

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1 company? Do Cliff and Jim Courtney own that as well?
 2 MR. BINDAS: They do not.
 3 COMMISSIONER JONES: Who owns that?
 4 MR. BINDAS: As we have pled in the --
 5 in the petition, it would be owned by someone other
 6 than Jim, Cliff, or a Courtney family member. So
 7 there is no individual I can tell you who owns that,
 8 but what I can tell you is it would not be owned by
 9 any Courtney family member. And that is alleged in
 10 Paragraph 115. The travel company would not be owned
 11 by Cliff, Jim --
 12 COMMISSIONER JONES: I see.
 13 MR. BINDAS: -- Jim or other Courtney
 14 family members.
 15 COMMISSIONER JONES: Thank you for that
 16 clarification.
 17 So explain how this operates, then. So the
 18 travel company would have a website, and they would --
 19 assuming that broadband service is sufficient in
 20 Stehekin for this, that's another issue. And then
 21 they would book passengers, a manifest would be
 22 created, and this would all be done by this travel
 23 company, right?
 24 MR. BINDAS: That is correct. If I
 25 remember correctly, our proposed Service No. 5 does

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1 not speak to how -- the mechanism by which the travel
 2 company would take reservations, but it does
 3 contemplate what you -- the second part of what you
 4 mentioned, that it would provide a manifest of those
 5 passengers who have purchased a package from them to
 6 the Courtneys, who would in turn provide service for
 7 those passengers, charging the travel company, not
 8 charging the individual passengers.
 9 COMMISSIONER JONES: Mr. Bindas, these
 10 are not legal questions and I understand this is
 11 primarily about legal issues, but I need to understand
 12 better this scenario in particular in order to render
 13 a judgment.
 14 So then a manifest would be created. So how
 15 do you distinguish -- well, so a manifest would be
 16 created, the travel company would charter -- would
 17 charter the boat transportation services with Cliff
 18 and Jim Courtney's boat, right?
 19 MR. BINDAS: That is correct.
 20 COMMISSIONER JONES: And then how
 21 would -- would it be a limited number of people and
 22 only to those people and how would that be controlled
 23 on the manifest? Because I think for charter
 24 companies, it is generally a -- it's a limited number
 25 of people that are already reserved, correct?

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1 MR. BINDAS: Correct, the transportation
 2 would be limited to those people who have purchased a
 3 package from the travel company, which would in turn
 4 provide a manifest to Jim and Cliff Courtney, who
 5 would require proof of identification upon boarding
 6 the boat.
 7 COMMISSIONER JONES: Okay.
 8 And then you say it would be a seasonal
 9 service and you would not operate it the entire year.
 10 You would just do it during the high season, in the
 11 summer, from Memorial Day through early October.
 12 MR. BINDAS: We would -- from -- yes,
 13 and we have -- as we have pled, it would be from
 14 Memorial -- I believe Memorial Day through mid --
 15 through early October, yes.
 16 COMMISSIONER JONES: And the prices are
 17 stated in Paragraph 121. \$37 for one way and 74
 18 round-trip.
 19 MR. BINDAS: We have stated that that
 20 would be the approximate charge. That charge in
 21 Scenario 5 would be charged to the travel company, it
 22 would not be charged to the individuals who are
 23 purchasing packages from the travel company.
 24 COMMISSIONER JONES: And, of course,
 25 these would be unregulated fares by the Commission.

