

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of James) DOCKET TS-151359
and Clifford Courtney for a Declaratory)
Order on the Applicability of Wash.) ORDER 01
Rev. Code § 81.84.010(1) and Wash.)
Admin. Code § 480-51-025(2).) DECLARATORY ORDER
)
.....)

BACKGROUND

1 On July 1, 2015, James and Clifford Courtney (collectively, Courtneys) jointly filed with the Washington Utilities and Transportation Commission (Commission) a Petition for a Declaratory Order (Petition). The Petition seeks an order on the applicability of the certificate of public convenience and necessity (CPCN) requirement set forth in RCW 81.84.010(1) and WAC 480-51-025(2) to boat transportation service on Lake Chelan for customers or patrons of specific businesses or groups of businesses.

2 The Courtneys propose five alternative services they would offer from Memorial Day weekend through early October each year. At the core of each service is a scheduled run between the federally-owned dock in Stehekin and the federally-owned dock in either Fields Point Landing or Manson Bay Marina. The boat would leave Stehekin at 10:00 a.m. and arrive at noon, then leave Fields Point or Manson Bay at 12:30 p.m. and arrive in Stehekin at 2:30 p.m. The Courtneys propose a one-way fare of \$37 for each adult passenger or \$74 round trip. The primary difference among the five routes are the types of passengers the boat would carry:

Proposal 1 (Lodging Customers of Stehekin Valley Ranch) – Passengers would be limited to persons with confirmed reservations to stay overnight at Stehekin Valley Ranch, owned by Clifford Courtney and his wife. The boat transportation service would be owned by Clifford Courtney, and make no intermediate stops.

Proposal 2 (Lodging Customers and Customers of Other Activities Offered at Stehekin Valley Ranch) – In addition to persons with reservations to stay at the ranch, passengers would include anyone with reservations to participate in any of the activities the ranch offers,

including activities provided by Stehekin Outfitters, run in part by Clifford Courtney's son. Again, the boat transportation service would be owned by Clifford Courtney and would make no intermediate stops.

Proposal 3 (Customers of Courtney Family-owned Businesses) – Passengers would be limited to anyone with reservations at any business owned by Clifford or James Courtney or their extended family, including but not limited to the Stehekin Valley Ranch. The boat would make intermediate stops at, or stand-alone trips to, other points on Lake Chelan as necessary to access the businesses. The boat transportation service would be owned by James and Clifford Courtney.

Proposal 4 (Customers of Stehekin-Based Businesses) – Passengers could be anyone with reservations at any Stehekin-based businesses that want to use the service, including but not limited to Courtney family-owned businesses. The boat would make intermediate stops at, or stand-alone trips to, other points on Lake Chelan as necessary to access the businesses. The boat transportation service would be owned by James and Clifford Courtney.

Proposal 5 (Charter by Stehekin-based Travel Company) – Passengers would be restricted to persons who have purchased a travel package from a Stehekin-based travel agency that is not affiliated with the Courtneys but would charter the boat from the Courtneys. The boat would make intermediate stops at, or stand-alone trips to, other points on Lake Chelan as necessary to access the travel locations. The boat transportation service would be owned by James and Clifford Courtney.

- 3 The Courtneys contend that none of the services they propose require a CPCN because they would not be “for the public use for hire” as that term is used in RCW 81.84.010(1). Passage would not be available to the public at large but would be limited to persons who are demonstrated customers of specific businesses. The Courtneys maintain that case law from other states establishes that such services are “private,” not provided by common carriers, and are not subject to regulation or restriction. Indeed, the Courtneys argue, the Commission expressly does not regulate comparable services in other transportation contexts, including hotel buses and private vehicles used as an adjunct to a company’s business.

