NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES COURTNEY; CLIFFORD COURTNEY, Plaintiffs-Appellants, v. DAVID DANNER, Chairman and Commissioner, in his official capacity as officer and member of the Washington Utilities and Transportation Commission; ANN E. RENDAHL, Commissioner, in her official capacity as officer and member of the Washington Utilities and Transportation Commission; JAY BALASBAS, Commissioner, in his official capacity as officer and member of the Washington Utilities and Transportation Commission; MARK JOHNSON, in his official capacity as executive director of the Washington Utilities and Transportation Commission, Defendants-Appellees.	No. 19-35100 D.C. No. 2:11-cv-00401-TOR MEMORANDUM* (Filed Apr. 15, 2020)

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

App. 2

Appeal from the United States District Court
for the Eastern District of Washington
Thomas O. Rice, Chief District Judge, Presiding

Submitted March 30, 2020**

Seattle, Washington

Before: McKEOWN, N.R. SMITH, and NGUYEN, Circuit Judges.

James and Clifford Courtney appeal the district court's order dismissing their complaint against the executive director and commissioners of the Washington Utilities and Transportation Commission (collectively, the "WUTC"). We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, *see Courtney v. Goltz*, 736 F.3d 1152, 1157 (9th Cir. 2013), we affirm.

The Courtneys seek to provide intrastate boat transportation on Lake Chelan for certain customers of Stehekin-based businesses. They contend that the WUTC's classification of their proposed services as a "public" ferry requiring a certificate of public convenience and necessity ("PCN certificate"), and its refusal to issue them one, violate their right under the Fourteenth Amendment's Privileges or Immunities Clause "to use the navigable waters of the United States." *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872).

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

"[T]he Privileges or Immunities Clause protects only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws.'" *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010) (quoting *The Slaughter-House Cases*, 83 U.S. at 79). The right to use the navigable waters of the United States is a national right because such waters are channels of interstate and foreign commerce, and the Constitution delegates power over those areas to Congress. *See Braniff Airways v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 597 (1954) (explaining that Congress's commerce power is "the . . . constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States").

Historically, states—not the federal government—regulated ferry franchises with the power to exclude a franchisee's potential competitors from the market. *See Conway v. Taylor's Ex'r*, 66 U.S. (1 Black) 603, 635 (1861) ("[T]he States have [always] exercised the power to establish and regulate ferries; Congress never."). An intrastate ferry franchise is a property right, and "[r]ights of commerce give no authority to their possessor to invade the rights of property." *Id.* at 634; *see also Merrifield v. Lockyer*, 547 F.3d 978, 983 (9th Cir. 2008) (holding that state licensing requirement impeding state resident from practicing particular profession within the state does not implicate the Privileges or Immunities Clause, which in general "bar[s] . . . claims against 'the power of the State

governments over the rights of [their] own citizens'" (quoting *The Slaughter-House Cases*, 83 U.S. at 77)).

The Courtneys' proposed ferry services, whether classified as "public" or "private,"[1] do not involve interstate or foreign commerce. Therefore, the WUTC's determination that the proposed services would interfere with the current ferry operator's franchise rights does not affect the Courtneys' privileges or immunities as citizens of the United States.

AFFIRMED.

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[1] We do not decide whether, for federal constitutional purposes, the Courtneys' proposed services should be classified as "private" and thus distinguishable from the proposed service at issue in their prior appeal. *See Courtney*, 736 F.3d at 1162 ("[T]he Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan. . . ."). Nor do we decide the relevance to this question, if any, of the WUTC's classification of the proposed services as "public" under the state law requiring PCN certification. *See* Wash. Rev. Code § 81.84.010(1).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JAMES COURTNEY and CLIFFORD COURTNEY, Plaintiffs, v. 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 MARK JOHNSON, in his official capacity as executive director of the Washington Utilities and Transportation Commission, Defendants.	NO. 2-11-CV-0401-TOR ORDER GRANTING DEFENDANTS' RENEWED MOTION TO DISMISS (Filed Jan. 3, 2019)

BEFORE THE COURT is the Defendants' Renewed Motion to Dismiss. ECF No. 59. The Court heard oral argument on November 20, 2018. Michael E. Bindas appeared on behalf of Plaintiffs James Courtney and Clifford Courtney. Assistant Attorney General Jeff Roberson appeared on behalf of the Defendants. The Court has reviewed the record and files herein, and is fully informed.

BACKGROUND

Plaintiffs James Courtney and Clifford Courtney ("the Courtneys") challenge the constitutionality of Washington's requirement that an operator of a commercial ferry obtain a certificate of "public convenience and necessity" ("PCN") from the Washington Utilities and Transportation Commission ("WUTC") before commencing operations. The Courtneys initially filed this lawsuit on October 19, 2011, asserting two claims under the Privileges or Immunities Clause of the Fourteenth Amendment. ECF No. 1. Currently, only the Courtneys' second claim remains pending before the Court. Specifically, the Courtneys assert that the PCN requirement, as applied to their proposed ferry service on Lake Chelan "for customers or patrons of specific businesses or groups of businesses," violates their right "to use the navigable waters of the United States" under the Fourteenth Amendment. ECF No. 1 at 34-38. Defendants move to dismiss the Courtneys' second claim pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 59. Defendants argue that dismissal is appropriate because the Courtneys do not have a Fourteenth Amendment right to operate a commercial ferry service and, therefore, they fail to state a claim upon which relief can be granted. *Id.* at 8.

