

NO. 35095-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JAMES COURTNEY and CLIFFORD COURTNEY, Appellants,

v.

WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION; DAVID DANNER, chairman and commissioner, ANN
RENDAHL, commissioner, and JAY BALASBAS, commissioner, in their
official capacities as officers and members of the Washington Utilities and
Transportation Commission; and STEVEN KING, in his official capacity
as executive director of the Washington Utilities and Transportation
Commission, Respondents,

and

ARROW LAUNCH SERVICE, INC., Intervenor-Respondent.

BRIEF OF RESPONDENT WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

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I. INTRODUCTION

In this administrative declaratory order case, the Washington Utilities and Transportation Commission declined to create a loophole allowing James and Clifford Courtney to operate a publicly accessible commercial ferry on Lake Chelan without first obtaining a certificate of public convenience and necessity.

Under RCW 81.84.010(1), a certificate is necessary if a commercial ferry will operate “for the public use for hire.” Here, the boat transportation services proposed by the Courtneys will operate “for the public use for hire” because each will be accessible to all who desire their use, on standard terms, without discrimination. The Courtneys must obtain a certificate.

The Courtneys argue that the proposed services should be unregulated because they are private. But they misunderstand the concept of private carriage. According to case law, a boat transportation service might be private if (1) it serves only the operator’s family or employees; (2) if it operates as a mere “appendage” to an existing business; or (3) if it operates as a “charter” that provides one-time, custom service to a cohesive group. *E.g., Futch v. Bohannon*, 134 Ga. 313, 67 S.E. 814 (1910) (ferry was a mere “appendage” to the operator’s private mill). The proposed services match none of these fact patterns.

The Commission properly declared that the proposed services will operate “for the public use for hire” within the meaning of RCW 81.84.010(1). This Court should affirm.

II. RESTATEMENT OF THE ISSUES

1. Whether the Commission exceeded its statutory authority when it declared that each of the five, publicly accessible, commercial ferry services proposed by the Courtneys will operate “for the public use for hire” within the meaning of RCW 81.84.010(1). Br. of Appellant at 2 (Assignment of Error 1).
2. Whether the above conclusion was arbitrary or capricious because the Commission declined to give the Courtneys the benefit of an administrative exemption that applies solely to certain surface transportation businesses like hotel buses. Br. of Appellant at 2 (Assignment of Error 2).
3. Whether the above conclusion was arbitrary or capricious because the Commission declined to view the Courtneys’ fifth proposal as a non-regulated “charter,” even though the proposed service will serve unrelated customers who lack a common purpose and, therefore, will not operate as a true charter. Br. of Appellant at 2 (Assignment of Error 2).

III. BACKGROUND

A. The State has Regulated Privately Owned Commercial Ferries for More than 100 Years

The state has regulated commercial ferry service since 1911, when the legislature first asserted control over the rates and terms of service of “steamboat companies.” Laws of 1911, ch. 117, §§ 8-9.

The legislature expanded its reach in 1927 by asserting control over the marketplace itself. As a means of limiting competition, it required new steamboat companies to obtain operating authority. It decreed, “No steamboat company shall hereafter operate any vessel or ferry for the public use for hire . . . without first applying for and obtaining . . . a certificate declaring that public convenience and necessity require such operation.” Laws of 1927, ch. 248, § 1. Steamboat companies that were “actually operating in good faith” prior to the enactment were grandfathered in. *Id.*

The law today is materially the same. “Steamboat companies” are now referred to as “commercial ferries.” RCW 81.84.010(1). But as in the early days, the state, acting through the Washington Utilities and Transportation Commission, must grant a certificate of public convenience and necessity before a commercial ferry may operate “for the public use for hire.” *Id.*; *see also* WAC 480-51-025 (prohibiting operation without a

certificate). The state continues to regulate rates and terms of service. RCW 81.28.010, .040; *see generally* WAC 480-51-075, -077, -080, and -090.

In 1951, the state began to operate a public ferry system on Puget Sound. This system, known as Washington State Ferries, is regulated by the Department of Transportation. RCW 47.60. To be clear, the Commission's jurisdiction extends only to privately owned commercial ferries that operate "for the public use for hire." RCW 81.84.010(1).

B. Certificated Commercial Ferries Enjoy Considerable Protection from Competition

Once granted a certificate, a commercial ferry enjoys freedom from competition so long as it provides satisfactory service. Under RCW 81.84.020(1), a would-be competitor may not obtain overlapping authority unless the Commission determines, after notice and a hearing, that the incumbent provider "has failed or refused to furnish reasonable and adequate service, has failed to provide the service described in its certificate or tariffs after the time allowed to initiate service has elapsed, or has not objected to the issuance of the certificate as prayed for."

This arrangement reflects the legislature's judgment that "the public's interest in reliable and affordable service is best served by a single, economically regulated provider whose owners can make the sizeable investments needed to initiate and maintain service without the threat of

having customers drawn away by a competing provider.”¹ CP 267. In theory, protection from competition allows the incumbent to survive the lean winter months by avoiding a damaging price war with competitors seeking to “skim the cream” during the profitable summer months. CP 261.

In exchange for protection from competition, the incumbent acquiesces to the Commission’s regulation of rates and terms of service. Regulation acts as a “surrogate for the pricing discipline that would be exerted by a competitive marketplace.” CP 267. If the incumbent charges unreasonable rates or provides inadequate service, the Commission may cancel, suspend, or modify the company’s certificate. RCW 81.84.060.