- 4 On July 2, 2015, the Commission issued a notice to all interested person setting a deadline of July 17, 2015, to submit a statement of fact and law on the issues raised in the Petition. The Commission received responsive comments or a statement of law and fact from Commission Staff (Staff), Arrow Launch Service, Inc. (Arrow), and Lake Chelan Recreation, Inc. d/b/a Lake Chelan Boat Company (LCBC) and heard oral argument from the Courtneys and all commenters on October 21, 2015. Michael E. Bindas, Institute for Justice, Bellevue, Washington, represents the Courtneys. Julian Beattie, Assistant Attorney General, Olympia, Washington, represents Staff. David W. Wiley, Williams Kastner & Gibbs PLLC, Seattle, Washington, represents Arrow. Jack Raines, President, LCBC, *pro se*, Chelan, Washington, represents LCBC.
- 5 Staff interprets RCW 81.84.010(1) differently than the Courtneys. While recognizing that customers of one or more businesses represent a subset of the public at large, Staff believes that such a subset is sufficiently large that the distinction is meaningless. For all intents and purposes, according to Staff, all of the services the Courtneys propose would be “for the public use for hire” within the meaning of the statute.
- 6 Arrow concedes that it does not operate on Lake Chelan but states that as a commercial ferry service operator in Washington, it has a substantial interest in the Commission’s interpretation of statutes that govern the industry. Arrow believes that the Commission should address the issues the Courtneys raise in the context of an adjudicated application for CPCN, rather than through a petition for declaratory order.
- 7 LCBC holds the existing CPCN for ferry service on Lake Chelan. LCBC states that permitting the Courtneys to operate a competing vessel only during the profitable months of the year would threaten LCBC’s financial viability and its ability to provide safe, reliable, and dependable service at reasonable prices year-round.
- 8 RCW 34.05.240(5) and WAC 480-07-930(5) require the Commission to take one of the following actions within 30 days after receiving the Petition: (1) enter a declaratory order; (2) set the matter for specified proceedings to be held no more than 90 days after receiving the Petition; (3) set a specified time no more than 90 days after receiving the Petition to enter a declaratory order; or (4) decline to enter a declaratory order. The Commission may extend either of the 90 day time limits for good cause. To accommodate oral argument and the schedules of all concerned, the Commission extended the deadline for Commission action on the Petition to December 2, 2015.

DISCUSSION

- 9 No commenter disputes the Courtneys' claim that they have satisfied the prerequisites for a declaratory order under RCW 34.05.240(1). We agree that the Courtneys have demonstrated compliance with three of the four requirements – uncertainty exists, as well as an actual controversy, and the uncertainty adversely affects the Courtneys. We are less certain that the adverse effect of the uncertainty on the Courtneys outweighs any adverse effects on others or on the general public that may likely arise from the order requested, but we accept that premise for purposes of this order.¹
- 10 The substantive issue before us is whether RCW 81.84.010(1) requires the Courtneys to obtain a CPCN from the Commission to offer any of the five service offerings the Courtneys propose to provide. The statute states in relevant part,

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, including the rivers and lakes and Puget Sound, without first applying for and obtaining from the commission a certificate declaring that public convenience and necessity require such operation.
(Emphasis added.)

There is no dispute that the Courtneys propose to operate a vessel or ferry between fixed termini or over a regular route upon the waters within this state. The sole issue is whether those proposed operations would be “for the public use for hire” as that phrase is used in the statute. We conclude that they would.

- 11 The legislature did not define “for the public use for hire,” and no Washington court has interpreted the meaning of that phrase in RCW 81.84.010(1). Nor has the Commission. We therefore look to the language of the statute to determine the legislature’s intent. The dictionary definition of “public” in this context is “accessible to or shared by all members

¹ Arrow raises the issue that the Commission “may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.” RCW 34.05.240(7). LCBC stated during oral argument that it would not provide such consent. This order, however, does not substantially prejudice LCBC’s rights and thus its written consent is not required.

of the community.”² A “community,” in turn, is “a body of individuals organized into a unit” or “linked by common interests.”³ The word “hire” means “payment for the temporary use of something.”⁴ Thus the plain meaning of the statutory language is that a CPCN is required to operate any ferry for payment that is accessible to all persons that are part of a group with common interests.

