Supreme Court No. 95796-7
Court of Appeals No. 35095-9-III

SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES COURTNEY and CLIFFORD COURTNEY, Petitioners,

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.

PETITION FOR REVIEW

INSTITUTE FOR JUSTICE
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I. *ENGLAND* RESERVATION

Under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964), Petitioners hereby:

1. Apprise this Court of the pendency of *Courtney v. Danner*, No. CV-11-401-TOR, in which the U.S. District Court for the Eastern District of Washington has exercised *Pullman* abstention and retained jurisdiction, *see* CP 252-54;[1]

2. State their intention, and reserve their right, to return to federal court to litigate their federal Privileges or Immunities Clause claim and any other federal issues after resolution of state proceedings; and

3. State that they will not litigate the federal constitutionality of the certificate of public convenience and necessity requirement in this Court.

II. IDENTITY OF PETITIONERS

The Petitioners are brothers James and Clifford Courtney.

III. COURT OF APPEALS' DECISION AND WUTC'S DECLARATORY ORDER

The decision of the Court of Appeals is the published opinion terminating review in *Courtney v. Washington Utilities and Transportation Commission*, No. 35095-9-III, entered April 3, 2018. The

[1] Though paginated using "CLP," the Clerk's Papers are referenced herein by "CP." *Courtney v. Danner* was previously styled *Courtney v. Goltz*. *See* Fed. R. Civ. P. 25(d).

opinion is included in the appendix at App. 1-24. This petition, however, arises as a judicial review proceeding under the Administrative Procedure Act, chapter 34.05 RCW. The underlying agency action is the declaratory order (hereinafter "Declaratory Order") of the Washington Utilities and Transportation Commission (hereinafter "WUTC") in Docket TS-151359, entered November 16, 2015. Because it is the Declaratory Order that this Court would review, *see Campbell v. State Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014), it, too, is included at App. 25-35.

IV. ISSUES PRESENTED FOR REVIEW

1. RCW 81.84.010(1) requires a certificate of public convenience and necessity (hereinafter "PCN") only for boat transportation that is "for the public use for hire." Is boat transportation on Lake Chelan that is provided solely for customers of a specific business or group of businesses, under the circumstances described in the Courtneys' petition for declaratory order, for the public use for hire?

2. Was it arbitrary or capricious for the WUTC to require a PCN certificate for the boat transportation services described in the Courtneys' petition for declaratory order when it exempts analogous transportation services in the non-waterborne context?

3. Was it arbitrary or capricious for the WUTC to not apply its "charter service" exemption to a situation in which a Stehekin-based

travel company contracts, by charter agreement, for the transportation of customers who have purchased travel packages from the company?

V. STATEMENT OF THE CASE

A. Ferry Regulation On Lake Chelan

Lake Chelan is a 55-mile-long lake in the North Cascades. CP 48. The city of Chelan lies at its southeast end and the unincorporated community of Stehekin at its northwest. CP 48. Stehekin and much of the lake's northwest end are part of the Lake Chelan National Recreation Area, which is accessible only by boat, plane, or foot; Lake Chelan thus provides a critical means of access to Stehekin and the recreation area, and it has been designated a navigable water of the United States. CP 48, 291.

In 1927, the Legislature enacted a law prohibiting anyone from operating a ferry on the lake without first obtaining a certificate of "public convenience and necessity." CP 261. Today, a PCN certificate is required to "operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state." RCW 81.84.010(1) (App. 36); *see also* WAC 480-51-025 (App. 40).

Obtaining a PCN certificate in an area already served by a ferry is practically impossible. The applicant must prove, among other things, that the existing certificate holder: "has not objected to the issuance of the certificate"; "has failed or refused to furnish reasonable and adequate

service"; or "has failed to provide the service described in its [own] certificate." RCW 81.84.020(1) (App. 37). The WUTC notifies the incumbent ferry provider of the application, which the incumbent, in turn, may protest. WAC 480-51-040(1). The WUTC then conducts an adjudicative proceeding in which the protesting provider participates as a party. *See* WAC 480-07-300(2)(c), -305(3)(e), -340(3)(g).

In October 1927, the state issued the first—and, to this day, only—certificate for ferry service on Lake Chelan. CP 262. Since 1929, it has been held by Lake Chelan Boat Company. CP 262. At least four other applications have been made, but, in each instance, Lake Chelan Boat Company protested and the applicant was denied a certificate. CP 262-65.

B. The Courtneys' Efforts To Provide An Alternative Service

Petitioners Jim and Cliff Courtney are brothers, fourth-generation residents of Stehekin, and the plaintiffs in *Courtney v. Danner*. CP 50. They, their siblings, and/or children own several businesses in the community, including Stehekin Valley Ranch, a rustic ranch with cabins and a lodge owned by Cliff and his wife,[2] as well as Stehekin Outfitters, Stehekin Log Cabins, and Stehekin Pastry Company. CP 47, 50.

After hearing customers complain about the inconvenience of Lake Chelan's lone ferry, Jim and Cliff made numerous efforts to provide

[2] Cliff and his wife own the ranch through Stehekin Valley Ranch, LLC, of which they are the sole members. CP 47.

alternative boat service on the lake. These efforts included a PCN application to operate an additional ferry, which the WUTC denied after Lake Chelan Boat Company protested, CP 51, 129, 155, as well as an effort to provide transportation solely for customers of Stehekin Valley Ranch, which failed when the WUTC's then-director/now-chairman David Danner indicated that this, too, required a PCN certificate, CP 52-55, 207-22. Jim and Cliff were thwarted by the PCN requirement at every turn.

C. The Courtneys' Challenge To The Certificate Requirement

Thus, in 2011, Jim and Cliff filed a federal constitutional challenge to the PCN requirement in the Eastern District of Washington. CP 86-126. They asserted two claims: that as applied to the provision of boat transportation service on Lake Chelan that is (1) open to the general public or (2) restricted to customers of a specific business or group of businesses, the PCN requirement and application process abridge their "right to use the navigable waters of the United States," which is protected by the Privileges or Immunities Clause of the 14th Amendment. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79, 21 L. Ed. 394 (1873). CP 115-23.

The district court dismissed both claims. *Courtney v. Goltz*, 868 F. Supp. 2d 1143 (E.D. Wash. 2012) (CP 295-317), *aff'd in part and vacated in part*, 736 F.3d 1152 (2013). Regarding the first, it held the right to use the navigable waters of the United States does not encompass a right "to

operate a commercial ferry service open to the public on Lake Chelan." *Id.* at 1151 (CP 311). Regarding the second, it held the Courtneys lacked standing to bring the claim and, in any event, abstention under *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), was warranted. 868 F. Supp. 2d at 1151-53 (CP 315-17).

The Courtneys appealed to the Ninth Circuit, which affirmed as to their first claim. 736 F.3d at 1162 (CP 244). As to their second claim, it held that the Courtneys do have standing, that *Pullman* abstention was nevertheless warranted, but that dismissal was *not* warranted. *Id.* at 1162-65 & n.6 (CP 245-50). It thus remanded the case with instructions to retain jurisdiction. *Id.* at 1165 (CP 250). The district court, in turn, issued an order "retain[ing] jurisdiction over [the] second constitutional claim pending an authoritative construction of the phrase 'for the public use for hire' by the WUTC or the Washington state courts." CP 253.

D. Petition For Declaratory Order

Accordingly, in 2014, the Courtneys petitioned the WUTC for a declaratory order as to whether the service at issue in their second claim requires a PCN certificate. CP 59. The WUTC declined to enter an order, claiming "the Petition lack[ed] sufficient information" and specifying "operational details" that it must contain. CP 384, 385. The Courtneys therefore filed a second petition in 2015, setting forth five specific

circumstances in which they would operate and requesting a declaration as to the applicability of the PCN requirement to each. CP 45-81.