IV. RESTATEMENT OF THE FACTS

A. The Courtneys Seek to Operate an Unregulated Commercial Ferry on Lake Chelan

The Courtneys’ petition for declaratory order proposes five boat transportation services that will operate on Lake Chelan from Memorial Day weekend through early October. CP 60-70. Lake Chelan is already served year-round by a certificated ferry, Lake Chelan Boat Company.

¹ Our Legislature is not alone in making this judgment. From colonial times, states have restricted competition within commercial ferry markets, and courts at all levels have recognized states’ power to perform this regulatory function. *See, e.g., Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 215-17 (1885); *Can. Pac. Ry. Co. v. United States*, 73 F.2d 831, 832-33 (9th Cir. 1934); *In re Island Hi-Speed Ferry, LLC*, 746 A.2d 1240, 1241-42 (R.I. 2000); *Kitsap Cnty. Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass’n*, 176 Wash. 489-91, 30 P.2d 233 (1934); 35A Am. Jur. 2d *Ferries* §§ 5, 8, 12-14, 18 (2001). Many state certificate requirements remain in force today. *E.g.,* Cal. Pub. Util. Code § 1007; Me. Rev. Stat. tit. 35-A, § 5101; R.I. Gen. Laws § 39-3-3; Wis. Stat. § 195.45.

CP 431. The Courtneys contend that the proposed services will not infringe Lake Chelan Boat Company's certificate because none will operate "for the public use for hire" within the meaning of RCW 81.84.010(1). CP 430.

The core of each proposed service is a scheduled run between the federal dock in Stehekin, located at the north end of the lake, and the federal dock either in Fields Point Landing or in Manson Bay Marina. CP 60-70; *see also* CP 289 (map showing geography of Lake Chelan and route currently served by Lake Chelan Boat Company). The vessel will be a "climate-controlled boat, 50 to 64 feet in length, with twin diesel engines and capable of a 23-knot cruise." CP 62. Adults will pay \$37 for a one-way fare, or \$74 for a round-trip fare. CP 61.

Proposal 1. Boat transportation will be available to anybody who reserves lodging at the Stehekin Valley Ranch, owned by Clifford Courtney and his wife. CP 60. Clifford Courtney will own the boat transportation service as a separate entity, independent of other business interests. *Id.*

Proposal 2. Boat transportation will be available to anybody who reserves lodging at Stehekin Valley Ranch and to anybody who reserves kayaking, hiking, camping, or horseback riding excursions through Stehekin Outfitters, owned in part by Clifford Courtney's son. CP 62. Clifford Courtney will own the boat transportation service as a separate entity, independent of other business interests. *Id.*

Proposal 3. Boat transportation will be available to anybody with lodging or excursion reservations, and to anybody who intends to patronize any business “owned by Courtney family members.” CP 64. Qualifying activities include “breakfast or lunch at Stehekin Pastry Company,” a bakery and restaurant owned in part by a third Courtney brother, Cragg Courtney. CP 65. The boat may make intermediate stops or “standalone trips” for customers with hiking or camping reservations at “other points on the lake.” CP 65. James and Clifford Courtney will own the boat transportation service as a separate entity, independent of other business interests. CP 64.

Proposal 4. Boat transportation will be available to individuals with lodging, excursion, or dining reservations, and to anybody who intends to patronize any Stehekin-based business “including, but not limited to, Courtney-family businesses.” CP 66. As with Proposal 3, the boat may make intermediate stops or standalone trips for customers with hiking or camping reservations at other points on the lake. CP 67. James and Clifford Courtney will own the boat transportation service as a separate entity, independent of other business interests. CP 66.

Proposal 5. Boat transportation will be available to individuals who book travel through a “Stehekin-based travel company that organizes travel packages for Stehekin visitors.” CP 68. The travel company will “charter

transportation for those customers by private charter agreement with the boat service.” CP 69. The boat may make intermediate stops or standalone trips, “as needed by the travel company in connection with the travel packages it has sold.” CP 69. James and Clifford Courtney will own the boat transportation service as a separate entity, independent of other business interests. CP 68.

For all proposals, the Courtneys will solicit reservations from a global customer base. For Proposals 1-4, customers located anywhere in the world will be able to reserve travel through “webervations.com,” or by telephone through “Stehekin Reservations,” a service affiliated with Stehekin Valley Ranch. CP 60-68. For Proposal 5, customers will book travel through a third party “travel company.” CP 68. Presumably, this “travel company” will also accept internet and telephone reservations.

All passengers will be subject to identical “terms of service and policies.” CP 79-81. For instance, passengers will be authorized to carry one item onboard; all other items “must be stowed as freight.” CP 79. Freight exceeding a weight threshold is subject to a standard charge. *Id.* Nothing in the record suggests that passengers will be able to negotiate modified rates or terms of service.

B. The Commission Declared that the Proposed Services will Require a Certificate

In November 2015, after receiving briefing and oral argument, the Commission entered its declaratory order. CP 429.

The Commission began its analysis by identifying the statutory criteria that trigger the certificate requirement. CP 432. It found that RCW 81.84.010(1) requires a certificate any time a privately owned boat transportation service will operate:

1. Any vessel or ferry
2. Between fixed termini or over a regular route
3. Upon the waters within this state
4. For the public use for hire.