FACTS

As the Courtneys observe, the Court is well-versed in the facts and procedural history of this case, which have been summarized at length by not only this

Court, but also the United States Court of Appeals for the Ninth Circuit and Division Three of the Washington Court of Appeals. The following facts are drawn from the Courtneys' Complaint, as well as the prior federal and state court decisions, and are accepted "as true" for purposes of this motion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

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, including two float plane companies, Stehekin Valley Ranch, Stehekin Outfitters, Stehekin Log Cabins, and Stehekin Pastry Company. ECF No. 1 at 15. Stehekin is a popular tourist destination, particularly during the summer months. However, access to the town is limited: the only means of accessing Stehekin is by boat, seaplane, or on foot. *Id.* at 5. Currently, most tourists and residents reach Stehekin by way of a public ferry operated by the Lake Chelan Boat Company, which has operated a year-round commercial ferry service on Lake Chelan since 1929. *Id.* at 7.

The State of Washington regulates commercial public ferries by statute. In 1927, the Washington legislature enacted a law that conditioned the right to operate a ferry service upon certification that such service was required by "public convenience and necessity." Laws of 1927, ch. 248, § 1. In its current form, RCW 81.84.010 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.

RCW 81.84.010(1). In order to obtain a PCN certificate, a potential ferry operator must prove that its proposed operation is required by "public convenience and necessity," and that it "has the financial resources to operate the proposed service for at least twelve months[.]" RCW 81.84.020(1)-(2). If the territory in which the applicant desires to set up operation is already being served by a commercial ferry company, no PCN certificate may be granted unless the applicant proves that 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." RCW 81.84.020(1).

Since 1927, only one PCN certificate has been issued for providing ferry services on Lake Chelan. ECF No. 35 at 6. The WUTC's predecessor issued a PCN certificate to the Lake Chelan Boat Company in 1929 and, since that time, the Lake Chelan Boat Company has successfully protected its exclusivity. ECF No. 1 at 7. At least four potential ferry operators have applied for a PCN certificate over the last sixty years, but all were

denied by the WUTC after Lake Chelan Boat Company objected to the applications. *Id.* at 13.

The Courtneys would like to establish a competing ferry service on Lake Chelan. In fact, they have unsuccessfully attempted to operate their own Stehekin-based commercial ferry over the past two decades. In 1997, James Courtney applied for a PCN certificate to operate a commercial ferry out of Stehekin. ECF No. 1 at 16. However, the Lake Chelan Boat Company objected, and the WUTC ultimately denied James's application. *Id.* at 16-18. In 2006, James explored the possibility of providing a Stehekin-based on-call boat service, which he believed fell within the "charter service" exemption to the PCN requirement. *Id.* at 19. The WUTC initially opined that a PCN certificate would not be needed for the proposed on-call boat service, then reversed course and informed James that a PCN certificate was needed, before reversing course yet again and advising James that the proposed service would be exempt from the PCN requirement. *Id.* at 19-20. Ultimately, no formal decision was ever rendered as to the proposed on-call service.

In 2008, Clifford Courtney contacted Defendant David Danner seeking guidance as to whether two alternative boat transportation services would require a PCN certificate. *Id.* at 22. The first proposal was a "charter" service whereby Clifford would hire a private boat to transport patrons of his lodging and river rafting businesses between Chelan and Stehekin. The second proposal was a service whereby Clifford would "shuttle" his customers between Chelan and Stehekin

in his own private boat. Defendant Danner responded that, in his opinion, both services would require a formal certificate. Specifically, Defendant Danner opined that even private boat transportation, offered exclusively to paying customers of Clifford's lodging and river rafting businesses, would be service "for the public use for hire" for which a formal certificate was required pursuant to RCW 81.84.010. Defendant Danner noted, however, that his opinion was merely advisory in nature and that Clifford was free to seek a formal ruling on the issue from the full Commission. ECF No. 1 at 24.

In February 2009, Clifford contacted the Governor of the State of Washington and several state legislators regarding the PCN requirement. *Id.* at 25. In response, the state legislature directed the WUTC to conduct a study on the regulation of commercial ferry services on Lake Chelan. The WUTC delivered a formal report to the state legislature in January 2010. *See* WUTC, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan: Report to the Legislature Pursuant to ESB 5894*, January 14, 2010 (available at https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Stehekin%20Report%20Final_a25a3eb0-cd39-4779-9c08-ecdec4c084a8.pdf). In the report, the WUTC concluded that Lake Chelan Boat Company was providing satisfactory service and recommended that there be no change to the existing laws and regulations. The WUTC noted, however, that there might be flexibility under the existing law to permit some competition by exempting certain

services from the PCN certificate requirement, including the private carrier exemption. As the WUTC explained,

> [T]here may be flexibility within the law for the Commission to take an expensive interpretation of the private carrier exemption from commercial ferry regulation. For example, the Commission might reasonably conclude that a boat service offered on Lake Chelan (and elsewhere) in conjunction with lodging at a particular hotel or resort, and which is not otherwise open to the public, does not require a certificate under RCW 81.84.

Report to Legislature at 15.

In 2011, the Courtneys filed suit in this Court against the WUTC and various commissioners and directors in their official capacities, seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. ECF No. 1. As noted, the Courtneys asserted two causes of action under the Privileges or Immunities Clause of the Fourteenth Amendment. First, they alleged the State of Washington's PCN requirement infringed upon their right to provide a commercial ferry service open to the general public on Lake Chelan. *Id.* at 30-33. Second, they claimed that the PCN requirement also infringed upon their right to provide a private ferry service for patrons of their Stehekin-based businesses. *Id.* at 34-38.