The five proposed services share an important characteristic: each would be limited to customers of a specific business (or group of businesses) and only run on days required by the business(es). CP 60-70. Each service would operate between Stehekin and either Fields Point Landing or Manson Bay Marina, CP 60-70 (although, as discussed below, some proposals would serve additional points, as needed by the businesses using the services).[3] The main difference among the proposals is the identity of the businesses served and passengers eligible for transportation.

1. Proposal 1 (Lodging Customers Of The Ranch)

The business served by the first boat service would be Stehekin Valley Ranch; only lodging customers with reservations to stay at the ranch could receive transportation. CP 60. The service would be owned by Cliff Courtney and make no intermediate stops on the lake. CP 60, 61.

2. Proposal 2 (Customers Of Ranch Activities/Lodging)

The business served by the second service would also be Stehekin Valley Ranch, but transportation would be available for not only lodging

[3] Among other similarities, each service would: (1) use an insured, inspected, and certified vessel; (2) run from Memorial Day weekend through early October; and (3) use the same fare structure. CP 60-70. Proposals 1-4, moreover, would run at the same times of day (but only on days required by the businesses they serve). CP 61, 63, 65, 67-68. Proposal 5, by contrast, would run at times determined by charter agreements. CP 69.

customers of the ranch, but also customers with reservations for other activities the ranch offers (*e.g.*, kayaking tours operated by the ranch itself and horseback riding excursions originating at the ranch and operated by Stehekin Outfitters). CP 62. The service would also be owned by Cliff and make no intermediate stops. CP 62, 63.

3. Proposal 3 (Customers Of Courtney-Family Businesses)

The businesses served by the third service would be businesses owned by Courtney family members, including Stehekin Valley Ranch, Stehekin Outfitters, Stehekin Log Cabins, and Stehekin Pastry Company; transportation would be restricted to customers with reservations for activities or services at these businesses. CP 64. In addition to running between Stehekin and either Fields Point Landing or Manson Bay Marina, it would serve other points on the lake, as intermediate stops or standalone trips, as needed by the Courtney-family businesses. CP 65. For example, it might transport customers of Stehekin Outfitters to other points in connection with hiking or camping trips for which they have reservations. CP 65. The service would be owned by Cliff and Jim Courtney. CP 64.

4. Proposal 4 (Customers Of Stehekin-Based Businesses)

The businesses served by the fourth service would be Stehekin-based businesses (including Courtney-family businesses) that wish to use the service to provide transportation for their registered customers;

transportation would be restricted to customers with reservations for activities or services at these Stehekin-based businesses. CP 66. Like the service in Proposal 3, it would serve additional points on the lake, as intermediate stops or standalone trips, as needed by the participating Stehekin-based businesses to provide transportation in connection with activities or services for which their customers have made reservations. CP 67. The service would be owned by Cliff and Jim. CP 66.

5. Proposal 5 (Charter By Travel Company)

The business served by the fifth service would be a Stehekin-based travel company that organizes travel packages for Stehekin visitors; packages would include lodging, meals, and/or other activities or services with Stehekin-based businesses. CP 68. Customers of the travel company would purchase packages directly from the company, which, in turn, would charter transportation for the customers by private charter agreement with the boat service; transportation would be restricted to customers who have purchased such a package. CP 68-69. Like the services in Proposals 3 and 4, it would serve additional points on the lake as needed by the travel company to provide transportation in connection with packages its customers have purchased. CP 69. The boat service would be owned by Cliff and Jim, but the travel company would not be owned by them or any other Courtney family members. CP 68.

E. Declaratory Order And Judicial Review Proceedings

In November 2015, the WUTC issued its Declaratory Order. CP 429-39. It began by explaining that "[t]he sole issue is whether th[e] proposed operations would be 'for the public use for hire' as that phrase is used in" RCW 81.84.010(1), in which case they would require a PCN certificate. App. 28 (¶ 10). "The legislature did not define 'for the public use for hire,'" it noted, "and no Washington court has interpreted the meaning of that phrase . . . . Nor has the Commission." App. 28 (¶ 11).

The WUTC acknowledged that the Courtneys' proposed 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.'" App. 29 (¶ 13). Nevertheless, it concluded the services would be "for the public use for hire"—and, thus, require a PCN certificate—because "[a]ny member of the public may reserve lodging or other . . . services or products at these businesses." App. 29 (¶ 13).

The WUTC recognized that, in the auto transportation context, it exempts services comparable to those the Courtneys proposed—for example, "hotel buses" and "private carriers who transport passengers as an incidental adjunct to another private business." App. 30 (¶ 15). But it claimed that these exemptions "derive from . . . legislative directive" and that there is no similar directive in the waterborne context. App. 31 (¶ 17).

Finally, the WUTC acknowledged that it "has exempted 'charter services' from the commercial ferry [PCN] requirement," which the Legislature did not direct. App. 32 (¶¶ 18, 19). It nevertheless found the Courtneys' fifth proposal—under which a Stehekin-based travel company would charter transportation, from the Courtneys, for customers who had purchased packages from the travel company—was not a "charter service" because it would have a "public character." App. 32 (¶ 20).

The Courtneys petitioned for judicial review in the Chelan County Superior Court, which affirmed the Declaratory Order. CP 735-39, 741-50. They then appealed to the Court of Appeals, Division III, which also affirmed. App. 1-24. The court concluded that the term "for the public use" is "ambiguous," App. 10; *see also* App. 12-13, but that the WUTC's construction of the term—"accessible to all persons *that are part of a group with common interests*," App. 11—"is appropriate," App. 17. "This interpretation," the court held, "allows 'for the public use' to apply to a subset of the public," including "a subset of the public who wish to patronize one business in Stehekin or a group of businesses in Stehekin." App. 11. Thus, the court concluded that "[l]imiting service to guests of one or more Stehekin businesses does not strip the [Courtneys'] proposed ferry service of its public character," App. 18, and that applying the PCN requirement is neither arbitrary nor capricious, App. 19-23.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The decision of the Court of Appeals warrants review under RAP 13.4(b)(1) because it conflicts with four decisions of this Court: two concerning the meaning of "public" and two concerning the scope of an agency's power to confer monopolies through a PCN requirement. The decision also warrants review under RAP 13.4(b)(3) and (4), because the scope of an agency's power to confer monopolies involves significant issues of law under the Washington Constitution that are of substantial public interest. Finally, the underlying Declaratory Order affirmed by the Court of Appeals is subject to judicial review and reversal under the APA.

A. The Court of Appeals' Decision Conflicts With This Court's Decisions Concerning The Meaning of "Public"

The decision of the Court of Appeals conflicts with this Court's decisions in *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285 P.3d 860 (2012), and *West Valley Land Co. v. Nob Hill Water Ass'n*, 107 Wn.2d 359, 729 P.2d 42 (1986). These cases make clear that the boat transportation the Courtneys proposed—which is restricted solely to customers of a specific business or group of businesses—is not for the "public" use for hire and, therefore, does not require a PCN certificate. Without even acknowledging these cases, however, the Court of Appeals held that such service *is* "public" and requires a PCN certificate.

Cregan concerned the term "public" as used in Washington's recreational use immunity statute, which, in certain circumstances, provides immunity from suit to landowners who open their land to the "public." 175 Wn.2d at 283. Like the PCN statute, however, the statute does not define "public." Noting that "[w]here a term is undefined, we apply the plain meaning of the word," the Court consulted *Black's Law Dictionary* to hold that the "plain meaning of the word . . . '[p]ublic' [is] '[o]pen or available for all to use, share, or enjoy.'" *Id.* at 285 (quoting *Black's Law Dictionary* 1348 (9th ed. 2009) (third alteration in original)). Because the landowner in *Cregan* had provided only "a selective invitation to enter the land" and had "restrict[ed] the users" of it, the Court concluded that the land was not open to the "public." *Id.* at 286.

