



STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION
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November 20, 2014

**NOTICE THAT THE COMMISSION
WILL NOT ENTER A DECLARATORY ORDER**

RE: *In the Matter of the Petition of James and Clifford Courtney for a Declaratory Order on the Applicability of RCW 81.84.010(1) and WAC 480-51-025, Docket TS-143612*

TO ALL PARTIES AND INTERESTED PERSONS:

BACKGROUND

On October 2, 2014, James and Clifford Courtney (collectively, Courtneys) jointly filed with the Washington Utilities and Transportation Commission (Commission) a Petition for a Declaratory Order (Petition) as to the applicability of the certificate of public convenience and necessity requirement set forth in RCW 81.84.010(1) and WAC 480-51-025(2) to provide “boat transportation service on Lake Chelan for customers or patrons of specific businesses or group of businesses.”

The Commission gave notice of the Courtneys’ Petition, as required by RCW 34.05.240 and WAC 480-07-930, and invited interested persons to submit a statement of fact and law on the issues raised by the Petition. Lake Chelan Recreation, Inc., d/b/a Lake Chelan Boat Company (LCBC) filed comments on October 16, 2014. Arrow Launch Services, Inc. (Arrow) filed a statement of fact and law on October 22, 2014. The Commission’s regulatory staff (Staff) filed a statement of fact and law on November 7, 2014, pursuant to a stipulation with the Courtneys to file on that date and to extend the deadline for Commission action on the Petition correspondingly to November 20, 2014.

RCW 34.05.240 and WAC 480-07-930 require the Commission, within thirty days of receiving the Courtneys’ Petition, to take one of the following actions; (1) enter a declaratory order, (2) notify the Courtneys that no order will be entered, (3) set a date by

which the Commission will enter an order, or (4) set a date and time for a hearing. The Commission may enter a declaratory order upon a showing that:

- (a) Uncertainty necessitating resolution exists;
- (b) There is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) The uncertainty adversely affects the petitioner; and
- (d) 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.¹

The Courtneys state in their Petition that a declaratory order is necessary to resolve the uncertainty and actual controversy over whether they can provide the boat transportation service they propose. Both the language of the statute and case law, the Courtneys assert, support the conclusion that such service is neither a public ferry nor a common carrier. They also point to similar private auto transportation services that the Commission has determined do not require Commission authority to operate. Accordingly, the Courtneys request that the Commission 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.

LCBC comments that the public's interest in safe, reliable, and fairly priced service on Lake Chelan is best served by a single, economically regulated provider. "Additional boat services offered on Lake Chelan for customers or patrons of specific businesses or group of businesses that operate only during the profitable time of the year would most certainly affect the ridership of the regulated service and drive rates higher and lessen services during the remaining eight to nine months of the year."² According to LCBC, the Commission "has the choice of either saving the current dependable service or destroying it, by allowing others to operate only during the profitable months."³

Arrow states that the Commission cannot and should not resolve the issues raised in the Petition without a hearing. Arrow opines that whether a certificate is required for customers or patrons of a "specific business or group of businesses" is a vague inquiry and that the Courtneys effectively are asking the Commission "to sanction unspecified

¹ RCW 34.05.240.

² LCBC Comments at 1.

³ *Id.* at 2.

service to an almost unlimited segment of the traveling or shipping public.”⁴ Arrow fears that the declaratory ruling that the Courtneys request would deprive Arrow and other commercial ferry operators of their certificated property rights, dilute infrastructure investments in service to the public, and deprive incumbent providers of substantive due process by trumping past Commission orders in a factual vacuum. Arrow asks that the Commission dismiss the Petition, or alternatively set the matter for hearing to allow development of an appropriate record.

Staff contends that the Petition lacks sufficient detail to establish the “specified circumstances” and “uncertainty necessitating resolution” required under RCW 34.05.240. According to Staff, the Commission cannot determine whether the operation the Courtneys propose would require a certificate without assuming facts not provided in the Petition:

The petition refers to a hypothetical “boat transportation service,” to be established by an unnamed party, on an unidentified vessel, for the benefit of unidentified “customers or patrons” of unidentified “businesses” or a “group of businesses.” No route is specified. Distances and points served are not identified. No rates or timetables are proposed. Terms of service are left undefined.

In short, more information is needed.⁵

Staff, therefore, recommends that the Commission decline to enter a declaratory order. Alternatively, Staff suggests that the Commission assume that the proposed operation will serve any member of the public and thus would be “for the public use for hire” requiring a certificate.

DISCUSSION

We decline to enter the requested declaratory order. We agree with Staff and Arrow that the Petition lacks sufficient information to enable the Commission to determine whether the Courtneys need a certificate to provide the service they have in mind.