- 12 We conclude that the Courtneys propose to operate just such a service. Each of their five proposals involves a charging a fee to serve any and all persons who are members of a group with common interests, *i.e.*, customers of various businesses located in and around Stehekin. As such, the Courtneys’ proposed operations would constitute service “for the public use for hire” requiring a CPCN.
- 13 The Courtneys contend that their proposed services are not “for the public use for hire” because they would not be available to everyone. Rather, the services would be “solely for customers with a preexisting reservation for services or activities at a specific lodging facility or other Courtney-family or Stehekin-based business.”⁵ We agree with Staff that this is a distinction without a difference. Any member of the public may reserve lodging or other unspecified services or products at these businesses. Indeed, the United States Supreme Court found in similar circumstances that limiting service to customers of hotels with which a taxicab company had contracted did not change the public nature of the service:

We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest

² Webster’s Third New International Dictionary 1836 (G&C Merriam Co. 1976). Similarly, the Oxford English Dictionary defines “public” as “open to or shared by all people.” http://www.oxforddictionaries.com/us/definition/american_english/public.

³ *Id.* 460.

⁴ *Id.* 1072. See WAC 480-51-020(7) (“The term ‘for hire’ means transportation offered to the general public for compensation.”).

⁵ Petition ¶ 131.

upon demand. We certainly may assume that in its own interest it does not attempt to do so. *The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. The public does not mean everybody all the time.*⁶

14 The Courtneys correctly observe that the Commission is not bound by this decision, but we find the Court’s reasoning persuasive. We agree that “[t]he public does not mean everybody all the time.” The Courtneys have not estimated the number of potential customers for any of the five proposed service options, but we can reasonably infer that, like the taxicab company’s customers, their potential customers represent “so considerable a fraction of the public that it is public in the same sense in which any other may be called so.” We conclude that the proposed limitations on the potential customers described in these five scenarios does not remove the public character of such transportation services.

15 The Courtneys maintain that the Commission reached the opposite conclusion in the context of auto transportation services. They observe that the Commission has promulgated a rule that excludes from regulation persons operating hotel buses, private carriers who transport passengers as an incidental adjunct to another private business, and transportation of airline flight crews and in-transit passengers between an airport and temporary hotel accommodations.⁷ The Courtneys claim that the ferry services they propose to provide are comparable to these auto transportation services that the Commission does not regulate.

16 This claim ignores that the Commission promulgates rules that implement statutes; it does not enact statutes. The legislature provided three specific exemptions from regulation for commercial ferries: (1) vessels that primarily transport freight other than vehicles if no more than ten percent of its gross revenues come from transporting passengers or vehicles;⁸ (2) vessels used solely to provide nonessential recreation service

⁶ *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255, 36 S. Ct. 583, 60 L. Ed. 984 (1916) (emphasis added); *accord Surface Transp. Corp. v. Reservoir Bus Lines, Inc.*, 271 A.D. 556, 560, 67 N.Y.S. 2d 135 (1946) (the fact that a bus line “carries only tenants of the landlords with whom it has contracted or with whom it may hereafter contract is not a sufficient limitation to remove the public character of its service”).

⁷ WAC 480-30-011(g), (i) & (j).

⁸ RCW 81.84.010(1).

that does not adversely affect the rates or services of an existing certificated provider;⁹ and (3) vessels operated by a governmental entity if no certificated company provides that service.¹⁰ None of these exemptions applies to the five types of service the Courtneys propose to provide.

17 By the same token, the legislature, not the Commission, excludes certain auto transportation services from regulation. By statute, auto transportation regulation does not apply to persons operating “taxicabs, hotel buses, . . . or any other carrier that does not come within the term ‘auto transportation company’ as defined in RCW 81.68.010.”¹¹ All of the exclusions the Courtneys cite from the Commission’s rule derive from this legislative directive.¹² Those statutory exemptions are specific to auto transportation companies, and the legislature did not extend them to commercial ferries. Unlike RCW 81.84.010(1), moreover, the statute governing auto transportation companies does not include the requirement that such companies operate vehicles “for the public use for hire,” even though the remainder of the operative language is virtually identical.¹³ We construe this omission, as we must, to be intentional. Had the legislature intended the Commission to regulate commercial ferries the same as auto transportation companies, the legislature would have used comparable language in the governing statutes. The legislature has not exempted from commercial ferry regulation the type of operations the Courtneys propose, and the Commission may not do so absent statutory authority.¹⁴

⁹ RCW 81.84.010(2).

¹⁰ RCW 81.84.010(3).