Cregan's holding is supported by *West Valley Land Co.*, which concerned "public" use as it relates to the WUTC's regulatory jurisdiction. 107 Wn.2d at 365. This Court held that "[t]he test used to determine if a corporation is to be regulated by the [W]UTC" is:

> whether or not the corporation holds itself out, expressly or impliedly, to supply its service . . . for use either by the public as a class or by that portion of it that can be served by the utility; or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.

Id. (quoting *Inland Empire Rural Elec., Inc. v. Dep't of Pub. Serv.*, 199 Wash. 527, 537, 92 P.2d 258 (1939)). Applying that test, the Court held a

water company was not subject to WUTC regulation because it "ha[d] not dedicated or devoted its facilities to public use, nor ha[d] it held itself out as serving, or ready to serve, the general public." *Id.* at 366. Rather, "criteria for service [were] set forth by" the company, which "chose[] to serve particular individuals of its own selection." *Id.* at 367.

The Court of Appeals ignored these two decisions and, as a result, issued a decision in conflict with both:

- While *Cregan* holds that "public" has a "plain meaning," 175 Wn.2d at 285, the Court of Appeals held that the term is "ambiguous," App. 10; *see also* App. at 12-13.
- While *Cregan* holds that the term means "[o]pen or available for *all* to use, share, or enjoy," 175 Wn.2d at 285 (emphasis added), the Court of Appeals construed the term to include service that is limited to a mere "subset of the public"—namely, "persons *that are part of a group with common interests*," App. 11.
- And while *West Valley Land Co.* holds that service lacks a "public" character if the operator sets forth "criteria to be met in order to qualify for service," 107 Wn.2d at 362, the Court of Appeals held that "[l]imiting service to guests of one or more Stehekin businesses does *not* strip the [Courtneys'] proposed ferry service of its public character," App. 18 (emphasis added).

The Court of Appeals' decision cannot be reconciled with *Cregan* and *West Valley Land Co.* Review is thus warranted under RAP 13.4(b)(1).[4]

B. The Court of Appeals' Decision Conflicts With This Court's Decisions Concerning The Scope Of An Agency's Power To Confer Monopolies

Even if the Court of Appeals was correct in concluding, contrary to *Cregan* and *West Valley Land Co.*, that "public" use is an "ambiguous" term, App. 10, its decision still conflicts with two other decisions of this Court: *In re Electric Lightwave*, 123 Wn.2d 530, 869 P.2d 1045 (1994), and *Davis & Banker, Inc. v. Metcalf*, 131 Wash. 141, 229 P. 2 (1924). Those cases hold that it is improper to ascribe to an administrative agency the power to grant monopolies unless the Legislature has expressly and *un*-ambiguously conferred such power by statute. Here, however, after concluding that the PCN statute is "ambiguous" in its application to the Courtneys' proposed services, App. 10, the Court of Appeals held that the WUTC has the power to grant Lake Chelan Boat Company the "exclusive

[4] To justify its holding, the Court of Appeals invoked *Kitsap County Transportation Co. v. Manitou Beach-Agate Pass Ferry Ass'n*, 176 Wash. 486, 30 P.2d 233 (1934), and *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 36 S. Ct. 583, 60 L. Ed. 984 (1916), which have no bearing here. In the former case, an "association" formed for the very purpose of securing, for its members, transportation between Seattle and Bainbridge Island. 176 Wash. at 494. It then retained a boat company to make "ten round trips daily" and claimed the arrangement was a private, rather than public, ferry because ridership was limited to association members. *Id.* This Court rejected the argument because membership in the association was "open to all." *Id.* That is hardly the case here. *Terminal Taxicab*, meanwhile, held that taxi service for hotel guests was subject to the jurisdiction of the D.C. Public Utilities Commission. The WUTC and Washington Legislature, however, have rejected its reasoning, *exempting* taxis and hotel shuttles from the WUTC's jurisdiction. RCW 81.68.015; WAC 480-30-011(6) (App. 38).

right[]" to provide those services, App. 14, 17.

In *Electric Lightwave*, the WUTC issued orders granting local telephone companies exclusive rights to certain service areas. 123 Wn.2d at 535. Other telephone companies petitioned for judicial review, arguing that the WUTC lacked the statutory authority to grant the exclusive rights. *Id.* at 535-36. This Court began its analysis by noting that the Washington Constitution "manifest[s] the state's abhorrence of monopolies" and, therefore, "militates against imputing the authority to grant" them. *Id.* at 538. Accordingly, the Court held that "the Legislature must expressly grant to the Commission the authority to grant monopolies before the Commission may exercise such rights." *Id.* Where a "statute [is] ambiguous," it added, "our state constitution makes it inappropriate to impute . . . a conferral of authority on the Commission to grant monopolies." *Id.* at 537. In this light, the Court held that the WUTC "lack[ed] the authority . . . to grant [the] exclusive rights" at issue. *Id.*

This Court applied a similar presumption against monopolies in *Davis & Banker*, which concerned whether a PCN requirement for freight transportation applied to a trucking company that hauled merchandise for a single creamery. 131 Wash. at 142-43. The Court refused to apply the PCN statute, and the exclusivity it confers, to such limited service:

> [T]his court should be slow to hold . . . that the statute was

> intended to enable one to obtain and hold such an exclusive monopoly for the carriage of passengers and merchandise over the public highways of the state as to exclude the owners thereof from carrying themselves or their goods or property, either personally, or by agent, or by an independent contract.

Id. at 144.

These cases make clear that in the absence of an express, unambiguous legislative grant of such authority, an agency does not have power to confer monopolies through a PCN requirement. Here, there was no such grant: indeed, the Court of Appeals itself concluded that the relevant language of the PCN requirement was "ambiguous" in its application to service that is limited to customers of a specific business or group of businesses. Nevertheless, it held that the WUTC could confer a monopoly on Lake Chelan Boat Company for the provision of such service.[5] That holding conflicts with *Electric Lightwave* and *Davis & Banker*, and review under RAP 13.4(b)(1) is therefore warranted.

[5] The Court of Appeals reasoned that an explicit grant of power to confer monopolies, as required by *Electric Lightwave*, could be found in RCW 81.84.020(1), which, according to the court, "explicitly directs the WUTC to protect a PCN ferry operator from an applicant seeking to provide competing services for the public use." App. 15-16. In other words, this provision merely (1) protects existing PCN holders (*i.e.*, persons providing service "for the public use") (2) from new PCN applicants (*i.e.*, persons who *wish* to provide service "for the public use"). In the end, the legislative directive turns on whether the existing PCN holder does, and the new PCN applicant would, operate "for the public use"—the very term the Court of Appeals found to be ambiguous. If a grant of authority turns on an ambiguous term, it is not an explicit grant.

C. The Court of Appeals' Decision Involves Significant Questions Of Washington State Constitutional Law That Are Of Substantial Public Interest

The decision of the Court of Appeals also warrants review under RAP 13.4(b)(3) and (4), because the scope of an agency's power to confer monopolies involves significant questions of state constitutional law that are of substantial public interest. As noted above, the state constitution "manifest[s] the state's abhorrence of monopolies." *Electric Lightwave*, 123 Wn.2d at 538. Allowing an agency to confer monopolies even when the governing statute is, according to the Court of Appeals, "ambiguous" transforms this constitutional "abhorrence" into a constitutional embrace.