The Washington legislature has determined 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 the public convenience and necessity require

⁴ Arrow Statement of Facts and Law ¶ 12.

⁵ Staff Statement of Fact and Law ¶¶ 9-10.

such operation.”⁶ The Washington Supreme Court broadly construed this statute several decades ago in the only case in which the Court has considered the issue.⁷ Recently, however, we have interpreted the restriction more narrowly.⁸ In the context of a legislatively-mandated review of the appropriateness of Commission regulation of ferry service on Lake Chelan, we recognized that “the Commission has some discretion as to how strictly it chooses to protect an incumbent provider from potential competitors.”⁹ The Commission identified three ways it could allow some limited competition, one of which is “declining to require a certificate for certain types of boat transportation services that are arguably private rather than for public use.”¹⁰

The Courtneys request that we take just such action on Lake Chelan, allowing them to provide their proposed boat transportation service without a certificate. Their Petition, however, does not even attempt to demonstrate that the service is for “private rather than for public use.” With no more information than the Courtneys have provided, we cannot determine whether service to “customers or patrons of specific businesses or a group of businesses” is distinguishable from service to the general public that would require a certificate under applicable law. At a minimum, we would need the operational details Staff lists in its comments to make such a determination.¹¹

Our conclusion is consistent with, if not mandated by, the decision of the Ninth U.S. Circuit Court of Appeals. In its rejection of the Courtneys’ constitutional challenge to the Commission’s regulatory authority, the court noted:

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. The court concluded that the service was still considered a “common carrier” and was subject to the [certificate] requirement. In doing so, the court emphasized that the “club boat” was, in

⁶ RCW 81.84.010(1).

⁷ See *Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass’n*, 176 Wash. 486, 30 P.2d 233 (1934) (*Kitsap*) (enjoining the operations of an association that sought to operate its own boat transportation service for its members because such service would infringe on the certificated provider’s statutory right to be protected from competition unless the incumbent fails or refuses to provide reasonable and adequate service).

⁸ See *In re Application of McNamara, Sean d/b/a Bellingham Water Taxi*, Dockets TS-121253, et al., Order 04, Final Order Denying Petition for Administrative Review ¶¶ 14-17 (July 17, 2013) (authorizing competing ferry service that differs from the service the incumbent provides).

⁹ UTC, Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan, Report to the Legislature Pursuant to ESB 5894, at 12 (Jan. 14, 2010).

¹⁰ *Id.*

¹¹ Staff Statement of Fact and Law ¶¶ 9-11.

practice, essentially a competing public ferry service. *Kitsap* is the only Washington case to have disapproved of a “private charter” service, and the [Commission] 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.” 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 those 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.¹²

The Petition offers no more details about their proposed service than the Courtneys’ federal complaint, and we can no better predict how the Washington Supreme Court would interpret RCW 81.84.010(1) under these circumstances than the Ninth Circuit could. The federal court left such a determination to the Commission in the first instance because of our expertise and experience with the regulation of ferry service in Washington. Such expertise and experience, however, is of limited value if we do not have the details of the proposed service.

We could broadly interpret the petition’s proposal that the Courtneys would serve “customers or patrons of specific businesses or group of businesses,” as Staff suggests, so that the universe of proposed customers would be congruent with the universe of the general public. However, it seems clear that if that is what the Courtneys are suggesting, then a certificate would be required. We would rather allow the Courtneys to clarify their request than speculate on their business plan.

The Commission concludes that the Petition fails to include sufficient “specified circumstances” to which the Courtneys’ proposed interpretation of RCW 81.84.010(1) and WAC 480-51-025 would apply as required under RCW 34.05.240(1) and WAC 480-07-930. The Commission, therefore, cannot enter a declaratory order in response to the Petition.¹³

¹² *Courtney v. Goltz*, 736 F.3d 1152, 1164 n.8 (9th Cir. 2014) (citations omitted).

¹³ Arrow also notes that the Petition is legally deficient under RCW 34.05.240(7) because the proposed declaratory order would substantially prejudice the rights of LCBC, as well as other ferry service certificate holders, none of whom has consented in writing to the determination of the matter by a declaratory order proceeding. Arrow Statement of Facts and Law ¶ 22 n.5. We need not reach this issue because we decline to enter a declaratory order on other grounds. We nevertheless observe that this may be an issue if the Courtneys file a revised petition for declaratory order, rather than an application to provide the boat transportation service they propose.

NOTICE

THE COMMISSION GIVES NOTICE that it finds the Courtneys' Petition does not satisfy the requirements for declaratory orders under RCW 34.05.240 and WAC 480-07-930. The Commission notifies the Courtneys and all other interested persons that it will not enter a declaratory order in response to the Petition.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, Commissioner