Defendants moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). This Court dismissed the Courtneys' first claim—

challenging the constitutionality of the PCN requirement as applied to the provision of a public ferry service on Lake Chelan—with prejudice, concluding that it was still unclear whether the "right to use the navigable waters of the United States" was "truly a recognized Fourteenth Amendment right," and, even assuming it was, it did not extend to protect the right "to operate a commercial ferry service open to the public." ECF No. 22 at 14-17. The Court dismissed the Courtneys' second claim—challenging the constitutionality of the PCN requirement as applied to the provision of boat transportation services on Lake Chelan for customers or patrons of specific businesses—without prejudice, holding that the Courtneys lacked standing, their claim was unripe, and that the Court would abstain from deciding the constitutional question under the *Pullman* abstention doctrine (*Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). *Id.* at 17-23.

In dismissing the Courtneys' second claim, the Court noted that neither the WUTC nor any other state adjudicative body had definitely ruled that the Courtneys' proposed "private ferry service would in fact require a PCN certificate under RCW 81.84.010. *Id.* at 19. In light of the lingering uncertainty about whether the Courtneys would be required to obtain a PCN certificate to operate their proposed private ferry service, the Court dismissed the Courtneys' second claim "without prejudice to afford the WUTC or the Washington state courts an opportunity to resolve this unsettled question of state law." *Id.* at 22-23.

On December 2, 2013, the Ninth Circuit affirmed the dismissal of the Courtneys' first claim but vacated the dismissal of the second claim. *Courtney v. Goltz*, 736 F.3d 1152 (9th Cir. 2013). Regarding the second claim, the Ninth Circuit concluded that the exercise of *Pullman* abstention was proper, but this Court "should have retained jurisdiction over the case pending resolution of the state law issues, rather than dismissing the case without prejudice." *Id.* at 1164. Accordingly, the Ninth Circuit vacated the dismissal of the second claim and remanded to this Court with instructions to retain jurisdiction over Defendants' second constitutional claim pending an authoritative construction of the phrase "for the public use for hire" by the WUTC or the Washington state courts. ECF Nos. 35; 36. On remand, consistent with the Ninth Circuit's instructions, this Court issued an order retaining jurisdiction over the Courtneys' second constitutional claim and staying the case pending action by the WUTC or the Washington courts. ECF No. 40.

On March 3, 2014, the Courtneys petitioned the United States Supreme Court for certiorari to review the disposition of their first claim only. The Supreme Court denied certiorari on the Courtneys' first claim on June 2, 2014. *Courtney v. Danner*, 572 U.S. 1149 (2014).

Thereafter, the Courtneys petitioned the WUTC for a declaratory order as to whether a PCN certificate was required to provide the "private" ferry service at issue in their second claim. ECF No. 52 at 4. The WUTC initially declined to enter an order on the ground that the Courtneys' petition lacked sufficient

information and operational details. The Courtneys then filed a second petition setting forth five proposed ferry services, which they contended were not "for the public use," as contemplated by RCW 81.84.010(1). *Courtney v. Wash. Utils. & Transp. Comm'n*, 3 Wash. App. 2d 167, 172-73 (2018). As described in their petition, the proposed services would operate between Memorial Day and early October each year, and charge a flat rate of $37 per adult passenger for a one-way ticket or $74 for a roundtrip ticket. *Id.* at 173. Each of the proposed services would be owned by James and/or Clifford Courtney. The primary difference among the proposed services is 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.

Id. at 173-74.

The WUTC issued a declaratory order concluding that the Courtneys were required to first obtain a PCN certificate before operating any of their five proposed ferry services. 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). *Id.* at 174. Based on the plain language of the statute, the WUTC construed the phrase "for the public use" as meaning "accessible to or shared by all members of the community." *Id.* at 175. The WUTC interpreted the term "community" to mean "a body of individuals organized into a unit" or "linked by common interests." *Id.* Combining these definitions, 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." *Id.*

The Courtneys argued that the 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 disagreed, noting that the United States Supreme Court had rejected a similar argument in *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252 (1916). Consistent with the *Terminal Taxicab* decision, the WUTC concluded that limiting services to persons who are demonstrated customers of specific businesses would not remove the services' essential public character. *Courtney*, 3 Wash. App. 2d at 175.

The Courtneys petitioned the Chelan County Superior Court for judicial review of the WUTC's declaratory order. *Id.* at 176. The trial court affirmed the agency's decision and the Courtneys appealed to Division Three of the Washington Court of Appeals. *Id.*

On April 3, 2018, the Washington Court of Appeals affirmed the trial court and explicitly adopted the WUTC's definition of "for the public use" as applying to subsets of the public. *Id.* at 181-82. In concluding that the WUTC's definition was correct, the Court of Appeals explained that "the public is free to visit Stehekin" and "[l]imiting service to guests of one or more Stehekin businesses does not strip the proposed ferry service of its public character." *Id.* at 182. Thus, the Court of Appeals held that "the WUTC's rule is correct and consistent with the legislative intent of RCW 81.84.010(1)." *Id.*

The Courtneys then petitioned the Washington Supreme Court for discretionary review on May 2,

2018. On August 8, 2018, the Washington Supreme Court denied review. *Courtney v. Wash. Utils. & Transp. Comm'n*, 191 Wash.2d 1002 (2018).