It was undisputed that the proposed services will satisfy the first three criteria. CP 432. The sole issue was (and continues to be) whether the proposed services will operate “for the public use for hire.” CP 432.

The Commission found that the proposed services will operate “for the public use for hire.” CP 439. It found that limiting passage “to persons who are demonstrated customers of specific businesses” will not remove the services’ essential “public character.” CP 430, 434. Despite the limitation, the Courtneys will still draw customers from a global base:

We agree that “[the] public does not mean everybody all the time.” The Courtneys have not estimated the number

of potential customers for any of the proposed service options, but we can reasonably infer that . . . 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.”

CP 434 (Declaratory Order, p. 6) (quoting *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255, 36 S. Ct. 583, 60 L. Ed. 984 (1916)).

The Commission concluded that the Courtneys “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.” CP 439.

C. The Chelan County Superior Court Affirmed the Commission’s Declaratory Order

On de novo review, the Chelan County Superior Court ruled that the Commission’s declaratory order contained no legal error and was not arbitrary or capricious.² CP 694. Like the Commission, the court concluded that the proposed services will require a certificate because each will operate “for the public use” within the meaning of RCW 81.84.010(1). CP 698.

The court found that the services will not be private because “the Courtneys will serve the public indifferently.” CP 696. It also questioned

² The court issued findings of fact, conclusions of law, and a final judgment affirming the Commission’s declaratory order. CP 694-99. The findings of fact and conclusions of law were supplemented by Judge Alicia Nakata’s ten-page memorandum decision dated January 25, 2017. CP 700-09.

whether the proposed services will be materially distinguishable from the service already offered year-round by the existing provider. It explained, “[I]n each proposal, the Courtneys will serve the same members of the public currently served by the incumbent certificate holder, Lake Chelan Boat Company. The public will merely be moving to another boat for travel.” CP 696.

V. ARGUMENT

The Commission properly declared that all five boat transportation services proposed by the Courtneys will operate “for the public use for hire” within the meaning of RCW 81.04.010(1). The ordinary meaning of “public,” considered in light of the statute’s purpose and of case law discussing the distinction between public and private carriage, makes clear that the proposed services’ public character does not fall away merely because each service will be limited to “customers or patrons of specific businesses or a group of businesses.” CP 45. The proposed services will still be accessible to “so considerable a fraction of the public” that they cannot fairly be considered “private.” *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255, 36 S. Ct. 583, 60 L. Ed. 984 (1916). This Court should affirm.

A. Standards of Review and Principles of Statutory Interpretation

This judicial review arises under the Washington Administrative Procedure Act (APA), RCW 34.05. In reviewing an agency order, this

Court applies “the standards of RCW 34.05 directly to the record before the agency.” *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998).

Under RCW 34.05.570(3), judicial relief is available in nine enumerated circumstances. The Courtneys’ petition for judicial review implicates two: (1) RCW 34.05.570(3)(b) (relief available when the order is “outside the statutory authority or jurisdiction of the agency conferred by any provision of law”); and (2) RCW 34.05.570(3)(i) (relief available when the order is “arbitrary or capricious”).³ For both claims, the Courtneys have the burden of proof. RCW 34.05.570(1)(a).

The Courtneys first allege that the Commission “does not have statutory authority to require a PCN [public convenience and necessity] certificate for the services proposed by the Courtneys.”⁴ CP 31 (Petition for Judicial Review at 31). This claim is reviewed de novo. *Kittitas Cty. v. E.*

³ The Courtneys argue that this appeal arises under RCW 34.05.570(4)(c)(ii) and RCW 34.05.570(4)(c)(iii). Br. of Appellant at 27. The Chelan County Superior Court, however, analyzed the case under RCW 34.05.570(3)(b) and RCW 34.05.570(3)(i). The superior court was correct because courts sitting in an appellate capacity review administrative declaratory orders as “orders in adjudicative proceedings” under RCW 34.05.570(3), not as “other agency action” under RCW 34.05.570(4). See RCW 34.05.240(8) (“A declaratory order has the same status as any other order entered in an agency adjudicative proceeding.”). This distinction may be academic, since the standards of judicial review are the same under either subsection.

⁴ The Commission obviously had “statutory authority” to enter its declaratory order. See RCW 34.05.240 (agencies may enter declaratory orders). So, when the Courtneys allege that the Commission lacks “statutory authority” to require a certificate for the proposed services, they are really arguing that the Commission erroneously interpreted or applied RCW 81.84.010(1).

Wash. Growth Mgmt. Hearings Bd., 172 Wn.2d 144, 155, 256 P.3d 1193 (2011). The Courtneys must show that the Commission committed an error of law in concluding that the proposed services will operate “for the public use” within the meaning of RCW 81.84.010(1). This Court gives substantial weight to the Commission’s interpretation of the law but is not bound by that interpretation. *Thurston Cty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008).