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1 This would be supposedly competitive market fares.
 2 MR. BINDAS: My understanding,
 3 Commissioner Jones, is that if a certificate is not --
 4 if it's not a certificated carrier, that the fare does
 5 not -- is not regulated by the Commission.
 6 COMMISSIONER JONES: Okay.
 7 So then I would turn to Staff, Mr. Beattie.
 8 So in Paragraph 18 of your brief, you have some
 9 difficulties -- or you have some issues with this
 10 definition of charter. You are saying that Scenario 5
 11 would, quote, not operate as a true charter.
 12 So first of all, a question to you is, what in
 13 your definition would be -- based on not just the
 14 legal question, but the operational questions, what
 15 would be a true charter, as opposed to Scenario 5?
 16 MR. BEATTIE: Staff's position on that
 17 is that a -- an example of a true charter would be a
 18 Boy Scout troop, a construction crew. I think that
 19 actually happened in reality. You know, a single,
 20 unified, preexisting group that books stand-alone
 21 passage from Point A to Point B, you know, for a
 22 single purpose. It's more of a one-off situation.
 23 What is being proposed here is not, you know,
 24 a charter for a specific purpose, it is going to be a
 25 reoccurring trip booked by -- and the people on the

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1 boat, though they may be funneled through a travel
 2 company, will still have the potential to -- you know,
 3 you could have someone from every continent -- I don't
 4 know if there are people living on every continent.
 5 Maybe that is a bad example. You get my point.
 6 COMMISSIONER JONES: Yes.
 7 MR. BEATTIE: Anybody from anywhere in
 8 the world can appear and show up and board the boat,
 9 though they may be funneled through a single travel
 10 company.
 11 COMMISSIONER JONES: So what are the
 12 limiting, or the factors here that are the most
 13 important in your view? Is it that because it is a
 14 travel company based on the Internet, a based
 15 reservation system, that anybody in the world can book
 16 a reservation, is that the primary factor? Or is it
 17 that you, Staff, thinks that a single company, like a
 18 construction crew, Holden Village, the Lutheran
 19 Church, whomever, that it -- it's based on the
 20 characteristics of the booking -- of the booker of
 21 that service, or both?
 22 MR. BEATTIE: The primary reason is the
 23 former, the fact that there is no substantial
 24 limitation on customer base.
 25 COMMISSIONER JONES: Okay. Thank you.

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1 Judge Kopta, that's the questions I had on
 2 Scenario No. 5.
 3 JUDGE KOPTA: All right. Thank you.
 4 Did you have anything further, Mr. Beattie, at
 5 this point?
 6 MR. BEATTIE: I spoke by the way of a
 7 brief closing statement. You know, Staff's view is
 8 that this is an easy case because the legislature has
 9 already answered all the questions by defining -- you
 10 know, by applying the certificate requirement broadly
 11 to protect the incumbent, and that's a legislative
 12 choice. The legislature did not create any exemptions
 13 that would apply in this case. You know, Staff's
 14 position in this case is that the Commission should
 15 simply apply the law as written.
 16 JUDGE KOPTA: Okay. Thank you.
 17 Mr. Wiley, do you have comments that you would
 18 like to make?
 19 MR. WILEY: A few, Your Honor.
 20 Good morning, Commissioners. I do have just a
 21 few comments over sort of a broad array of topics that
 22 have been touched upon this morning.
 23 First of all, I want to characterize the
 24 position of Arrow Launch Service in this proceeding.
 25 Admittedly, it is a peripheral player in the facts of

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1 this proceeding, but it has a significant stake in the
 2 outcome of the construction of the statute as a
 3 current and longtime certificate holder under
 4 RCW 81.84.

5 It has been involved in terms of monitoring
 6 and participating in this case from the district court
 7 level and was an amicus in the Ninth Circuit action.
 8 Throughout that process -- and I should add, one of
 9 the roles of Staff at the Ninth Circuit argument was
 10 to remind the court that there is a procedural issue
 11 under the APA, which is -- and the section is 35.04 --
 12 excuse me, 34.05.247, where an existing certificate
 13 holder would appear to have to consent in writing to
 14 having their rights construed or affected by the
 15 Commission, by a declaratory order.

16 It is possible that you could construe the
 17 statement of the pro se certificate holder in mid July
 18 as potentially acknowledging that, but I'm not sure.
 19 I certainly want to remind the Commission, as the
 20 Ninth Circuit was reminded by Ms. Woods at argument,
 21 that that is a procedural issue that we have to
 22 continue to keep in mind.