¹¹ RCW 81.68.015.

¹² Arranged transportation of airline flight crews and in-transit passengers between an airport and their hotel is a variation of a “hotel bus.” The statute defines “auto transportation company,” in relevant part, as any person operating any “vehicle used in the business of transporting persons and their baggage,” RCW 81.68.010(3), which does not include private carriers using their own vehicles to transport passengers as an incidental adjunct to another established private business the private carriers own or operate.

¹³ See RCW 81.68.040 (“An auto transportation company shall not operate for the transportation of persons and their baggage for compensation between fixed termini or over a regular route in this state, without first having obtained from the commission under this chapter a certificate declaring that public convenience and necessity require such operation.”).

¹⁴ *E.g.*, *In re Consolidated Cases Concerning the Registration of Electric Lightwave, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994).

- 18 The Courtneys, however, argue that the Commission has exempted “charter services” from the commercial ferry CPCN requirement,¹⁵ which the Commission defines as “the hiring of a vessel, with captain and crew, by a person or group for carriage or conveyance of persons or property.”¹⁶ The Courtneys argue that their fifth proposal, to charter boat services to an unaffiliated travel company that organizes travel packages for Stehekin visitors, is just such a “charter service.”
- 19 The legislature did not create an exemption from the “for the public use for hire” requirement in RCW 81.84.010(1) for “charter service.” Accordingly, we must construe this qualification in our rules to be consistent with the statute. In the context of passenger transportation services, the Commission has defined a “charter carrier” more expansively as “every person engaged in the transportation of *a group of persons* who, pursuant to a common purpose and *under a single contract*, have acquired the use of a motor bus *to travel together as a group* to a specified destination or for a particular itinerary, either agreed upon in advance or modified by *the chartering group* after having left the place of origin.”¹⁷ This definition comports with our interpretation of “charter services” in the Commission rules governing commercial ferries. Charter services provide transportation to a group of persons that hires the entire ferry to travel together to and from a mutually agreed destination.
- 20 The Courtneys’ fifth proposal is not such a “charter service.” They do not propose to make their vessel available for hire by cohesive groups travelling together. Rather, the Courtneys would have an exclusive arrangement with a travel company that would hire the vessel and aggregate individuals who have booked trips separately to travel to businesses in and around Stehekin. Such individuals would not be limited by geography or technology; for example, any customer, whether he or she be in the United States or abroad, could make a booking over the Internet with the travel company. Rationally, we would categorize such a service as a commercial ferry service pursuant to RCW 81.84.010. The only practical distinction between this proposal and the Courtneys’ fourth proposal is that passengers would book passage on the vessel with a travel company, rather than the Courtneys. Such a distinction does not change the public character of the service provided or remove it from the statutory prerequisite to obtain a CPCN.

¹⁵ WAC 480-51-022(1).

¹⁶ WAC 480-51-020(14).

¹⁷ WAC 480-30-036 (emphasis added).

- 21 The Oregon Court of Appeals decision in *Iron Horse Stage Lines, Inc. v. Public Util. Comm'n*¹⁸ is not to the contrary. In that case a corporation engaged a broker licensed under Oregon law to arrange regular shuttle service between Eugene and the Willamette ski area using at least three different motor carriers, each of which was authorized to provide irregular service. The company with the CPCN to serve this route sought a cease and desist order against the corporation and the broker, claiming they had conspired to provide regular route service in violation of Oregon statutes. The court upheld the Public Utility Commission of Oregon's determination not to issue that order because the corporation and the broker were not "carriers" under Oregon law.
- 22 We question whether the described arrangement in *Iron Horse* would be permissible in Washington, but neither the court nor the Oregon commission addressed the issue presently before us, *i.e.*, the legal rights of the carrier that actually provides the transportation service. Indeed, we agree with the dissenting judge De Muniz, who wrote that the majority incorrectly did not address the key issue in the case, namely whether the service being provided was a "charter service":

The legislative history of ORS 767.005(5) demonstrates that a charter service [is] not intended to be used as a subterfuge to provide competition for regular route service without meeting the requirements to be licensed for a regular route. The requirement that a charter service be a group that not only has a common trip purpose but is also a complete cohesive group, avoids improper use of a charter service.¹⁹