After both the WUTC and the Washington courts definitively concluded that the PCN requirement does, in fact, apply to the Courtneys' proposed "private" ferry service, the Courtneys moved this Court to dissolve the stay and reopen their case "to afford the Courtneys the opportunity to litigate their second Privileges or Immunities Clause claim." ECF No. 52 at 5. The Court lifted the stay and reopened this case on September 13, 2018. ECF No. 56 at 2. As before, Defendants again move to dismiss the Courtneys' remaining claim under Federal Rule of Civil Procedure 12(b)(6).

DISCUSSION

A motion to dismiss pursuant to Federal Rule of Procedure 12(b)(6) "tests the legal sufficiency of a [plaintiff's] claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive such a motion, a plaintiff must allege facts which, when taken as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation and citation omitted). In order for a plaintiff asserting a cause of action under 42 U.S.C. § 1983 to satisfy this standard, he or she must allege facts which, if true, would constitute a violation of a right guaranteed by the United States Constitution. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). Similarly, a plaintiff seeking declaratory relief under 28 U.S.C. § 2201 must

allege facts which, if true, would violate federal law. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950) (holding that Declaratory Judgment Act did not expand subject-matter jurisdiction of federal courts). As discussed below, Plaintiffs fail to satisfy these standards.

A. Plaintiffs' Second Cause of Action: Operation of a Private Ferry Service to Patrons of Stehekin-Based Businesses

When this Court initially dismissed the Courtneys' constitutional claims in 2011, no federal court had ever directly examined the "right to use the navigable waters of the United States," as referenced by the Supreme Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1872). In the absence of applicable precedent, this Court looked to the *Slaughter-House* decision, as well as the history and purpose of the Privileges or Immunities Clause, for guidance in defining the "right to use the navigable waters of the United States" and determining whether the State of Washington's PCN requirement infringed upon the right. Assuming the Fourteenth Amendment did in fact protect "the right to use the navigable waters of the United States," this Court concluded that the right did not extend to operating a commercial ferry open to the public on Lake Chelan. ECF No. 22 at 17. Particularly relevant here, this Court expressly rejected the Courtneys' argument that the Privileges or Immunities Clause was designed to protect quintessentially economic rights, and determined that using the navigable

waters of the United States "*in the manner the Courtneys have proposed—i.e.*, to operate a competing commercial ferry business—is one of the 'fundamental' rights conferred by state citizenship." *Id.* at 16 (emphasis in original).

On appeal, the Ninth Circuit agreed that "even if the Privileges or Immunities Clause recognizes a federal right 'to use the navigable waters of the United States,' the right does not extend to protect the Courtneys' use of Lake Chelan to operate a commercial public ferry." *Courtney*, 736 F.3d at 1158. In reaching this holding, the Ninth Circuit defined for the first time the "right to use the navigable waters of the United States," as the phrase had "yet to be interpreted by a single federal appellate court in the privileges or immunities context." *Id.* at 1159. According to the Ninth Circuit, "the right to use the navigable waters of the United States" is "a right to *navigate* the navigable waters of the United States," *id.* at 1160 (emphasis in original), not a right to *pursue economic opportunity* on the navigable waters of the United States. Based on this interpretation of the phrase, the Ninth Circuit held that "the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan," and explained what this meant for the Courtneys' first constitutional claim:

> At the end of the day, the state legislation the Courtneys challenge is narrow in scope, merely restricting the operation of *commercial public ferries* to those who obtain a PCN

> certificate. The PCN requirement does not constrain the Courtneys from traversing Lake Chelan in a private boat for private purposes. Nor does it affect their ability to operate a commercial freight transportation service. For that matter, the Courtneys are free to operate a commercial ferry service so long as they apply for and obtain a PCN certificate.

Id. at 1162 (emphasis added, citations omitted).

Here, the Courtneys argue that the Ninth Circuit's holding has no bearing on the success of their second claim because the proposed ferry service at issue here "involves only transportation for customers of a particular business" rather than a "commercial public ferry." ECF No. 60 at 4. According to the Courtneys, while the Ninth Circuit's decision conclusively establishes that the right "to use the navigable waters of the United States" does not include a right to operate a *commercial public ferry* on Lake Chelan, the question remains as to whether the right extends to the *private* boat transportation services at issue in their second claim.

Though the Courtneys describe the proposed ferry service at issue in their second claim as a "private" boat transportation service, the Court cannot ignore the fact that both the WUTC and the Washington courts have definitely concluded that the proposed "private" ferry service is in fact a *commercial public ferry service* under Washington law. As the Washington Court of Appeals observed, "[l]imiting service to guests of one or more Stehekin businesses does not strip the proposed ferry service of its public character." *Courtney*, 3 Wash.

App. 2d at 182. Thus, the Court agrees with Defendants that, regardless of the label the Courtneys choose to affix to the ferry service at issue in their second claim, at the end of the day it is a commercial public ferry service that they seek to provide.