23 Also, under your own procedural regulations,
 24 as someone has noted previously, you could convert
 25 this proceeding into an adjudication. From Arrow

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1 Launch's standpoint, that adjudication should be
 2 application case.

3 It's ironic, in our view, that we -- that we
 4 have heard from the petitioner for -- throughout the
 5 last four or five years about the expense and
 6 protraction of administrative litigation, when we have
 7 spent the time and money in judicial litigation that
 8 we have on the constitutional issue.

9 Now, I realize that -- that a conventional
 10 garden-variety 81.84 application case is not sexy, is
 11 not dazzling, and is something that sounds mundane,
 12 but it is certainly something that the statute
 13 envisions from the start. I do take issue with some
 14 of the characterizations of the process by the
 15 petitioner in pleadings throughout this process
 16 because I think federal district court litigation is
 17 far more costly and far more protracted.

18 That being said, I think it is the position of
 19 Arrow Launch Service that this proceeding, as the
 20 federal litigation has -- has seemed in its view, is
 21 premature. And by that I mean that -- that there is
 22 an alternative to address all of these issues in an
 23 abbreviated adjudicative hearing standpoint with an
 24 application case where you can weigh all the
 25 arguments, including the legal arguments about whether

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1 a certificate is required on that hearing record. You
 2 would have the best of both worlds. Because if you
 3 decided a certificate was required, you could weigh
 4 the evidence, weigh the proponent's case, and
 5 determine whether a certificate should be issued under
 6 the statute.

7 I wanted to talk as well about the discussion
 8 this morning that I think is very pertinent, first
 9 raised by the questions by Commissioner Rendahl and by
 10 Staff. As someone fairly familiar with Title 81, we
 11 do not have a garden-variety exemption in Title 81.84
 12 that we have in other statutes. Ms. Rendahl mentioned
 13 Title 81.80, Mr. Beattie mentioned 81.77, which --
 14 which subpart 010, Subsection 5 is the definition of
 15 private carriage and incidental adjuncts and those
 16 sorts of terms. I would allude to those as examples
 17 of the legislature carving out the ability of the
 18 Commission to find exceptions to regulated service.

19 The problem with 81.84, and those of us who
 20 have grappled with its interpretations over the years
 21 and the decades, it's a fairly skeletal statute, and
 22 we do not have the kind of creative exceptions or
 23 exemptions that exist in other Title 81 provisions.

24 I would also point out that Mr. Bindas alluded
 25 to taxicabs as an exception that the Commission

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1 promulgated. As I recall, there is a specific
 2 statutory exemption that removes taxicabs from
 3 Commission regulation in Title 81.

4 Again, my point is that most of these
 5 exceptions have been legislatively decreed. I don't
 6 think it is the role of the Commission to create
 7 additional exceptions or exemptions in the statute,
 8 even in the guise of modernizing some of the
 9 interpretations.

10 As Mr. Beattie has indicated, in the
 11 legislature, we have dealt with changes to the statute
 12 in the last decade, including provisions that require
 13 certificate holders not to, quote, sit on, unquote,
 14 their certificates after they are granted by the
 15 Commission. The legislature has revisited this
 16 statute quite frequently and has not chosen to define
 17 or to broaden exemptions such as are being proposed by
 18 the petition.

19 Basically, Arrow Launch believes there is a
 20 procedural avenue to pursue that the petitioner should
 21 consider. It takes no position -- meaning Arrow
 22 Launch takes no position on whether a certificate
 23 should or should not be granted that overlaps the
 24 existing certificate, but in the Ninth Circuit alluded
 25 to the Commission itself authorizing an overlapping