To evaluate whether the Commission properly interpreted RCW 81.84.010(1), this Court should apply principles of statutory interpretation. Specifically, it should consider “the ordinary meaning of words, the basic rules of grammar, and the statutory context.” *Darkenwald v. Emp’t Sec. Dep’t*, 183 Wn.2d 237, 245, 350 P.3d 647 (2015) (quoting *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838-39, 215 P.3d 166 (2009)). If this “plain meaning” analysis fails to yield a single reasonable meaning, this Court may consider extrinsic aids, including legislative history. *Darkenwald*, 183 Wn.2d at 245. The Court’s overriding objective is to “ascertain and carry out the Legislature’s intent.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

The Courtneys next allege that the Commission’s declaratory order was arbitrary or capricious. CP 31 (Petition for Judicial Review at 31). For this claim, the Courtneys must establish that “the order represents ‘willful

and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.” *Kittitas Cty.*, 172 Wn.2d at 155 (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46-47, 959 P.2d 1091 (1998)).

The arbitrary or capricious standard is “highly deferential” to the administrative agency. *Arco Prods. Co. v. Utils. & Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). “Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” *Campbell v. Tacoma Pub. Sch.*, 192 Wn. App. 874, 889, 370 P.3d 33 (2016) (quoting *Cummings v. Dep’t of Licensing*, 189 Wn. App. 1, 25-26, 355 P.3d 1155 (2015)).

B. The Commission Properly Concluded that All Proposed Services Will Operate “For The Public Use For Hire” Within the Meaning of RCW 81.84.010(1)

The phrase “for the public use for hire” comes from RCW 81.84.010(1), which provides in 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.

RCW 81.84.010(1).

Under this statute, the Courtneys must obtain a certificate to operate:

1. Any vessel or ferry,
2. Between fixed termini or over a regular route,
3. Upon the waters within this state,
4. For the public use for hire.

The sole issue on appeal is whether the proposed services will operate “for the public use for hire.” CP 432.

The legislature did not define “for the public use for hire,” and no controlling judicial authority has interpreted the phrase. Nevertheless, the legislature’s intent is clear from the ordinary meaning of “public,” considered in light of the statute’s purpose and of case law that establishes why the proposed services cannot fairly be considered “private.” The Commission got it right: The certificate requirement applies broadly and was intended to cover services like those proposed here.

1. “Public” Means Accessible to All Who Desire the Service, Without Discrimination

The plain meaning of an undefined, nontechnical term can be discerned using a dictionary definition. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). “Public” has been defined in the context of commercial transportation as “accessible to or shared by all members of the community” (usage example: “tourist passengers enjoy 16 public rooms

aboard the magnificent new . . . flagship”). *Webster’s Third New Int’l Dictionary* 1836 (1966) (ellipsis in original).

Using this definition, the phrase “for the public use” as used in RCW 81.84.010(1) encompasses service that is accessible to all members of the community. The word “community” clarifies that the service need not be open to everybody, all the time. Instead, a commercial ferry operates “for the public use” if it is accessible on a nondiscriminatory basis to all who desire its use.

Here, each of the services proposed by the Courtneys will operate “for the public use” because each will be accessible to anyone who desires its use, without discrimination. The “community” will consist of people linked by a common desire to visit Stehekin and to patronize its businesses. Strictly speaking, this community will be limited to a subset of the global population—not everybody will have the means or desire to arrange a visit. But the potential customer base still represents “so considerable a fraction of the public” that the community cannot fairly be considered “private.” *Terminal Taxicab Co.*, 241 U.S. 252 at 255.

The breadth of the potential customer base should not be discounted. A key consideration is that the Courtneys will solicit customers using a publicly accessible, online reservation system. CP 60-70. Consequently, anyone, anywhere in the world, can become a customer, if he or she so

desires. Of equal importance, the Courtneys will have no ability to discriminate among paying customers or to enter into individualized contracts. They will instead charge standard rates and apply identical terms of service to all paying customers. CP 79-81.

Given these considerations, the proposed services will plainly operate “for the public use.” The services will be accessible to all who desire their use, without discrimination.

2. “Public” Does Not Mean Everybody, All of the Time

The Courtneys argue that limiting passage to “customers or patrons of specific businesses or a group of businesses” strips the proposed services of their public character. CP 45. They implicitly interpret “public” to mean “everybody, all the time.” See Br. of Appellant at 30 (arguing that “public” means “[o]pen or available for *all* to use, share or enjoy”) (quoting *Black’s Law Dictionary* 1422 (10th ed. 2014)) (emphasis added). This interpretation is unreasonable and therefore should not supplant the plain meaning discussed above.

In the context of commercial transportation, it is settled law that “public” does not mean “everybody, all the time.” A key case is *Terminal Taxicab Company v. Kutz*, 241 U.S. 252, 36 S. Ct. 583, 60 L. Ed. 984 (1916). In that case, a taxi company with exclusive rights to serve certain District of Columbia hotels unsuccessfully argued that its operations fell

outside the District’s authority to regulate companies “controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire.” *Terminal Taxicab Co.*, 241 U.S. at 253. Service was limited to hotel guests—strictly speaking, a community within the general population. That limitation, however, did not strip the operation of its public character:

*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 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.***

Id. at 254 (citations omitted) (emphasis added).

The same principles apply here. Under all proposed scenarios, the public is generally free to visit Stehekin “if it can afford to.” *Terminal Taxicab*, 241 U.S. at 255. Not everyone will have the means or desire to do so, but that general limitation fails to negate the proposed services’ essential public character. As in *Terminal Taxicab*, the services will remain accessible to “so considerable a fraction of the public that [they will be] public in the same sense in which any other may be called so.” *Id.* at 254.