Thus, like their first claim, the actual privilege at stake here is "a ferry operation privilege, not a broad navigation privilege." *Courtney*, 736 F.3d at 1160. The Courtneys are not merely seeking to "travers[e] Lake Chelan in a private boat for private purposes," nor are they being prevented from doing so. *Id.* at 1162. Instead, the Courtneys simply desire to operate a commercial ferry service for a subset of the public, their customers. As the Ninth Circuit explained, albeit in the context of the Courtneys' first claim,

> Here, it is clear that the Courtneys wish to do more than simply navigate the waters of Lake Chelan. Indeed, they are not restrained from doing so in a general sense. Rather, they claim the right to utilize those waters for a very specific professional venture. While navigation of Lake Chelan is a necessary component of the Courtneys' proposed activity, it is neither sufficient to achieve their purpose nor the cause of their dissatisfaction . . . Were navigation all the Courtneys wished to do, they would not need the WUTC's permission and this dispute would never have arisen.

Id. at 1160. This logic applies with equal force to the Courtneys' second claim. Accordingly, the Court concludes that the Courtneys do not have a Fourteenth

Amendment right to operate a commercial ferry service open to a subset of the public on Lake Chelan.

In their response to Defendants' renewed motion to dismiss, the Courtneys devote fifteen page of their twenty-page brief to convincing this Court that the right to "use the navigable waters of the United States" encompasses "a right to use navigable waters in pursuit of a livelihood." ECF No. 60 at 7-21. In those fifteen pages, much ink is spilled in an effort to explain "[t]he link between national citizenship and use of the navigable waters in economic activity," and why "it is inconceivable that *Slaughter-House* did not intend the right to use the navigable waters of the United States to encompass use in the pursuit of a livelihood." *Id.* at 18-19, 21. The Courtneys assert that the fact that "they wish to exercise the ["right to use the navigable waters of the United States"] in an economic pursuit only strengthens their claim." *Id.* at 7.

However, this argument has previously been rejected by this Court and the Ninth Circuit. In holding that "the right to use the navigable waters of the United States" did not extend to operating a commercial public ferry, this Court explicitly rejected "the Courtneys' assertions that the Privileges or Immunities Clause was designed to protect quintessentially *economic* rights." ECF No. 22 at 15 (emphasis in original). Likewise, recognizing that the Courtneys' proposed commercial ferry service was an economic pursuit, the Ninth Circuit explained that economic rights are not generally protected by the Privileges or Immunities Clause:

> Further, the driving force behind this litigation is the Courtneys' desire to operate a particular business using Lake Chelan's navigable waters—an activity driven by economic concerns. We have narrowly construed the rights incident to United States citizenship enunciated in the *Slaughter-House Cases*, particularly with respect to regulation of intrastate economic activities.

Courtney, 736 F.3d at 1160-61. In short, contrary to the Courtneys' contentions, the economic purpose of the proposed ferry service at issue cuts against, rather than strengthens, their case.

Because the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan, the Court concludes the Courtneys' remaining claim fails to allege the deprivation of a right protected by the United States Constitution. Accordingly, the Courtneys' second claim must be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendants' Renewed Motion to Dismiss (ECF No. 59) is **GRANTED**.
2. Plaintiffs' second cause of action is **DISMISSED** with prejudice.

The District Court Executive is hereby directed to enter this Order and Judgment accordingly, provide copies to counsel, and close the file.

DATED January 3, 2019.

[SEAL] /s/ Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge

THE SUPREME COURT OF WASHINGTON

JAMES COURTNEY, et al., Petitioners, v. WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, et al., Respondents.	No. 95796-7 **ORDER** Court of Appeals No. 35095-9-III (Filed Aug. 8, 2018)

A Special Department of the Court, composed of Chief Justice Fairhurst and Justices Owens, Stephens, Gonzàlez, and Yu, considered at its August 7, 2018, Motion Calendar, whether review should be granted pursuant to RAP 13. 4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 8th day of August, 2018.

For the Court

/s/ Fairhurst, CJ.
CHIEF JUSTICE

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 (Filed Apr. 3, 2018)

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

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[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 from here forth.

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.

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 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

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*

[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.

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, 869 P.2d 1045.

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.

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).

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

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 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 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)).

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

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

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[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."

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.

/s/ Lawrence-Berry, C.J.
Lawrence-Berry, C.J.

WE CONCUR:

/s/ Korsmo, J.
Korsmo, J.

/s/ Siddoway, J.
Siddoway, J.

STATE OF WASHINGTON
CHELAN COUNTY SUPERIOR COURT

JAMES COURTNEY and CLIFFORD COURTNEY, Petitioners, v. WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; DAVID DANNER, chairman and commissioner, ANN RENDAHL, commissioner, and PHILIP JONES, 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-Respondent.	NO. 15-2-01015-2 **FINAL ORDER AND JUDGMENT AFFIRMING AGENCY DECLARATORY ORDER** (Filed Feb. 6, 2017)

This matter having come before the Court on James and Clifford Courtney's Petition for Judicial

Review of the declaratory order entered by the Washington Utilities and

Transportation Commission on November 16, 2015, in Docket No. TS-151359; the Court having considered the following materials:

1. Petition for Judicial Review, from Petitioners James Courtney and Clifford Courtney.
2. Opening Brief of Petitioners James Courtney and Clifford Courtney
3. Response Brief of Respondent Washington Utilities and Transportation Commission
4. Response Brief of Intervenor-Respondent Arrow Launch Service, Inc.
5. Reply Brief of Petitioners James Courtney and Clifford Courtney
6. Certified administrative record (AR) for Washington Utilities and Transportation Commission Docket No. TS-151359

and the Court having heard oral argument on October 31, 2016, the Court enters its findings of fact, conclusions of law, judgment, and order, as follows:

MEMORANDUM DECISION

As a supplement to the findings of fact and conclusions of law set forth below, the Court incorporates its memorandum decision, dated January 25, 2017, and attached hereto as Exhibit A.