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1 certificate in Arrow Launch's territory in 1991 -- or
 2 1990 rather.
 3 So there are case law examples of overlapping
 4 service being granted. This -- this statute has been
 5 interpreted to allow for more than one provider, and
 6 the Commission has ample legal grounds to assess
 7 whether another certificate should be issued on Lake
 8 Chelan.
 9 JUDGE KOPTA: Mr. Wiley, let me just
 10 clarify. Does Arrow Launch take a position on the
 11 purely legal issue of whether the Company -- I mean
 12 whether the Courtneys in their petition have, in any
 13 of the five scenarios, demonstrated that they should
 14 not be required to obtain a certificate?
 15 MR. WILEY: The answer that the -- that
 16 Arrow Launch agrees with Staff's interpretation of the
 17 statute and of the facts, in terms of exceptions or
 18 exemptions that are sought by the petitioner.
 19 JUDGE KOPTA: And in addition, there has
 20 been a lot of discussion about specific exemptions in
 21 statute. While there may not be any in 81.84, there
 22 is still the use of the word "public" and there is no
 23 definition of that. Is that up to the Commission to
 24 decide what public means with or without exemptions?
 25 And it may be that the Commission could be informed by

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1 exemptions and other statutes in terms of what is
 2 public in that context?
 3 MR. WILEY: I think that the Commission
 4 can look, and it has articulated in a lot of public
 5 demand sort of concepts in Title 81.80 cases before
 6 preemption. There is a lot of case law on that and on
 7 private carriage by the Commission. But while I think
 8 it can be informed about that, I think we have to be
 9 careful because of the wording of the statute. But
 10 also Arrow Launch, for instance, is -- is a common
 11 carrier who holds out to the public for hire. It only
 12 has in reality a fairly small or discrete customer
 13 base, but it is absolutely available for public hire
 14 24/7, 365 days a year, which is sort of a common
 15 element of common carriers for hire.
 16 I think you should not be distracted by the
 17 natural narrowness of a customer base in finding that
 18 that isn't public use for hire.
 19 COMMISSIONER RENDAHL: Mr. Wiley, on
 20 this issue of charter, the fifth scenario.
 21 MR. WILEY: Yeah.
 22 COMMISSIONER RENDAHL: So can you help
 23 me with the Iron Horse case and how that might be
 24 distinguishable from the fact pattern identified in
 25 the fifth scenario and in context of the Commission's

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1 analysis of charter?
 2 MR. WILEY: I would love to,
 3 Ms. Rendahl. Honestly, I am not -- I haven't gone
 4 over the Iron Horse case.
 5 I do think we have to be very careful, as I
 6 believe the petitioner at one point alluded, in
 7 looking to other state law interpreting our statute
 8 and even public use. I think commercial ferry
 9 service -- and we -- I was looking at a case we
 10 alluded to from 1931 in our Ninth Circuit brief. The
 11 supreme court has recognized the unique geography and,
 12 you know, demand for ferry service in this state
 13 versus a lot of other locales. I do think Washington
 14 is somewhat unique in that way. It's unique in solid
 15 waste regulation. I also believe it is unique in
 16 commercial ferry regulation because some of the tenets
 17 that have been developed by case law, not just of this
 18 Commission but of the courts, have established or
 19 recognized that we can't really analogize broadly to
 20 other jurisdictions' views on ferry common carriage.
 21 COMMISSIONER RENDAHL: So in looking at
 22 the definition of charter in 81 --
 23 MR. WILEY: Yes.
 24 COMMISSIONER RENDAHL: I guess it's in
 25 the rules.

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1 MR. WILEY: Yeah.
 2 COMMISSIONER RENDAHL: No, it's in --
 3 MR. WILEY: It's in the rule, 022.
 4 COMMISSIONER RENDAHL: And it's also in
 5 the definitions in 480-51-020.
 6 MR. WILEY: Yeah.
 7 COMMISSIONER RENDAHL: So in looking at
 8 that definition --
 9 MR. WILEY: Did you say 81.84.020?
 10 COMMISSIONER RENDAHL: 480-51-020.
 11 MR. WILEY: Okay.
 12 COMMISSIONER RENDAHL: That's the ferry
 13 rules.
 14 MR. WILEY: Okay.
 15 COMMISSIONER RENDAHL: The definition of
 16 charter is at Subsection 14.
 17 MR. WILEY: Right.
 18 COMMISSIONER RENDAHL: So looking at
 19 that definition and the fifth scenario the petitioners
 20 include in their petition, can you explain to me
 21 whether or not that scenario would fit within the
 22 charter service definition?
 23 MR. WILEY: On the surface I have
 24 problems fitting Scenario 5 into that definition
 25 because of the -- the -- as I understand the fifth