Another instructive case is *Surface Transportation Corporation of New York v. Reservoir Bus Lines, Inc.*, 271 A.D. 556, 67 N.Y.S.2d 135 (N.Y. App. Div. 1946). There, the court applied the reasoning in *Terminal Taxicab* to hold that a bus company operated “for the use and convenience of the public” within the meaning of the New York Public Service Law, even though the company exclusively served residents of particular apartments. *Surface Transp. Corp.*, 271 A.D. at 558-59. The court reasoned:

The fact that [the bus company] 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. The rule is well established that an operation need not be open to all to make it a public use. . . . Within the limits of its functions [the bus company] is available to everyone who desires the use of its facilities.

Id. at 560 (citations omitted). The services proposed in this case will likewise be available to all who desire their use, on nondiscriminatory terms, within the “limits of [their] functions.” *Id.* Thus, applying the reasoning in *Terminal Taxicab* and *Surface Transportation Corporation of New York*, the proposed services cannot fairly be considered “private.”

The Courtneys cite *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285 P.3d 860 (2012), but that case actually supports the Commission’s plain meaning analysis. The issue in *Cregan* was whether a landowner who occasionally hosted free bible camps qualified for tort immunity under

Washington’s recreational use statute. The Supreme Court denied immunity because the camp was not “open to the public” at the time of the injury. *Cregan*, 175 Wn.2d at 286. The camp was instead restricted to users with certain religious affiliations. *Id.* at 286. The Court held that the camp lost its public character when the owner restricted access “by discriminating against the user based on personal traits.” *Id.* Here, nothing in the record suggests that the Courtneys will discriminate based on personal traits like religious affiliation.

Similarly unavailing is the Courtneys’ reliance on *West Valley Land Company v. Nob Hill Water Association*, 107 Wn.2d 359, 729 P.2d 42 (1986). In that case, the Court held that a small water utility was a “nonprofit cooperative” that fell outside the Commission’s jurisdiction over “public service companies.” *W. Valley Land Co.*, 107 Wn.2d at 361. This case can only be understood by examining a predecessor decision, *Inland Empire Rural Electrification v. Department of Public Service*, 199 Wash. 527, 92 P.2d 258 (1939).

In *Inland Empire*, a small, cooperative utility formed by Eastern Washington farmers fell outside the Commission’s jurisdiction because it did not “hold[] itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served.” *Inland Empire*, 199 Wash. at 537. It instead operated “entirely

on a cooperative basis, typifying an arrangement under and through which the users of a particular service and the consumers of a particular product operate the facilities which they themselves own.” *Id.* at 539-40.

The utility in *West Valley* likewise operated not “for gain to itself, or for the profit of investing stockholders,” but “entirely on a cooperative basis.” *W. Valley Land Co.*, 107 Wn.2d 367. Applying the analysis in *Inland Empire*, the Court found “complete identity of interest between the corporate agency supplying the service and the persons who are being served.” *Id.* at 367 (quoting *Inland Empire*, 199 Wash. at 540). Because member-owners had a “voice” in the utility’s management, the necessity for government oversight was minimal. *See W. Valley Land Co.*, 107 Wn.2d at 368 (“The members of [the cooperative utility] do not stand in the same position as members of the general public needing the protection of the UTC in the matter of rates and service supplied by an independent corporation.”).

The boat transportation services proposed by the Courtneys bear little resemblance to the member-owned utilities in *West Valley Land Company* and in *Inland Empire*. Critically, the proposed services will operate on a for-hire basis, not on a cooperative basis. Each service will “have the character of an independent corporation engaged in business for profit to itself at the expense of a consuming public.” *W. Valley Land Co.*, 107 Wn.2d at 366 (quoting *Inland Empire*, 199 Wash. at 539). Passengers

will not own the services and, consequently, will have no “voice” in their management. The resulting need for consumer protection both strengthens the justification for government regulation and bolsters the conclusion that the services will operate “for the public use.” *See W. Valley Land Co.*, 107 Wn.2d at 366-68.

West Valley Land Company and *Inland Empire* also undermine the Courtneys’ argument that “public” means everybody, all the time. Both cases conclude that a utility retains its status as a “public service corporation” when it “holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class *or by that portion of it that can be served.*” *W. Valley Land Co.*, 107 Wn.2d at 365 (quoting *Inland Empire*, 199 Wash. at 537) (emphasis added). The utility in *West Valley Land Company* lost its public character in part because it “chose[] to serve particular individuals of its own selection.” *Id.* at 367. The court noted “[s]pecific instances where [the utility] has denied service to potential customers.” *Id.* at 362. The Courtneys, in contrast, will serve all paying customers. The proposed services will retain their public character because the Courtneys will serve “that portion of [the public] that can be served,” on standard terms, without discrimination. *Id.* at 365.

3. The Commission's Interpretation is Consistent with the Statute's Purpose

As explained above in Section III, the certificate requirement in RCW 81.84.010 reflects the legislature's judgment that "the public's interest in reliable and affordable service is best served by a single, economically regulated provider whose owners can make the sizeable investments needed to initiate and maintain service without the threat of having customers drawn away by a competing provider." CP 267.

Given this purpose, the Commission's broad reading of "for the public use for hire" makes sense. A broad reading ensures that the certificate requirement applies broadly, thereby reducing the likelihood that an unregulated service will harm the public interest by weakening the incumbent provider through competition. A narrow reading, like that proposed by the Courtneys, limits the requirement's reach and thereby thwarts the legislature's decision to limit competition.