Moreover, if allowed to stand, the sweeping definition of "public" use adopted by the Court of Appeals will infect areas of law far beyond government-conferred monopolies. It threatens to extend not only the reach of *Cregan*'s recreational use immunity statute into areas the Legislature never intended, but also government's eminent domain power into areas this Court has never allowed. This Court, after all, has indicated that "a private hotel" is not a "public use" for which eminent domain may be used, *In re Petition of Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 616 n.1, 639, 121 P.3d 1166 (2005), yet the Court of Appeals held that transportation for the exclusive use of a hotel's customers is "*for* the public use," App. 16, 17 (emphasis added). Review is needed to prevent

such erroneous reasoning from creeping into these other areas of the law.

D. The Declaratory Order Warrants Review Under The APA

Finally, the Declaratory Order itself warrants review under the APA. Its conclusion that the PCN requirement applies to the Courtneys' proposed services is an "erroneous[] interpret[ation] or appli[cation] [of] the law" and "outside the statutory authority" of the WUTC. RCW 34.05.570(3)(d), (3)(b), (4)(c)(ii).[6] Indeed, an agency "exceed[s] its scope of authority" when it "expands the meaning of terms in" a statute "in a manner that is not consistent with the statute" itself. *Wash. State Hosp. Ass'n v. Wash. State Dep't of Health*, 183 Wn.2d 590, 597, 353 P.3d 1285 (2015). Here, the WUTC did just that: the relevant statute requires a PCN certificate only for service that is "for the public use," RCW 81.84.010(1), but the WUTC expanded it to encompass purely private transportation. Its conclusion contravenes this Court's decisions, but also those of other courts holding such service is neither a public ferry nor a common carrier.[7]

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[6] The Court of Appeals applied the erroneous-interpretation standard, believing it more appropriate for review of the Courtneys' arguments. App. 10 & n.2. The Declaratory Order, however, was not entered in an "adjudicative proceeding," *see* CP 449, and the APA lacks an erroneous-interpretation standard for agency action not taken in an adjudicative proceeding. *See* RCW 34.05.570(4). That said, "[a] declaratory order has the same status as any other order entered in an agency adjudicative proceeding." RCW 34.05.240(8). Thus, whichever standard applies, the Declaratory Order may be set aside.

[7] *E.g.*, *Meisner v. Detroit, Belle Isle & Windsor Ferry Co.*, 154 Mich. 545, 548-49, 118 N.W. 14 (1908) (holding a boat service provided for amusement park customers to travel to and from the island where the park was located was not a common carrier); *Self v. Dunn & Brown*, 42 Ga. 528, 530-31 (1871) (holding boat transportation provided for mill customers to travel to and from the mill was a "private ferry," not a common carrier).

The Declaratory Order is also "arbitrary [and] capricious," RCW 34.05.570(3)(i), (4)(c)(iii). "Agencies may not treat similar situations in different ways." *Seattle Area Plumbers v. Wash. State Apprenticeship & Training Council*, 131 Wn. App. 862, 879, 129 P.3d 838 (2006). Here, however, the WUTC required a PCN certificate of the Courtneys, even though it exempts substantively identical services—including "hotel buses" 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"—from the PCN requirement for surface transportation. WAC 480-30-011(6), (8). In fact, even in the ferry context, the WUTC exempts "[c]harter service[]," WAC 480-51-022(1) (App. 39)—the very type of service at issue in the Courtneys' fifth proposal—yet it insisted that the Courtneys require a PCN certificate. Such inconsistent treatment of similar services is arbitrary and capricious.

VII. CONCLUSION

For the forgoing reasons, this Court should grant review.

Respectfully submitted this 2nd day of May, 2018.

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PROOF OF SERVICE

I, Michael Bindas, hereby certify that on May 2, 2018, I filed the foregoing *Petition for Review,* and the accompanying appendix through the Court's electronic filing system. I further certify that on May 2, 2018, I caused to be served a copy of the foregoing *Petition for Review,* and the accompanying appendix by electronic service, as well as messenger delivery, to the following:

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I further certify that on May 2, 2018, I caused to be mailed a copy of the foregoing *Petition for Review,* and the accompanying appendix by United Postal Service to:

Jack Raines
President
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d/b/a Lake Chelan Boat Company
P.O. Box 186
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2nd day of May, 2018, in Seattle, Washington.

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Appendix

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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, ARROW LAUNCH SERVICE, INC., Intervenor.	)	No. 35095-9-III PUBLISHED OPINION

LAWRENCE-BERREY, C.J. — RCW 81.84.010(1) prohibits operating a commercial ferry for the public use over a regular route unless the Washington Utilities and Transportation Commission (WUTC) issues a certificate declaring that public

convenience and necessity (PCN) requires such operation. James Courtney and Clifford Courtney sought a declaratory order from the WUTC to determine whether any of their five proposed commercial ferry services on Lake Chelan would require a PCN certificate. They contended that none of their proposed services were "for the public use," as contemplated by RCW 81.84.010(1). The WUTC disagreed and concluded that all five of the Courtneys' proposed ferry services were for the public use and would require a PCN certificate.

On appeal, the Courtneys contend that the WUTC erred in too broadly construing "for the public use." They also contend that the WUTC acted arbitrarily or capriciously because it treats surface transportation carriers differently from commercial ferries and because the WUTC refused to apply the charter service exemption for commercial ferries to one of its proposed ferry services.

We review the legislative intent behind RCW 81.84.010(1), conclude that the phrase "for the public use" should be construed broadly to protect regulated commercial ferries, and affirm the WUTC.

FACTS

Lake Chelan Boat Company has operated a year-round commercial ferry service on Lake Chelan since 1918. The WUTC's predecessor issued a PCN certificate to Lake

Chelan Boat Company in 1929 and, since that time, Lake Chelan Boat Company has successfully protected its exclusivity.

The Courtneys are residents of Stehekin, Washington, a small, unincorporated town at the northwest end of Lake Chelan. The Courtneys and their families own several businesses in Stehekin, Washington, including two floating plane companies, Stehekin Valley Ranch, Stehekin Outfitters, Stehekin Log Cabins, and Stehekin Pastry Company. They have attempted to operate their own commercial ferry on Lake Chelan for the past two decades. Stehekin, a popular tourist destination, is accessible only by boat, plane, or foot.

In 2009, Cliff Courtney sent a letter to his state legislators and the governor urging them to eliminate or relax the commercial ferry PCN requirement. The legislature passed, and the governor signed, a bill directing the WUTC to study and report on the appropriateness of the regulations governing ferry service on Lake Chelan.

The WUTC published its report in early 2010. The report reviewed the history of ferry service regulation on Lake Chelan from 1911 to 2009 and the legal framework for regulation and its rationale. The report discussed the then-current ferry service on Lake Chelan and the views of stakeholders as to whether existing laws should be relaxed to

allow unregulated commercial ferries to compete with regulated commercial ferries. The report concludes with a discussion and recommendation to the legislature:

> [T]he ferry services provided by the Lake Chelan Boat Company provide a lifeline to the communities of Stehekin and Holden Village. Faced with the question posed in 1921—would these communities be adequately served by unregulated passenger ferry operators?—the present Commission could not say with confidence that they would.
>
> In the short term, it is conceivable, and perhaps likely, that during the busy summer months customer would enjoy the benefits of competition among boat operators, who would lower fares and improve service to make their offerings more attractive to potential customers. During these periods, tourism may even increase as prices fall.
>
> But we agree with our predecessors that . . . ferry operators would cease all unprofitable activities. With no legal obligation to serve, they would reduce or eliminate services during the winter months, or during times when fuel prices are high, or during times when more attractive business opportunities arise for the use of their boats or docking facilities. Even if revenues during the summer months would allow the operators revenue to serve year-round, they would not be expected to so if such activities were unprofitable and they were under no obligation to provide them. In any event, it is not clear that summer operations would subsidize winter service if the operators were to lose market share during those months to seasonal competitors.
>
> Moreover, the issue of safety must be considered. Because the purchase, maintenance and operation of ferry service is a costly venture . . . we doubt that the opportunity to provide ferry service on Lake Chelan will attract more than a few operators that the Commission would deem "fit, willing and able" to provide service under current standards. . . .
>
> For these reasons, the Commission does not recommend at this time any changes to the state laws dealing with commercial ferry regulation as it pertains to Lake Chelan. . . .