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1 scenario, and you all understand it better than I, but
 2 it's -- it's a travel company-based scenario where a
 3 travel company, quote/unquote, charters the vessel.
 4 I don't think -- and I recall the rulemaking
 5 in 1993 or '4 where we dealt with this. I believe
 6 that rule is very common -- is very much analogous to
 7 81.70 and charter parties for buses, and that that
 8 is -- I think the example that Mr. Beattie gave is the
 9 more common one. It's a Boy Scout group, it's a --
 10 it's a group that has some sort of affiliation that
 11 has a single purpose and a single destination in mind
 12 in chartering the vehicle, the vessel, et cetera.
 13 That's the -- and I don't believe that a separate
 14 business with a separate purpose really satisfies the
 15 concept of a charterer in that context because a
 16 travel company has a whole other purpose, which is to
 17 make money on any form of travel. I don't believe
 18 that's the intent of WAC 480-51-020(14) or the
 19 traditional concepts of charter that the Commission
 20 has administered by statute.
 21 COMMISSIONER RENDAHL: And then in terms
 22 of the first four scenarios, it could be considered or
 23 it could be argued to be private carriage.
 24 MR. WILEY: Right.
 25 COMMISSIONER RENDAHL: Even though there

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1 is no statutory exemption for private carriage or rule
 2 exemption for private carriage in the ferry statutes
 3 or rules, if we look to the 81.80 definition, what's
 4 in 81.77, and also 81.68, that incidental to and in
 5 furtherance of a primary business is the general
 6 description of that private service, right?
 7 MR. WILEY: Right.
 8 COMMISSIONER RENDAHL: So how would
 9 those -- how would this be or not be -- in those first
 10 four scenarios be -- fall within that incidental to
 11 and in furtherance of?
 12 MR. WILEY: In my --
 13 COMMISSIONER RENDAHL: I don't know if
 14 you have thought about that.
 15 MR. WILEY: In my view, in listening to
 16 your questions this morning, where I distinguish it is
 17 that for me, those first four scenarios,
 18 transportation seems to be integral to rather than
 19 incidental to. I mean it -- while their business may
 20 have a primary purpose that's not transportation,
 21 under these scenarios, transportation is a complete,
 22 you know, add-on to -- to offerings that they want to
 23 make to the public, as I understand these scenarios.
 24 Private carriage in motor, freight, and in
 25 solid waste has always been viewed in a very narrow

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1 context as sort of a -- almost a happenstance, but
 2 certainly a nonroutine aspect of the business.
 3 COMMISSIONER RENDAHL: Okay. Thanks.
 4 COMMISSIONER JONES: Mr. Wiley,
 5 Commissioner Jones. Just a couple of follow-up
 6 questions.
 7 In your opening statement, you talked about a
 8 procedural issue and cited to 34.05.240. What
 9 specific part of that statute were you referring to?
 10 I think you were talking about the incumbent
 11 certificate holder --
 12 MR. WILEY: Correct.
 13 COMMISSIONER JONES: -- and the due
 14 process, right?
 15 MR. WILEY: Correct.
 16 COMMISSIONER JONES: So is that your
 17 point on that one?
 18 MR. WILEY: Yes. And I'm not speaking
 19 for them at all. I don't represent them.
 20 COMMISSIONER JONES: I don't want you
 21 to. I think they are on the phone.
 22 I think it is Sub 7. It says, An agency may
 23 not enter a declaratory order that would substantially
 24 prejudice -- the word is "prejudice" -- the rights of
 25 a person who would be a necessary party and who does