4. The Commission's Interpretation is Consistent with the Statute Read as a Whole

Under RCW 81.84.010, the following services are expressly exempt from the certificate requirement:

- **Freight vessels:** "A vessel primarily engaged in transporting freight other than vehicles, whose gross earnings from the transportation of passengers or vehicles, or both, are not more than

ten percent of the total gross annual earnings of such vessel.”

RCW 81.84.010(1).

- **Recreation vessels:** A commercial ferry service that “does not serve an essential transportation purpose and is solely for recreation” that, if allowed to operate, “would not adversely affect the rates or services of any existing certificate holder.”

RCW 81.84.010(2).

The presence of these narrow carve-outs within RCW 81.84.010 implies that regulation is the rule and exemption is the exception. *See City of Union Gap v. Dep’t of Ecology*, 148 Wn. App. 519, 527, 195 P.3d 580 (2008) (appellate courts narrowly construe exceptions to statutory provisions to give effect to the legislative intent underlying the general provisions). The Commission’s broad reading of “for the public use for hire” is consistent with RCW 81.84.010 read as a whole.

5. The Commission’s Interpretation is Consistent with Common Law Distinctions Between “Common” and “Private” Carriers

The Courtneys rely on early cases from Georgia and Michigan to argue that a commercial ferry is not a “common carrier,” as defined under common law, if it merely transports “one’s self, goods, employees, and customers.” Br. of Appellant at 37. This argument is problematic for two reasons. First, whether the proposed services will operate as common law

common carriers is not before this Court. The question before this Court is whether, as a matter of Washington statutory law, the services will operate “for the public use for hire.” RCW 81.84.010(1). Second, to the extent that the common law aids this Court’s plain meaning analysis, the cases cited by the Courtneys are either inapposite or distinguishable. As discussed below, each case merely confirms that the Courtneys misunderstand the concept of “private” carriage.

In *Self v. Dunn & Brown*, 42 Ga. 528 (1871), the Georgia Supreme Court held that a ferry was not a common law “common carrier” because the service was a mere “appendage” to the operator’s private mill. *Self*, 42 Ga. at 530. The mill owner charged no fee for passage because the service was “a simple accommodation” to the mill’s customers. *Id.* at 531. Here, in contrast, the Courtneys will charge for transportation. Further, the proposed boat transportation services will not be mere “appendages” to existing businesses. Under all five proposals, the Courtneys will own the boat transportation services separately from any interest in other Courtney-family businesses. The proposed services will be independent, for-profit businesses.

In *Meisner v. Detroit, Belle Isle & Windsor Ferry Co.*, 154 Mich. 545, 118 N.W. 14 (1908), the Michigan Supreme Court held that a ferry was not a common law “common carrier” because the operator, seeking to

“secure[] the better class of people,” reserved the right to “exclude the rough, boisterous, and rowdyish element from its boats and grounds.” *Meisner*, 118 N.W. at 15. The court noted that the operator “invites such persons as it chooses, and upon such terms as it chooses to make.” *Id.* Here, in contrast, the Courtneys have reserved to themselves no means to select their clientele. They will not invite “such persons as [they] choose” but will instead serve anybody who purchases a standard-offer travel package using a publicly accessible reservation system. *Id.* Further, all paying customers will be subject to identical terms of service.

In *Futch v. Bohannon*, 134 Ga. 313, 67 S.E. 814 (1910), the Georgia Supreme Court held that “the operation of a boat by a person merely for the purpose of conveying his own teams and employees across a stream would be neither a public nor a private ferry.” *Futch*, 67 S.E. at 814. Here, the Courtneys will not limit service to employees of Courtney-family businesses. They will instead transport all paying customers, without discrimination.

Finally, in *State ex rel. Public Utilities Commission of Utah v. Nelson*, 65 Utah 457, 238 P. 237 (1925), the Utah Supreme Court held that a bus service was neither a common law nor a statutory “common carrier” because the operator “transported no one who was not a guest or intended to become a guest of the camp.” *Pub. Utils. Comm’n of Utah*, 238 P. at 239.

Like the boat transportation service in *Self*, however, the bus service was a mere appendage to the campground that it served: “The transportation was not the main or principal object or business. It was but an incident or secondary to another, the community camp and its maintenance.” *Id.* at 239-40. Significantly, the bus driver was paid a daily wage by the campground owner, regardless of how many guests he transported. *Id.* at 239. Here, in contrast, the proposed boat transportation services will be independent, for-profit businesses. They will operate for their own benefit, not as mere “incidents” to established businesses.

The Courtneys cite *Futch* for the additional proposition that a common law “common carrier” was “bound to take over *all* who come.” Br. of Appellant at 37 (quoting *Futch*, 67 S.E. at 815) (emphasis added). A Washington case cited by the Courtneys similarly recites that “ferry-men,” as common law common carriers, must “carry *all* freight and merchandise delivered to them.” *Puget Sound Nav. Co. v. Dep’t of Pub. Works*, 156 Wash. 377, 383, 287 P. 52 (1930) (emphasis added). Contrary to the Courtneys’ argument, these statements do not establish that “public” means everybody, all the time. As discussed above, it is well established that “[n]o carrier serves *all* the public.” *Terminal Taxicab Company v. Kutz*, 241 U.S. 252, 254, 36 S. Ct. 583, 60 L. Ed. 984 (1916) (emphasis added). At common law, a carrier was a “common carrier” so long as it held itself out as

“furnishing transportation to any and all members of the public *who desire such services* insofar as its facilities enable it to perform the service.” 13 Am. Jur. 2d *Carriers* § 2 (2000) (emphasis added). A carrier may be a “common carrier” even it serves a subset of the public.