Clerk's Papers (CP) at 287.

In 2011, the Courtneys commenced a federal constitutional challenge to the PCN requirement. The federal district court dismissed the Courtneys' claims, but the Ninth Circuit reversed in part. On remand, the federal district court issued an order "retain[ing] jurisdiction over [the Courtneys'] second constitutional claim pending an authoritative construction of the phrase 'for the public use for hire' by the WUTC or the Washington state courts." CP at 252.

In furtherance of that order, the Courtneys filed a petition with the WUTC for it to determine the meaning of "for the public use for hire."[1] The WUTC declined to enter an order on the basis that the petition lacked sufficient information and operational details. The Courtneys then filed a second petition setting forth five proposed ferry services so that the WUTC could make its determination as to each proposed service.

The services share several features in common. The proposed vessel is a 50- to 64-foot climate-controlled boat, and would operate between Memorial Day and early October of each year. Each service would charge a flat rate of $37 per adult passenger for a one-way ticket, or $74 for a round trip.

[1] The WUTC has defined "for hire" as "transportation offered to the general public for compensation." WAC 480-51-020(7). The Courtneys do not challenge the WUTC's definition of this part of the statutory language. For this reason, we truncate the phrase

Each service would be a scheduled run between 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., arrive at either destination at noon, depart at 12:30 p.m., and arrive back at Stehekin at 2:30 p.m. The primary difference among the proposed services are the scope 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

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from here forth.

> 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.

CP at 429-30. In all of the proposed services, the commercial ferry service would be owned independently from the other businesses.

The WUTC issued notice for all interested persons or entities to submit comments. Lake Chelan Boat Company expressed its opposition to another ferry service on Lake Chelan, claiming its financial viability and ability to operate year-round services for the public would be under threat. Arrow Launch Service, Inc.—a PCN ferry operator not servicing Lake Chelan—also expressed its opinion that the Courtneys' proposed services would create a template for setting up ferries that are public in all but name, which would threaten the viability of all true regulated public ferries in Washington.

The WUTC heard oral argument and issued its declaratory order a few weeks later. The WUTC noted that the only legal issue was whether the proposed services would

operate "for the public use" within the meaning of RCW 81.84.010(1). The order noted that the legislature did not define the phrase and that neither the WUTC nor any Washington court had interpreted the phrase.

The WUTC then looked to the plain language of the statute to derive the legislature's intent. Relying on a dictionary definition, the WUTC construed "for the public use" as meaning "'accessible to or shared by all members of the community.'" CP at 432-33. Relying on a dictionary definition once again, the WUTC construed "community" as meaning "'a body of individuals organized into a unit'" or "'linked by common interests.'" CP at 433. Combining the dictionary definitions for both terms, the WUTC concluded that a commercial ferry operator must obtain a PCN certificate when the ferry "is accessible to all persons that are part of a group with common interests." CP at 433.

The Courtneys argued to the WUTC that their proposed services were not for the public use because ferry services would be limited to customers of one or more particular Stehekin businesses. The WUTC noted that the United States Supreme Court had rejected a similar argument in *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 36 S. Ct. 583, 60 L. Ed. 984 (1916). The WUTC, in rejecting this argument, concluded that limiting

services to persons who are demonstrated customers of specific businesses would not remove the services' essential public character.

The Courtneys also argued that exemptions applicable to commercial ferries should be as broad as exemptions applicable to surface transportation companies. The WUTC, noting that there are important differences between the commercial ferry statutes and surface transportation statutes, rejected that argument.

The Courtneys further argued that Proposal 5 was exempt under the ferry charter service exemption. The WUTC disagreed and explained that Proposal 5 was not a true charter service because it would not transport cohesive groups for a single agreed-upon purpose; rather, it would simply be customers of Stehekin businesses aggregated through a third-party booking agency, thus maintaining the public character of the previous proposals.

The WUTC issued a declaratory order that stated the Courtneys must first obtain a PCN certificate before operating any of their five proposed ferry services. The Courtneys sought judicial review of the declaratory order in Chelan County Superior Court. That court affirmed the agency's decision.

The Courtneys appealed to this court.

ANALYSIS

A. REVIEW OF AN AGENCY ORDER IN GENERAL

Our limited review of an agency order is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW. *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014). We sit in the same position as the superior court and apply the APA standards directly to the administrative record. *Id.* Thus, the decision we review is that of the agency, not of the superior court. *Id.*

RCW 34.05.570(3) sets forth nine bases by which a court may grant relief from an agency order in an adjudicative proceeding. The Courtneys seek review on two bases. The Courtneys claim that the WUTC's order (1) erroneously interpreted or applied the law[2] and (2) is arbitrary or capricious. *See* RCW 34.05.570(3)(d), (i). For both claims, the Courtneys have the burden of proof. RCW 34.05.570(1)(a).

B. THE WUTC DID NOT ERR IN DEFINING "FOR THE PUBLIC USE"

1. "For the public use" is ambiguous; it can mean the general public or a subset of the public

[2] The Courtneys requested relief under a narrower basis, RCW 34.05.570(4)(c)(ii), i.e., agency action outside its statutory authority. The commission obviously had authority to enter its declaratory order. *See* RCW 34.05.240. The Courtneys' actual argument is broader: the Courtneys challenge the WUTC's interpretation of "for the public use." The WUTC acknowledges this in its brief. WUTC Br. at 12 n.4. We therefore review the Courtneys' broader argument.

RCW 81.84.010(1) provides 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 . . . without first applying for and obtaining from the commission a certificate declaring that public convenience and necessity require such operation.

(Emphasis added.)

The WUTC interpreted "for the public use" as meaning "accessible to all persons *that are part of a group with common interests*." CP at 433 (emphasis added). This interpretation allows "for the public use" to apply to a subset of the public. For example, it would apply to a subset of the public who wish to patronize one business in Stehekin or a group of businesses in Stehekin.

The Courtneys argue that the WUTC's construction is too broad and should not include subsets of the public. They argue that their proposed ferry services are not "for the public use" because their ferry services would not be accessible to the general public but instead would be limited to those who wish to patronize one Stehekin business or a group of Stehekin businesses.

We must determine whether the legislature intended "for the public use" to apply to a subset of the public.

To begin our analysis, we first recite general rules of statutory interpretation:

> When interpreting a statute, the court's fundamental objective is to ascertain and give effect to the legislature's intent. We begin with the plain meaning of the statute. In doing so, we consider the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. If the meaning of the statute is plain on its face, then we must give effect to that meaning as an expression of legislative intent. If, after this inquiry, the statute remains ambiguous or unclear, it is appropriate to resort to aids of construction and legislative history.

Lenander v. Dep't of Ret. Sys., 186 Wn.2d 393, 405, 377 P.3d 199 (2016) (citations omitted).