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1 not consent in writing to the determination of the
 2 matter by a declaratory order proceeding.
 3 Is that what you cite to?
 4 MR. WILEY: Yes, Commissioner Jones.
 5 Again, it was one that Ms. Woods prominently featured
 6 in her argument in the Ninth Circuit because it seems
 7 to be a technical prerequisite of issuing a
 8 declaratory order in this kind of circumstance.
 9 COMMISSIONER JONES: And then the last
 10 question. You mentioned expedited proceeding and you
 11 favor if this proceeds to go to an adjudication on the
 12 CPCN. What -- the certificate. What do you mean by
 13 "expedited" and can you cite to previous cases with
 14 commercial ferries or auto transportation?
 15 Generally, people who don't understand our
 16 process on the outside think of an adjudication as
 17 long, convoluted, cumbersome, expensive, takes a lot
 18 of time. I would like to hear your views on this.
 19 MR. WILEY: Sure. Thank you.
 20 Yes, a brief adjudicative proceeding, which
 21 both statute and rule authorizes, is one such example.
 22 That has now been adopted by the Commission, for
 23 instance in RCW 81.68, auto trans application. That
 24 clearly is an option.
 25 Even the conventional hearing process takes

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1 far less time than the -- and Mr. Bindas is certainly
 2 more versed in federal court litigation than I, but it
 3 takes far less time than federal court litigation and
 4 I would assume would be considerably less costly. So
 5 I think -- I don't want to just not respond to the
 6 arguments that -- that proceeding at the Commission
 7 level is arduous, expensive, protracted, without
 8 comparing it to the process that we have already
 9 undertaken.

10 COMMISSIONER JONES: Thank you.
 11 JUDGE KOPTA: All right. Finally, Lake
 12 Chelan Boat Company, you are on the phone. Did you
 13 want to say anything?

14 MS. ENGSTROM: The only thing that we
 15 would back up is what Mr. Wiley just presented there
 16 in RCW 34.05.240(7). I won't repeat what you just
 17 said, but we are aware of that, and it does appear
 18 that we would need to consent in writing, which we
 19 would not be doing.

20 JUDGE KOPTA: Okay. Anything further?
 21 MS. ENGSTROM: We have nothing further
 22 to add.

23 JUDGE KOPTA: Commissioner Jones, did
 24 you have a follow-up question?
 25 COMMISSIONER JONES: Let me see.

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1 Who is on the phone? Is this Ms. Raines?
 2 MS. ENGSTROM: It is Cindy Engstrom.
 3 COMMISSIONER JONES: I'm sorry,
 4 Ms. Engstrom.
 5 MS. ENGSTROM: That's okay. It was
 6 Raines.
 7 COMMISSIONER JONES: I know it's a
 8 close-knit community up there at Lake Chelan.
 9 You wrote a letter to us. What is your
 10 written documentation in this docket? I have a letter
 11 in front of me dated July 16th, 2015, signed by Jack
 12 Raines.
 13 MS. ENGSTROM: That is correct. We
 14 wanted to be sure that that information was included
 15 in this meeting today, if we need to read that or if
 16 it is already presented there. I don't want to make
 17 this longer than necessary. I know a lot of
 18 information has been presented.
 19 JUDGE KOPTA: Just to clarify that
 20 point, Ms. Engstrom, it is already in the record so
 21 there would be no need for you to repeat that
 22 information here.
 23 MS. ENGSTROM: Okay. Thank you.
 24 COMMISSIONER JONES: And I would just
 25 like to clarify, in Paragraph 4, Ms. Engstrom, you

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1 say, There are three larger groups in the upper Lake
 2 Chelan region that could look at their own service,
 3 the Courtney family, who is here before us today, they
 4 have multiple businesses, the NPS Concessionaire in
 5 Stehekin, and Holden Village.
 6 Is that statement still correct, there are no
 7 other larger groups in the upper Chelan area that
 8 could potentially engage in a business that we are
 9 talking about today, is there?