FINDINGS OF FACT

1. On July 1, 2015, James Courtney and Clifford Courtney filed with the Washington Utilities and Transportation Commission a petition pursuant to RCW 34.05.240 seeking an order declaring the applicability of the certificate requirement in RCW 81.84.010(1) to five hypothetical boat transportation services detailed at pages 16-26 of the petition (AR 18-28). AR 3-347.

2. The Commission entered a declaratory order in Docket No. TS-151359, November 16, 2015, pursuant to RCW 34.05.240. AR 384-94.

3. The Courtneys timely petitioned for judicial review of the Commission's declaratory order, pursuant to RCW 34.05.570.

4. The Courtneys' petition for judicial review made the following allegations: (1) the Commission's declaratory order is "outside the statutory authority or jurisdiction of the agency conferred by any provision of law" within the meaning of RCW 34.05.570(3)(b); and (2) the Commission's declaratory order is "arbitrary or capricious" within the meaning of RCW 34.05.570(3)(i).

5. This Court reviewed the applicability of RCW 81.84.010(1)'s certificate requirement to the five proposed boat transportation services detailed at pages 16-26 of the Courtneys' petition for declaratory order (AR 18-28).

6. The Court finds that in each proposal, the Courtneys will serve the same members of the

public currently served by the incumbent certificate holder, Lake Chelan Boat Company. The public will merely be moving to another boat for travel. Additionally, the Courtneys will serve the public indifferently. Customers will be able to make a reservation regardless of their identity.

7. Proposed services 1-4 will not operate as mere incidental adjuncts to existing Stehekin, Wash., businesses operated by the Courtneys or by their family members. Proposed services 1-4 involve customers separately paying for the voyage at a rate that presumably provides for the payment of debt, operation, upkeep, and maintenance of the vessel. At $37.00 one-way, or $74.00 round-trip, proposed services 1-4 are not incidental to Stehekin businesses but, rather, stand alone.

8. A boat transportation service that operates between fixed termini or upon a regular schedule is not a "charter service." Proposed service 5 is not a "charter service" because it would involve a vessel running regular routes between federally-owned docks at Stehekin and either the federally-owned dock at Fields Point Landing or the Manson Bay Marina. The exemption of "charter services" in WAC 480-51-022(1) is redundant considering the "fixed termini" and "regular route" language in RCW 81.84.010(1).

9. The Commission has not authorized exemptions to RCW 81.84.010(1)'s certificate requirement that are similar to the exemptions

to RCW 81.68.040 (certificate requirement for auto transportation companies) set forth in WAC 480-30-011.

10. All five proposed services will operate "for the public use" within the meaning of RCW 81.84.010(1).

11. All five proposed services will require a "certificate declaring that public convenience and necessity require such operation." RCW 81.84.010(1).

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to chapter 34.05 RCW, Part V. Venue is proper in this Court pursuant to RCW 34.05.514(1).

2. Petitioners have standing to obtain judicial review of the Commission's declaratory order. RCW 34.05.530.

3. Petitioners have the burden to demonstrate the invalidity of the Commission's declaratory order. RCW 34.05.570(1)(a).

4. In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. RCW 34.05.574(1).

5. Chapter 81.84 RCW, including RCW 81.84.010(1)'s certificate requirement, does not violate Article XII § 22 of the Washington Constitution. *Kitsap Cy. Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass 'n*, 176 Wash. 486, 30 P.2d 233 (1934); *Dep't of Public Works v. Inland Forwarding Corp.*, 164 Wash. 412, 2 P.2d 888 (1931).

6. All five proposed services will operate "for the public use" within the meaning of RCW 81.84.010(1).

7. All five proposed services will require a "certificate declaring that public convenience and necessity require such operation." RCW 81.84.010(1).

8. Petitioners failed to demonstrate that the Commission's declaratory order is "outside the statutory authority or jurisdiction of the agency conferred by any provision of law," as required for judicial relief under RCW 34.05.570(3)(b)

9. Petitioners failed to demonstrate that the Commission's declaratory order is arbitrary or capricious, as required for judicial relief under RCW 34.05.570(3)(i).

FINAL JUDGMENT AND ORDER

THEREFORE, IT IS ORDERED THAT the agency declaratory order entered by the Washington Utilities and Transportation Commission on November 16, 2015, in Docket TS-151359 is AFFIRMED.

DATED this 6th day of February, 2017.

/s/ Alicia H. Nakata
HON. ALICIA H. NAKATA

Presented by:

ROBERT W. FERGUSON
Attorney General

/s/ Julian H. Beattie
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WSBA No. 45586
Assistant Attorney General
Counsel for Respondents WUTC, David Danner, Ann Rendahl, Philip Jones, and Steven King

Approved as to form:
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/s/ Michael E. Bindas
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Attorney for Petitioners James and Clifford Courtney

Approved as to form
Notice of presentation waived:

/s/ David W. Wiley
David W. Wiley,
WSBA No. 8614
Williams Kastner & Gibbs LLC
Attorney for Intervenor-Respondent Arrow Launch Service, Inc.