We note that the phrase, "for the public use," is not defined. So, we review the statutory scheme to discern legislative intent. Our review is assisted by the WUTC's 2010 report to the legislature that accurately summarizes the scheme:

> *Rate and service regulations*—Once granted a certificate for the provision of commercial ferry service, the operator's rates and services are subject to regulation by the Commission. [Chapter 81.28 RCW; chapter 81.04 RCW] This means that the operator must file with the Commission a tariff reflecting its fares and terms of service and must charge only in accordance with that tariff. [RCW 81.28.040, .080] If the operator wishes to change its rates or terms, it must file an amendment to its tariff on 30 days notice to the Commission and the public. [RCW 81.28.050] The Commission may audit the company's books and records and if the Commission is not satisfied that the rates reflected in the tariff are fair, just, reasonable and sufficient, the Commission may suspend the operation of the tariff amendments and initiate an adjudication to determine the rates and terms of service. [RCW 81.04.130]

> The Commission may revoke an operator's certificate if the operator fails to provide the service described in its tariff or if it fails to comply with the statutes and rules governing commercial ferry service. [RCW 81.84.060]
>
> *Protection against competition*—Certificated commercial ferries enjoy considerable protection from competition as long as they continue to provide satisfactory service and comply with regulations. If a person applies for a certificate to initiate a new ferry service on a route or in an area already served by an incumbent certificate holder, the incumbent must be afforded notice and an opportunity to be heard. [RCW 81.84.020] More importantly, the Commission may not grant a certificate to operate in an area already served by an existing certificate holder, unless the existing certificate holder has failed or refused to furnish reasonable and adequate service, or the existing certificate holder does not object. [RCW 81.84.020]

CP at 266-67 (footnotes omitted).

The statutory scheme does not answer whether the legislature intended "for the public use" to apply to a subset of the public. We next look to the historical construction of the statutory scheme.

2. A significant case interpreting the rights of PCN ferry operators reinforces the WUTC's determination that "for the public use" extends to a subset of the public

In *Kitsap County Transportation Co. v. Manitou Beach-Agate Pass Ferry Ass'n*, 176 Wash. 486, 494-96, 30 P.2d 233 (1934), the Supreme Court described the strong public policy that supports protecting a regulated ferry from unregulated competition. There, Kitsap County Transportation Company (KCTC) held a certificate to provide year-around ferry service from Seattle to a point on Bainbridge Island. *Id*. at 487. A group of

Bainbridge residents, dissatisfied with the service, formed an association for the purpose of having alternate ferry service. *Id.* at 488. The association entered into a charter agreement with Puget Sound Navigation Company to use one of its ferries for $7,500 per month. *Id.* at 494. The chartered ferry was available only to a subset of the public—club members, their families, their servants, or their guests. *Id.* at 492. To be a club member, a person was required to pay $1 per year. *Id.* at 494.

KCTC obtained an injunction and stopped the competing ferry service. *Id*. at 488-89. After a trial, the lower court entered a permanent injunction. *Id*. at 489. The Supreme Court affirmed. *Id*. at 496. In affirming, the court explained the public policy that supported issuance of a PCN certificate to one operator and the threat to public welfare by permitting unregulated competition. *Id.* at 489-96. The court concluded: "To allow a competitor to enter the field would be to encourage ruinous competition which would be not only destructive of [KCTC]'s rights under its certificate of convenience and necessity, but inimical to the best interests of the traveling public at large." *Id.* at 496.

3. RCW 81.84.020(1) confers on the WUTC the power to grant exclusive rights to an operator in compliance with its public obligations

The Courtneys nevertheless assert that some unregulated competition must be permitted. Citing *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994),

they argue that Washington Constitution article XII, section 22 manifests the state's abhorrence of monopolies and, where a statute is ambiguous, our state constitution makes it inappropriate to impute a conferral of authority on the WUTC to grant monopolies.

Electric Lightwave is distinguishable on the basis that the legislature granted the WUTC different authority to regulate competition between the two statutory schemes. In *Electric Lightwave*, the court reviewed the legislature's grant of authority to the WUTC to regulate telecommunications companies. RCW 80.36.230 provides, "The commission is hereby granted the power to prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies." The court held:

> This language does not confer on the [WUTC] the power to grant monopolies or exclusive rights. Since the [WUTC] is fully capable of exercising its authority under RCW 80.36.230 without the power to grant monopolies or other exclusive rights, the text does not necessarily or impliedly grant such power.

Electric Lightwave, 123 Wn.2d at 537.

We contrast the WUTC's authority to protect a singular telecommunications company with its authority to protect a singular commercial ferry operator. With the former, the legislature did not explicitly or implicitly grant the WUTC authority to protect one telecommunications company over another. With the latter, the legislature explicitly

directs the WUTC to protect a PCN ferry operator from an applicant seeking to provide competing services for the public use. RCW 81.84.020(1) provides, in relevant part:

> [T]he commission may not grant a [PCN] certificate to operate between districts or into any territory . . . already served by an existing certificate holder, unless the existing certificate holder has failed or refused to furnish reasonable and adequate service, has failed to provide the service described in its certificate or tariffs . . . or has not objected to the issuance of the certificate as prayed for.

As noted in our discussion of *Kitsap County Transportation Co.*, this authority extends to protecting a PCN ferry operator from an unregulated commercial ferry seeking to provide competing services for the public use.[3]

4. Old decisions from states outside Washington do not persuasively establish legislative intent

The Courtneys also assert that various decisions, mostly over 100 years old and from other jurisdictions, warrant a narrower construction of "for the public use." The WUTC asserts that most of the decisions are distinguishable on one or more bases. We need not analyze these other decisions given our view that *Kitsap County Transportation Co.* justifies a broad construction of "for the public use" to protect a PCN ferry operator from unregulated competition.

[3] Further, the protections afforded by RCW 81.84.020(1) do not run afoul of Washington Constitution article XII, section 22's prohibitions on monopolies. This is because the grant of a right to operate ferries across navigable waters is not the grant of a

5. The WUTC's definition is appropriate

We next determine whether we should adopt the WUTC's definition. While the courts retain ultimate authority to interpret a statute, we afford great weight to an administering agency's interpretation of a statute's legislative intent. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994).

As mentioned previously, the WUTC utilized dictionary definitions to interpret "for the public use" in a manner that extends the phrase to subsets of the public. This extension is consistent with *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252. *Terminal Taxicab* was the leading case discussing the phrase "public use" when our legislature, in 1927, enacted what now is RCW 81.84.010.

In *Terminal Taxicab*, 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. *Id*. at 257. The District's authority extended to "'controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire.'" *Id*. at 253 (quoting Public Utilities Commission Appropriation Act of Mar. 4, 1913, ch. 150, § 8, ¶ 1). Similar to the limitations in the Courtneys' five proposals, the taxi company limited its services to a

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private or common right. *Kitsap County Transp. Co.*, 176 Wash. at 489-91.

subset of the public, i.e., only persons who were guests of hotels with whom it had a contract. *Id*. at 254-55. The United States Supreme Court held that such a limitation did not strip the taxi company 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. . . . 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 255 (citations omitted) (emphasis added).

Similarly here, the public is free to visit Stehekin. Limiting service to guests of one or more Stehekin businesses does not strip the proposed ferry service of its public character. Subject to consideration of the Courtneys' next argument, we believe that the WUTC's rule is correct and consistent with the legislative intent of RCW 81.84.010(1).

The Courtneys argue that *Terminal Taxicab* is distinguishable because their proposed services would not affect a considerable portion of the public. At first blush, their argument is persuasive. How could Proposal 1 or Proposal 2 impact the viability of the current PCN certificate holder and thus the public?

In the context of commercial ferries, an operator must make a sizeable capital investment to purchase a ferry. Also, the daily variable costs of ferry service requires a

large stream of revenue sufficient to cover both daily expenses and to provide a reasonable rate of return on the initial capital investment.

The Courtneys' proposed vessel is a 50- to 64-foot, climate-controlled boat that would provide service between Memorial Day and early October of each year. At $37 per adult ticket, the service would be viable only if the four-month demand is substantial. We therefore conclude that any viable proposal would sufficiently impact the current PCN certificate holder and thus the public.