10 MS. ENGSTROM: That is correct. Those
 11 are the largest of the groups, so that is correct.
 12 And then I don't know if it would affect, you know, a
 13 change in ruling, how it would affect other parties
 14 even in the Chelan area doing similar services if it
 15 were available.

16 COMMISSIONER JONES: And is Holden
 17 Village still about 25 percent of your current
 18 ridership?
 19 MS. ENGSTROM: They are normally. We
 20 are still in the mine clean-up phase at Holden
 21 Village, so we are in -- I think we have spoken quite
 22 a few times on that.
 23 COMMISSIONER JONES: Yes. Okay.
 24 MS. ENGSTROM: They are cleaning up the
 25 mines, so we are not in a normal Holden Village --

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1 COMMISSIONER JONES: Got it.
 2 MS. ENGSTROM: But that is correct as
 3 well, in a normal setting.
 4 COMMISSIONER JONES: No need to repeat
 5 that. Thank you.
 6 JUDGE KOPTA: All right. Thank you,
 7 Ms. Engstrom.
 8 CHAIRMAN DANNER: I just want to remind
 9 you that you promised Mr. Bindas the last word.
 10 JUDGE KOPTA: All right. I believe that
 11 covers everyone who has filed comments. As the
 12 Chairman points out, Mr. Bindas, you will have the
 13 last word.
 14 MR. BINDAS: And it will be a quick last
 15 word, Your Honor, and members of the Commission. Just
 16 two points.
 17 You know, as I think we have seen, the Iron
 18 Horse case has been one that seems to be on all fours
 19 with Proposal 5. Mr. Beattie and Mr. Wiley are
 20 correct that it is nonbinding on the State of
 21 Washington, but I did not represent it, as Mr. Wiley
 22 suggested, that we shouldn't look to other cases. I
 23 did say that the supreme court case, cited by Staff in
 24 its pleading, was nonbinding and has actually been --
 25 its logic has been rejected by the State of

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1 Washington, so I wouldn't look to that for those
 2 reasons. That does not mean you cannot look to Iron
 3 Horse or any of the other cases, or the Terminal
 4 Taxicab case, for that matter. Of course, you can
 5 look to those, none of them are binding, but certainly
 6 the ones we have cited we believe are squarely on
 7 point.
 8 Finally, the last point I would make is that
 9 the suggestion that the Courtneys should have to go
 10 through the public convenience and necessity process,
 11 when that is the very process they have alleged to be
 12 unconstitutional in federal court, is I believe a
 13 nonstarter. Again, that is the very issue at stake in
 14 our constitutional litigation. The Ninth Circuit and
 15 the Eastern District of Washington abstained in order
 16 to -- for this Commission to determine whether that
 17 process applies. To force the Courtneys to undergo
 18 that process, when they have alleged it to be
 19 unconstitutional, is, in my opinion, not an option
 20 under the Ninth Circuit and the Eastern District's
 21 orders.
 22 That is all I have. I appreciate, Judge
 23 Kopta, Chairman Danner, and members of the Commission
 24 for your time this morning.
 25 JUDGE KOPTA: All right. Thank you.

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1 Anything further from the Commissioners?
 2 CHAIRMAN DANNER: No. I too want to
 3 thank everyone for being here today. I think it was a
 4 very informative discussion.
 5 JUDGE KOPTA: All right. That concludes
 6 our discussion. Thank you very much. The Commission
 7 will be issuing a determination within the time frame
 8 that it set out in the notice. We will see what
 9 happens with that.
 10 We are off the record. Thank you.
 11 (Proceeding concluded 10:35 a.m.)
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C E R T I F I C A T E

STATE OF WASHINGTON
 COUNTY OF KING

I, Sherrilyn Smith, a Certified
 Shorthand Reporter in and for the State of Washington,
 do hereby certify that the foregoing transcript is
 true and accurate to the best of my knowledge, skill
 and ability.

 SHERRILYN SMITH