EXHIBIT A

Memorandum Decision in Chelan County Superior Court Docket 15-2-01015-2

**SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR CHELAN COUNTY**

**Lesley A. Allan,
Judge**
Department 1
T.W. Small, Judge
Department 2

[LOGO]

**Alicia H. Nakata,
Judge**
Department 3
Bart Vandegrift
Court Commissioner

401 Washington Street
P.O. Box 880
Wenatchee, Washington 98807-0880
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January 25, 2017

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Seattle, WA 98101-2380

RE: *Courtney v. WUTC, et al. – Chelan Co. Cause No. 15-2-01015-2*

Dear Counsel:

The following is the Court's memorandum opinion:

BACK GROUND

The city of Chelan sits at the southeast end of Lake Chelan. Approximately fifty-five (55) miles away at the northwest end of Lake Chelan is Stehekin, which is accessible only by boat, float plane, or hiking in by foot. Currently, most Stehekin tourism occurs during the summer months with the vast majority of tourists traveling on the ferry operated by the Lake Chelan Boat Company (Boat Company) between Chelan and Stehekin.

For over twenty years, the Petitioners James and Clifford Courtney have attempted to commence boat transportation services for the customers of their Stehekin-based tourism businesses. Their efforts to add transportation services as part of their tourism businesses have been unsuccessful because of the requirement for a commercial ferry to obtain a "certificate of public convenience and necessity" (CPCN) from the Washington Utilities and Transportation Commission (WUTC) before being allowed to operate boat transportation services for public use. They have chafed under the burden of having to acquiesce to the loss of this potential business to the Boat Company.

In 1983, the WUTC transferred the existing CPCN for providing ferry service to Stehekin from the previous grantee to the current Boat Company. In 1997,

Petitioner James Courtney applied for, but was denied the issuance of a CPCN to operate an additional ferry service to Stehekin. Subsequent letters to the director of the WUTC in 2006 and 2008 by the Courtneys in hopes of obtaining a favorable advisory opinion avoiding the necessity of a CPCN for a proposed "on-call boat service" or a "boat service incidental to other services" were also unsuccessful. In 20092010, Clifford Courtney unsuccessfully sought state legislative change to relax or to create an exemption from the requirement of obtaining a CPCN. See *WUTC Report to the Legislature, Pursuant to ESB 5894, January 14, 2010; AR 220.* Most recently the Courtneys have sought relief from the federal courts. *Courtney v. Goltz, 736 F.3d 1152 (9th Cir. 2013) AR 183-207.*

By setting the terms for the issuance of a CPCN, the WUTC controls the fares charged and the required services provided by the Boat Company in order to ensure not only service during the lucrative summer months, but as well all-the-year-round service for the approximately seventy-five (75) year round residents of Stehekin. See *WUTC Report to the Legislature, Pursuant to ESB 5894, January 14, 2010; AR.215, 217.*

Because there is no legal obligation for the state or local governments to provide ferry service, the state regulatory scheme provides considerable protection to the private investor, who has incurred substantial risk and capital cost to initiate ferry service by requiring a potential competitor offering services "for the public use for hire between fixed termini or over a regular route" to apply and secure a CPCN. RCW 81.84.010. The

WUTC may not grant a CPCN over the objection of the existing certificate holder already serving the area unless the existing certificate holder has failed or refused to provide reasonable and adequate service. RCW 81.84.020.

Against this back drop, the Courtneys requested and received a declaratory order from the WUTC regarding whether their proposed options for boat service would require a Certificate of Public Convenience and Necessity (CPCN). The five options are as follows:

> Option No. 1: The passengers of the boat transportation service, would be lodging customers of the Stehekin Valley Ranch owned by Clifford Courtney and his wife. The boat company would be separately owned by Cliff Courtney. The service would operate a 50-64 foot boat between Memorial Day and early October, and run solely between Stehekin, and Fields Point Landing (a distance of approximately 34 miles) or between Stehekin and Manson Bay Marina (a distance of 42 miles). Fares would be approximately $37 one way or $74 round-trip and reservations for boat service would be made at the time of booking lodging over the internet or by phone.

Option No. 2: This boat transportation service would provide not only service to lodging customers of the Stehekin Valley Ranch, but as well those participating in one or more of the activities offered at the Ranch, such as horseback riding. The other details are essentially the same as Option No. 1.

Option No. 3: Under this option the boat would be owned by Clifford and James Courtney. The boat would service customers of all lodging, recreational and food businesses owned and operated by various Courtney family members. The boat service and reservations would be the same as Option No. 1, but would also make intermediate flag stops or stand- alone trips if required by the requested services by obtaining dock permits from the US Forest Service, National Park Service and other agencies as required. (The Court notes that flag stop service defined as an on-demand stop for either pick up or drop off is also offered by the Boat Company. *WUTC Report to the Legislature, Pursuant to ESB 5894, January 14, 2010; AR 228*).

Option No. 4: Clifford and James Courtney would own the boat. The boat service would serve various businesses operating at Stehekin, including businesses not owned and operated by the Courtney family members, and would make intermediate flag stops or stand-alone trips as described in Option 3. The other details are the same as Option No.1.

Option No. 5: This option is described as a "charter service". Clifford and James Courtney would own the boat. Boat service would be limited to customers who had purchased a travel package of Stehekin lodging and services through a Stehekin-based travel company which was not owned by any Courtney. The travel company would consolidate the various bookings and then hire the Courtney boat service by a private "charter" agreement. The boat service would include intermediate flag stops or stand-alone trips as described in Option No. 3.