C. THE WUTC'S ORDER IS NOT ARBITRARY OR[4] CAPRICIOUS

The Courtneys make two arguments to support their contention that the WUTC's order is arbitrary or capricious. We will discuss each argument in turn.

The scope of review under an arbitrary or capricious standard is very narrow, and the party asserting it carries a heavy burden. *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 359, 340 P.3d 849 (2015). An agency's decision is arbitrary or capricious if the decision is the result of willful and unreasoning disregard of the facts and circumstances. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010). "'[W]here there is room for two opinions, an

[4] RCW 34.05.570(3)(i) permits a court to grant relief if the agency decision is "arbitrary *or* capricious." Appellate decisions, perhaps using a prior standard, often speak of "arbitrary *and* capricious." We will use the statutory standard in our analysis. We do

action taken after due consideration is not arbitrary [or] capricious even though a reviewing court may believe it to be erroneous.'" *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003) (first alteration in original) (quoting *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002)).

1. Surface transportation is not similar to commercial ferries

The Courtneys argue that the WUTC's order is arbitrary or capricious because the WUTC exempts certain surface transportation activities but does not exempt comparable commercial ferry activities. "Agencies should strive not to treat similar situations differently and should strive for equal treatment." *Stericycle of Wash., Inc. v. Wash. Utils. & Transp. Comm'n*, 190 Wn. App. 74, 93, 359 P.3d 894 (2015).

The Courtneys note that surface (or passenger) transportation companies, similar to commercial ferry operators, must obtain a PCN certificate. WAC 480-30-086(1). The Courtneys contend that WAC 480-30-011(6),[5] (8),[6] and (9)[7] provide exemptions from the

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not believe the different standards result in a different analysis or result.

[5] "Person owning, operating, controlling, or managing . . . hotel buses . . . ."

[6] "Private carriers who, in their own vehicles, transport passengers as an incidental adjunct to some other established private business owned or operated by them in good faith."

[7] "Transporting transient air flight crew or in-transit airline passengers between an airport and temporary hotel accommodations under an arrangement between the airline carrier and the passenger transportation company."

PCN certificate requirement to surface transportation companies that are analogous to one or more of their five proposed ferry services.

First, we fail to see the similarity between the noted surface transportation exemptions and any of the Courtneys' proposed commercial ferry services.

Second, the statutory treatment of surface transportation companies is different from the statutory treatment of commercial ferries. The different treatment no doubt is due to the differences between the two types of commercial carriers. For instance, taxis and buses are ubiquitous, and ferries are not. If a taxi service in a city suddenly ceases operation, residents will have numerous alternatives to travel. But if the Lake Chelan Boat Company suddenly ceases operation, Stehekin residents would be hard-pressed to leave and return to Stehekin. This leads to the conclusion that surface transportation companies and commercial ferry operators are sufficiently different that the WUTC is not treating similar commercial carriers differently.

Third, the WUTC did consider the facts and circumstances when declining to apply the surface transportation exemptions to commercial ferry operators. The WUTC noted that hotel buses are expressly exempt by statute, that airline crew transportation between airports and hotels is simply a variation of hotel buses, and that private carriers that transport people incidental to an established business do not fit within the definition

of an "auto transportation company." This is because under RCW 81.68.010(3), transporting passengers incidental to an established business is not a transport business.

The Courtneys argue that the WUTC "could have" exempted their proposed services. However, in making this argument, they ignore the highly deferential standard of our review. In summary, we conclude that the WUTC did not act arbitrarily or capriciously by refusing to apply surface transportation exemptions to commercial ferry operators.

2. The WUTC did not err by refusing to treat Proposal 5 as a private charter service

The Courtneys next argue that the WUTC arbitrarily or capriciously ignored its own regulation and did not treat Proposal 5 as an exempt charter service.

WAC 480-51-020(14) exempts "charter service" from the PCN certificate requirements of RCW 81.84.010(1). The WUTC adopted this exemption pursuant to a 1995 legislative act—Laws of 1995, chapter 361, section 3, which authorized the exemption. The authorization expired in 2001. LAWS OF 1995, ch. 361, § 4. The WUTC neglected to remove the expired exemption from its rules.

The WUTC, recognizing the lack of a statutory basis for the exemption, nevertheless analyzed whether Proposal 5 would be a private charter service. The WUTC concluded that it would not. We agree.

A true charter does not operate within the meaning of RCW 81.84.010(1) because it represents a one-time private use between a chartering party and an operator. *See Cushing v. White*, 101 Wash. 172, 181-82, 172 P. 229 (1918). This arrangement can be contrasted with the arrangement previously discussed in *Kitsap County Transportation Co.* There, several Bainbridge Island residents formed an association to "charter" a competing ferry between Seattle and Bainbridge Island. *Kitsap County 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 the association's subterfuge and concluded that the association's real purpose "was to establish and maintain a vehicular ferry service between Seattle and [Bainbridge Island]." *Id.* at 488. The court concluded that the ferry service was a public use and affirmed the trial court's injunction. *Id.* at 496.

Similarly, Proposal 5 seeks to use a chartering arrangement to establish and maintain a ferry service between Stehekin and various other points on Lake Chelan. Proposal 5 is not a true charter because it does not involve a one-time private use between a chartering party and an operator. We conclude that Proposal 5 is a public use within the meaning of RCW 81.84.010(1).

Affirmed.

Lawrence-Berrey, C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

[Service date November 16, 2015]

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

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

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[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

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[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]

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[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.

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[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.

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[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

RCW 81.84.010

Certificate of convenience and necessity required—Recreation exemption—Service initiation—Progress reports.

(1) 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. Service authorized by certificates issued to a commercial ferry operator must be exercised by the operator in a manner consistent with the conditions established in the certificate and tariff filed under chapter **81.28** RCW. However, a certificate is not required for 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.

(2) If the commission finds, after a hearing, that an existing or a proposed commercial ferry service does not serve an essential transportation purpose and is solely for recreation, the commission may, by order, exempt that service from the requirements of certification and regulation under this chapter. If the nonessential service is a proposed service not already provided by an existing certificate holder, the commission must also find, after notice to any existing certificate holder operating within the same territory and an opportunity to be heard, that the proposed service would not adversely affect the rates or services of any existing certificate holder.

(3) This section does not affect the right of any county public transportation benefit area or other public agency within this state to construct, condemn, purchase, operate, or maintain, itself or by contract, agreement, or lease, with any person, firm, or corporation, ferries or boats across the waters within this state, including rivers and lakes and Puget Sound, if the operation is not over the same route or between the same districts being served by a certificate holder without first acquiring the rights granted to the certificate holder under the certificate.

(4) The holder of a certificate of public convenience and necessity granted under this chapter must initiate service within five years of obtaining the certificate, except that the holder of a certificate of public convenience and necessity for passenger-only ferry service in Puget Sound must initiate service within twenty months of obtaining the certificate. The certificate holder shall report to the commission every six months after the certificate is granted on the progress of the certificated route. The reports shall include, but not be limited to, the progress of environmental impact, parking, local government land use, docking, and financing considerations. Except in the case of passenger-only ferry service in Puget Sound, if service has not been initiated within five years of obtaining the certificate, the commission may extend the certificate on a twelve-month basis for up to three years if the six-month progress reports indicate there is significant advancement toward initiating service.

[**2009 c 557 § 2; 2007 c 234 § 92.** Prior: **2003 c 373 § 4; 2003 c 83 § 211; 1993 c 427 § 2; 1961 c 14 § 81.84.010;** prior: 1950 ex.s. c 6 § 1, part; 1927 c 248 § 1, part; RRS § 10361-1, part.]