In sum, the common law provides no support for the Courtneys’ claim that the proposed services constitute “private” carriage. Actually, the common law supports the Commission’s contrary conclusion. The cases discussed above yield the general principle that a carrier is “private” only if it “reserves the right arbitrarily to accept or reject the offered business,” either by operating as a mere appendage to an existing business, or by offering one-time, custom services to “a particular group or class of persons under a special contractual arrangement.” 13 Am. Jur. 2d *Carriers* § 5 (2000); *see also Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 920, 500 P.2d 218 (1972) (“Availability to the public without discrimination appears to be the main feature distinguishing a private and common carrier.”); *Florida Power & Light Co. v. Fed. Energy Regulatory Comm’n*, 660 F.2d 668, 674 (5th Cir. 1981) (“A carrier will not be a common carrier where its practice is to make individualized decisions in particular cases as to whether and on what terms to serve.”). Here, the proposed services will operate “for the public use,” and therefore cannot be considered “private,” because they will be accessible to all who desire their use, without discrimination.

6. Our State Constitution’s “Abhorrence” of Monopolies is Irrelevant

The Courtneys refer to the “abhorrence of monopolies expressed in Article XII, section 22 of the Washington Constitution.” Br. of Appellant at 41. The “abhorrence of monopolies” is irrelevant because the Commission has not attempted to “impute” authority to grant monopoly rights. *Elec. Lightwave v. Utils. & Transp. Comm’n*, 123 Wn.2d 530, 537, 869 P.2d 1045 (1994) (Commission improperly imputed authority to grant exclusive rights to certain telecommunications companies). Its declaratory order instead upholds the express will of the legislature, as set forth in RCW 81.84. In *Kitsap County Transportation Company v. Manitou Beach-Agate Pass Ferry Association*, the Supreme Court held that the certificate requirement does not violate Article XII, section 22. 176 Wash. 486, 489-90, 60 P.2d 233 (1934). Therefore, the Commission’s order is also consistent with Article XII, section 22.

C. The Commission’s Order is not Arbitrary or Capricious

The Courtneys complain about the Commission’s refusal to give them the benefit of an inapplicable exemption. Br. of Appellant at 43-45. They also argue that the Commission arbitrarily declined to view their fifth proposal as an unregulated “charter” service. *Id.* at 45-50. These claims fail because the Commission had sound justifications for both decisions.

1. The Commission Properly Declined to Apply an Inapplicable Exemption

The Commission has adopted administrative rules deregulating, or exempting from regulation, hotel buses (WAC 480-30-011(6)), airline crew vans (WAC 480-30-011(9)), and “[p]rivate carriers who, in their own vehicles, transport passengers as an incidental adjunct to some other established private business owned or operated by them in good faith” (WAC 480-30-011(8)).⁵ According to the Courtneys, the Commission arbitrarily failed to apply these exemptions *by analogy* to the boat transportation services at issue in this case.

This argument fails because the cited exemptions apply solely to surface transportation providers regulated under RCW 81.68, RCW 81.70, and WAC 480-30. A completely different set of laws and regulations, RCW 81.84 and WAC 480-51, applies to commercial ferries. The Commission was under no obligation to apply inapplicable laws by analogy.

The Courtneys made no argument below, and make no argument here, that the surface transportation provisions (RCW 81.68, RCW 81.70, and WAC 480-30) and the commercial ferry provisions (RCW 81.84 and WAC 480-51) stand in *pari materia*. “The principle of reading statutes in *pari materia* applies where statutes relate to the same subject matter.”

⁵ The Commission’s declaratory order, at page 6, note 7, cites identical prior versions of these rules. CP 434.

Hallauer v. Spectrum Props., 143 Wn.2d 126, 146, 18 P.3d 540 (2001). If statutes do not stand in pari materia, then “there is no basis for inferring a legislative intent to import terms from one statutory scheme to the other.” *Auto Value Lease Plan v. Am. Auto Lease Brokerage*, 57 Wn. App. 420, 423, 788 P.2d 601 (1990). Stated differently, without legislative direction, the Commission lacks discretion to mix-and-match industry-specific rules that have been adopted to implement separate and independent regulatory schemes.⁶

The Courtneys give undue weight to *Smith v. Cahoon*, 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264 (1931), and to *State ex rel. Department of Public Works v. Inland Forwarding Corporation*, 164 Wash. 412, 2 P.2d 888 (1931). The upshot of these cases is that the state cannot purport to regulate all carriers within a particular industry—i.e., both private and public carriers within an industry—but then arbitrarily exempt certain private carriers within the industry. *See Dep’t of Pub. Works*, 164 Wash. at 424-25. The Courtneys cite no authority for the proposition that this principle applies *across* industries. *See id.* at 422 (inquiry is whether the challenged scheme amounts to “discrimination between . . . carriers of the

⁶ The Courtneys may, at any time, petition the Commission to adopt administrative exemptions for commercial ferries that mirror the surface transportation exemptions discussed above. RCW 34.05.330(1) (“Any person may petition an agency requesting the adoption, amendment, or repeal of any rule.”). To date, the Courtneys have not pursued this potential remedy.

same class”) (emphasis added). The state may lawfully regulate different industries differently.