- 23 The Washington Supreme Court also agreed that charter service cannot be used as a subterfuge for commercial ferry service. In a case involving ferry service between Seattle and Bainbridge Island, a group of Bainbridge Island residents created a "ferry association" whose membership was open to anyone wishing to travel to Seattle and willing to pay the nominal fee. The association chartered a vessel from a ferry company that had previously been denied a CPCN to compete with the existing certificate holder. The company agreed to operate the vessel on regular scheduled trips to transport association members and their families, guests, and vehicles between the island and

¹⁸ 125 Ore. App. 671, 866 P.2d 516 (1994).

¹⁹ *Id.* at 678-79.

Seattle. The Court found that this arrangement did not change the public character of the service. “While the charter [agreement] provided that the ferry association would employ pursers to sell tickets and collect fares, it is quite apparent that, stripped of this pretense, the transaction was one whereby the [ferry company] was to furnish the boat and the ferry association was to furnish the passengers.”²⁰ The Court affirmed the lower court’s order enjoining this service as unlawful competition with the certificated carrier. The Courtneys’ fifth proposal is the same type of pretense, which similarly fails to distinguish that service from regulated commercial ferry service.

24 The Courtneys nevertheless cite judicial decisions in Georgia and Michigan purportedly holding that “[t]ransportation for one’s self, goods, employees, and customers, . . . if a ferry at all, was a *private* ferry and did not require a franchise from the state.”²¹ Not only are those decisions not binding on the Commission, those other state courts were interpreting different statutory language in different factual circumstances than those presented here, and the holdings are more limited than the Courtneys claim.²² None of these cases, in either their core arguments or ultimate decisions, alters our interpretation of Washington law.

²⁰ *Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass’n*, 176 Wn. 486, 495, 30 P.2d 233 (1934).

²¹ Petition ¶ 132 (emphasis in original).

²² In *Futch v. Bohannon*, 134 Ga. 313, 67 S.E. 814 (1910), the Georgia Supreme Court modified a lower court injunction prohibiting a sawmill operator from operating a competing ferry service “to allow the defendant to employ a flat-boat or other suitable means of conveying his employees and his wagons and teams across the stream.” The transportation did not involve payment for passage or the availability of service to company customers. In *Meisner v. Detroit Belle Island & Windsor Ferry Co.*, 154 Mich. 545, 549, 118 N.W. 14 (1908), the Michigan Supreme Court upheld the right of a company to deny passage to a disruptive customer on the boat it operated between Detroit and an island amusement park the company owned: “The defendant can exact an entrance fee at the park, or it can compensate itself by charging for transportation to it and admit its patrons otherwise free to the park. The ride upon the boat and the use of the grounds are part of the same scheme for pleasure furnished by the defendant to those whom it may choose to carry.” The company’s right to operate the boat was not before the court, and the ferry was effectively an entrance to the company’s amusement park, not a separate service. In *Self v. Dunn & Brown*, 42 Ga. 528 (1871), the Georgia Supreme Court held that a mill operating a ferry as an accommodation for its customers was liable only for its gross negligence under Georgia statutes because the mill did not charge a fare for passage on the ferry and thus was not a bailee for hire. Again, the court did not consider whether the mill had a right to operate the ferry, and the mill did not receive compensation for the ferry service.

- 25 Each of the five proposed services described in the Petition requires the operation of a vessel “for the public use for hire” under RCW 81.84.010(1). Accordingly, the Courtneys must obtain a CPCN from the Commission before offering any of those services.

ORDER

THE COMMISSION ORDERS That

- 26 (1) The Commission grants the request for a declaratory order in the Petition of James and Clifford Courtney for a Declaratory Order on the Applicability of Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(2) but denies the request for the declaratory order the Petition proposes.
- 27 (2) James and Clifford Courtney may not operate any vessel or ferry on Lake Chelan to provide any of the five services they describe in their Petition without first applying for and obtaining from the Commission a certificate declaring that public convenience and necessity require such operation consistent with RCW 81.84.010(1) and WAC 480-51-025(2).

DATED at Olympia, Washington, and effective November 16, 2015.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

ANN E. RENDAHL, Commissioner