NOTES:

Findings—Intent—2003 c 373: See note following RCW **47.64.090**.

Findings—Intent—Captions, part headings not law—Severability—Effective date—2003 c 83: See notes following RCW **36.57A.200**.

RCW 81.84.020

Application—Hearing—Issuance of certificate—Determining factors.

(1) Upon the filing of an application, the commission shall give reasonable notice to the department, affected cities, counties, and public transportation benefit areas and any common carrier which might be adversely affected, of the time and place for hearing on such application. The commission may, after notice and an opportunity for a hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate any terms and conditions as in its judgment the public convenience and necessity may require; but the commission may not grant a certificate to operate between districts or into any territory prohibited by RCW **47.60.120** or already served by an existing certificate holder, unless the existing certificate holder has failed or refused to furnish reasonable and adequate service, has failed to provide the service described in its certificate or tariffs after the time allowed to initiate service has elapsed, or has not objected to the issuance of the certificate as prayed for.

(2) Before issuing a certificate, the commission shall determine that the applicant has the financial resources to operate the proposed service for at least twelve months, based upon the submission by the applicant of a pro forma financial statement of operations. Issuance of a certificate must be determined upon, but not limited to, the following factors: Ridership and revenue forecasts; the cost of service for the proposed operation; an estimate of the cost of the assets to be used in providing the service; a statement of the total assets on hand of the applicant that will be expended on the proposed operation; and a statement of prior experience, if any, in such field by the applicant. The documentation required of the applicant under this section must comply with the provisions of RCW **9A.72.085**.

(3) In granting a certificate for passenger-only ferries and determining what conditions to place on the certificate, the commission shall consider and give substantial weight to the effect of its decisions on public agencies operating, or eligible to operate, passenger-only ferry service.

(4) Until July 1, 2007, the commission shall not accept or consider an application for passenger-only ferry service serving any county in the Puget Sound area with a population of over one million people. Applications for passenger-only ferry service serving any county in the Puget Sound area with a population of over one million pending before the commission as of May 9, 2005, must be held in abeyance and not be considered before July 1, 2007.

[**2007 c 234 § 93; 2006 c 332 § 11.** Prior: **2005 c 313 § 609; 2005 c 121 § 7; 2003 c 373 § 5; 2003 c 83 § 212; 1993 c 427 § 3; 1961 c 14 § 81.84.020;** prior: 1950 ex.s. c 6 § 1, part; 1927 c 248 § 1, part; RRS § 10361-1, part.]

NOTES:

Severability—2005 c 313: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**2005 c 313 § 901.**]

Effective date—2005 c 313: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 9, 2005]." [**2005 c 313 § 902.**]

Findings—Intent—2003 c 373: See note following RCW **47.64.090**.

Findings—Intent—Captions, part headings not law—Severability—Effective date—2003 c 83: See notes following RCW **36.57A.200**.

WAC 480-30-011

Exempt operations.

The commission does not regulate the following passenger transportation operations under this chapter:

(1) Auto transportation company operations conducted wholly within the limits of an incorporated city or town, or auto transportation company operations from a point in a city or town in the state of Washington for a distance of not more than three road miles beyond the corporate limits of the city or town in which the trip began. The operations must not be part of a journey beyond the three-mile limit, either alone or in conjunction with another vehicle or vehicles.

(2) Commuter ride sharing or ride sharing for persons with special transportation needs under RCW **46.74.010**, provided the ride-sharing operation does not compete with nor infringe upon comparable service that was actually provided by an auto transportation company under chapter **81.68** RCW before the ride-sharing operation started.

(3) Municipal corporations and other government entities.

(4) Public transit agencies.

(5) Persons operating vehicles under exclusive contract to a public transit agency.

(6) Persons owning, operating, controlling, or managing taxi cabs, hotel buses, or school buses, when operated as such.

(7) Passenger vehicles carrying passengers on a noncommercial basis, including but not limited to, nonprofit corporations.

(8) Private carriers who, in their own vehicles, transport passengers as an incidental adjunct to some other established private business owned or operated by them in good faith.

(9) Transporting transient air flight crew or in-transit airline passengers between an airport and temporary hotel accommodations under an arrangement between the airline carrier and the passenger transportation company.

(10) Substituting ground transportation for air transportation under an arrangement between the airline carrier and the passenger transportation company in emergency situations arising from the inability of the air carrier to perform air transportation due to adverse weather conditions, equipment failure, or other causes.

(11) Transporting passengers who have had or will have had a prior or subsequent movement by air under a through ticket or common arrangement with an airline or with a connecting out-of-state passenger transportation company.

(12) Any other carrier or company that does not come within the term:

(a) "Auto transportation company" as defined in RCW **81.68.010**;

(b) "Charter party carrier" as defined in RCW **81.70.020**; or

(c) "Excursion service carrier" as defined in RCW **81.70.020**.

[Statutory Authority: RCW **80.01.040**, **80.04.160**, **80.54.020**, and **80.54.060**. WSR 16-02-076 (Docket TE-151080, General Order R-583), § 480-30-011, filed 1/4/16, effective 2/4/16. Statutory Authority: RCW **80.01.040**, **81.04.160**, **81.12.050**, **81.68.030**, and **81.70.270**. WSR 06-13-006 (General Order No. R-533, Docket No. TC-020497), § 480-30-011, filed 6/8/06, effective 7/9/06.]

WAC 480-51-022

Exempt vessels and operations.

The rules of this chapter do not apply to the following vessels or operations:

(1) Charter services;

(2) Passenger-carrying vessels that depart and return to the point of origin without stopping at another location within the state where passengers leave the vessel;

(3) Vessels operated by not-for-profit or governmental entities that are replicas of historical vessels or that are recognized by the United States Department of the Interior as national historical landmarks;

(4) Excursion services that:

(a) Originate and primarily operate at least six months per year in San Juan County waters and use vessels less than sixty-five feet in length with a United States Coast Guard certificate that limits them to forty-nine passengers or less;

(b) Do not depart from the point of origin on a regular published schedule;

(c) Do not operate between the same point of origin and the same intermediate stop more than four times in any month or more than fifteen times during any twelve-month period;

(d) Use vessels that do not return to the point of origin on the day of departure; or

(e) Operate vessels upon the waters of the Pend Oreille River, Pend Oreille County, Washington.

[Statutory Authority: RCW **81.84.070**, 1993 c 427, 1995 c 361 and RCW **80.01.040**(4). WSR 95-22-001 (Order R-435, Docket No. TS-941485), § 480-51-022, filed 10/18/95, effective 11/18/95.]

WAC 480-51-025

General operation.

(1) Commercial ferries must comply with all pertinent federal and state laws, chapter **81.84** RCW, and the rules of this commission.

(2) No certificated commercial ferry shall provide service subject to the regulation of this commission without first having obtained from the commission a certificate declaring that public convenience and necessity require, or will require, that service.

(3) No company may operate any vessel providing excursion service subject to the regulation of this commission over the waters of this state without first having obtained a certificate of public convenience and necessity as provided in RCW **81.84.010**.

(4) Any operator holding unrestricted commercial ferry authority may provide excursion service on an existing route without the need to obtain additional authority. The commission may restrict grants of commercial ferry authority to operations in excursion service.

(5) Any certificate of public convenience and necessity obtained by any false affidavit, statement or misrepresentation shall be subject to revocation and cancellation by this commission.

[Statutory Authority: RCW **81.84.070**, 1993 c 427, 1995 c 361 and RCW **80.01.040**(4). WSR 95-22-001 (Order R-435, Docket No. TS-941485), § 480-51-025, filed 10/18/95, effective 11/18/95.]

INSTITUTE FOR JUSTICE

May 02, 2018 - 4:15 PM

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