2. Stripped of Pretense, Proposal No. 5 Will not Operate as a True Private “Charter”

A Commission rule exempts “charter services” from the RCW 81.84.010(1)’s certificate requirement. WAC 480-51-022(1). The Commission adopted this rule pursuant to a 1995 legislative act, Laws of 1995, ch. 361, § 3, that authorized the exemption. Wash. St. Reg. 95-22-001. The authorization expired in 2001. Laws of 1995, ch. 361, § 4. But for reasons not explained by the record, the rule stayed on the books.

Although the rule currently lacks an express statutory basis, the Commission assumed for purposes of its declaratory order that the certificate requirement does not apply to boat transportation services that have the characteristics of a “charter.” CP 436.

A true “charter” does not operate “for the public use” within the meaning of RCW 81.84.010(1) because it provides transportation to a “group of persons that hires the *entire* ferry to travel together to and from a mutually agreed destination.” CP 436 (emphasis added).⁷ The service is also

⁷ The Courtneys argue that the Commission ignored the definition of “charter service” in WAC 480-51-020(14), which applies to commercial ferries, and arbitrarily relied on the definition of “charter carrier” from WAC 480-30-036, which applies surface transportation providers. Br. of Appellant at 46. As discussed above, a “charter” avoids regulation because it does not operate “for the public use for hire” within the meaning of RCW 81.84.010(1). That conclusion holds under either definition.

“private” within the common law understanding of common carriage, because it represents a one-time, custom use negotiated between the operator and the chartering party. *See Cushing v. White*, 101 Wash. 172, 181, 172 P. 229 (1918) (“[I]f the undertaking be a single transaction, not a part of the general business or occupation engaged in, as advertised and held out to the general public, then the individual or company furnishing such service is a private and not a common carrier.”)

The Courtneys’ fifth proposal will not operate as a true charter. The service will not transport cohesive groups that have hired the entire ferry for a common purpose. It will instead transport unrelated individuals who have been aggregated by a third-party travel company. CP 68. Individuals who share no common purpose do not become a “charter party” simply because they have been funneled through a “charter” company. *See Iron Horse Stage Lines v. Pub. Util. Comm’n*, 125 Or. App. 671, 677, 866 P.2d 516 (1994) (De Muniz, J., dissenting) (for purposes of Oregon law regulating auto transportation providers, a “charter service” requires both a cohesive group and a common trip purpose). This must be true. If not, then any ferry can evade regulation simply by using a “shell company” to process reservations.

In *Kitsap County Transportation Company v. Manitou Beach-Agate Pass Ferry Association*, 176 Wash. 486, 60 P.2d 233 (1934), the Court struck down a sham “charter” company similar to the one proposed here.

The sham company initially sought authority to compete directly with the incumbent certificate-holder, which transported passengers by steamboat between Bainbridge Island and Seattle. After the state denied the company's application, proponents of the company tried to cheat the system by organizing a charitable association to "charter" a competing ferry. *Kitsap Cy. Transp. Co.*, 176 Wash. at 488. The association claimed that the competing ferry was merely a "club boat" operated for the convenience of "club members." *Id.* at 492. The Court saw through this sleight-of-hand.

"The real purpose," the Court said, "was to establish and maintain a vehicular ferry service between Seattle and [Bainbridge Island's] Manitou Beach." *Id.* at 488. Several factors established that the "charter" was a sham. The service operated on a regular schedule and charged fixed rates. *Id.* at 494. Members paid a trivial fee for "membership" and neither they nor the association assumed any financial responsibility for ferry's operation. *Id.* at 495. "For all practical purposes," the Court observed, "membership or its privileges were open to all who might desire transportation between Seattle and Bainbridge Island." *Id.* at 494. The Court concluded that the arrangement, "[s]tripped of pretense," was merely a scheme whereby the association furnished passengers for an illegal ferry operation. *Id.* at 495.

The Courtneys' fifth proposal mirrors *Kitsap County* in material respects. The proposed "travel company" will not be a private club. Instead,

like the sham “association” described above, it will merely act as an intermediary between the public and the ferry operator. It will not arrange custom tours for cohesive groups that hire the entire vessel. It will merely furnish individual passengers for scheduled runs at fixed rates. *Id.* at 495.

Stripped of pretense, Proposal 5 will operate “for the public use for hire” within the meaning of RCW 81.84.010(1). Like Proposals 1-4, Proposal 5 will require a certificate.

VI. CONCLUSION

The Commission properly concluded that all five services proposed by the Courtneys will operate “for the public use for hire” within the meaning of RCW 81.84.010(1). The services will appeal to a subset of the population, but “[n]o carrier serves all the public.” *Terminal Taxicab Company v. Kutz*, 241 U.S. 252, 254, 36 S. Ct. 583, 60 L. Ed. 984 (1916). The proposed services will retain their public character, despite being limited to “customers of a specific business or group of businesses,” because they will be accessible to all who desire their use, on standard terms, without discrimination. Because the Commission’s order was legally sound, and was not arbitrary or capricious, this Court should affirm.

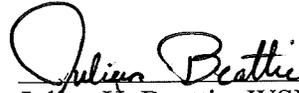
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RESPECTFULLY SUBMITTED on July 5, 2017.

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