In its declaratory order, the WUTC held that a CPCN was required in each of the five options put forward by the Courtneys.

ANALYSIS

A. Standing

Pursuant to RCW 34.05.530, the Courtneys have standing to obtain judicial review of the WUTC's action. The WUTC declaratory order has aggrieved the Courtneys by determining that they must obtain a certificate declaring that public convenience and necessity allow for the operation of additional boat services to Stehekin. A judgment by this Court in their favor would substantially eliminate or redress the prejudice caused or likely to be caused by the WUTC's declaration that a CPCN is required for all five options. *See* RCW 34.05.530.

B. Standard of Review

The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a). The Courtneys seek review based upon two criteria: (1) The order is outside the statutory authority or jurisdiction of the WUTC; and (2) the order is arbitrary or capricious. *See* RCW 34.05.570(3)(b), (i).

This matter involves review of a declaratory order based on a set of undisputed hypothetical facts. When considering a matter wherein the facts are undisputed, conclusions of law are reviewed de novo. *Vance v. Dep't of Retirement Systems*, 114 Wn. App. 572, 576, 59 P.3d 130 (2002), *rev. denied*, 149 Wn.2d 1028 (2003). The reviewing court accords substantial weight to legal interpretations of the agency when it is acting within its realm of expertise. 114 Wn. App. at 576. An agency's

regulations "are entitled to considerable deference since they are the construction of [statutes] by those whose duty is to administer [their] terms." *Gross v. City of Lynnwood*, 90 Wn.2d 395, 399, 583 P.2d 1197 (1978) (modified to reflect plural tense).

C. Chapter 81.84 does not violate Art. XII, § 22 of Wash. Const.

The Courtneys' constitutional argument calls for the examination of the regulation of commercial ferry services for the public welfare. The operation of a commercial ferry for the public use for hire between fixed termini or over a regular route requires the commission to issue a certificate declaring that public convenience and necessity (CPCN) require such operation. RCW 81.84.010.

The Washington Supreme Court recognized the need for the state to control and regulate ferries traveling over its navigable waters in *Kitsap County Transp. Co. v. Manitou Beach Agate Pass Ferry Ass'n, et al.*, 176 Wash. 486, 30 P.2d 233 (1934). In response to the Washington Supreme Court reversing an order issued by the Department of Public Works[1] granting a CPCN to a company desiring to add a ferry to a route already serviced by another company; a Ferry Association, consisting of about twenty (20) residents of Bainbridge Island, was formed "to create a social, benevolent and charitable organization," in an attempt to avoid the necessity

[1] The Washington Department of Public Works was a predecessor to the WUTC.

of an issuance of a CPCN. 176 Wash. at 488. The residents each paid a $1.00 fee to join the Association which in reality was formed to operate a ferry service between Seattle and Bainbridge Island. 176 Wash. at 488. On the first day that the Association began to run its scheduled trips, the company holding the certificate filed an action to enjoin the Association. After issuing a temporary restraining order stopping the service after 3 trips, the King County Superior Court entered a decree permanently restraining the Association from operating a ferry service over the route. 176 Wash. at 488-89.

The Association argued that Chapter 248, § 1, which was eventually codified as RCW 81.84.020, violated Art. XII, Sec. 22, of the Washington Constitution. The Courtney's advance the same argument in the matter at bar claiming that the restriction of ferry service on Lake Chelan is inconsistent with the "abhorrence of monopolies" contained in the Washington Constitution.

The Washington Supreme Court responded by reflecting on the policy and history of granting exclusive service licenses for ferries. "The act is but an exercise of the power of the state recognized and exercised from time immemorial, to control travel over and on its navigable streams and waters." 176 Wash. at 489. Commercial ferries are subject to regulation and control in order to preserve a benefit to the public of having a mode of transportation available. The Supreme Court's decision included a recitation of the law from *Norris v.*

Farmers' & Teamsters' Co., 6 Cal. 590, 65 Am. Dec. 535 (1856):

> The reason for this, as given by Mr. Blackstone, is that the owner of a ferry is bound to the public to keep it in repair and readiness for the use of the citizens, and that he cannot do if his franchise may be invaded, or if the income of the bridge or ferry may be curtailed by diverting passengers by means of a rival unauthorized establishment of a like kind. Therefore, although the public convenience is the occasion of granting franchises of this nature, and, for example, the ferry established on the road chartered is *publici juris*, yet the property is private, and consequently an injury to it may be the subject of an action, for no person could be expected to serve the public by bestowing his time, labor and money in establishing a ferry or erecting a bridge, if its value could be immediately destroyed by the caprice or malice of private persons, in adopting means of drawing away the custom to some establishment of their own.

Kitsap County Transp. Co., 176 Wash. at 490 (*quoting Norris*, 6 Cal. at 595).

The Supreme Court further found that the granting by the state of a right to erect a bridge or operate a ferry over navigable waters did not violate Art. XII, Sec. 22, because no person had a common right to engage in either activity. 176 Wash. at 490 (*citing Charles River Bridge v. Warren Bridge, et al.*, 36 U.S. 420 (Story, J., *dissenting*)).

> [T]herefore the grant was no restriction of any common right. It was neither a monopoly; nor, in a legal sense, had it any tendency to a monopoly. It took from no citizen what he possessed before; and had no tendency to take it from him. It took, indeed, from the legislature the power of granting the same identical privilege or franchise to any other persons. But this made it no more a monopoly, than the grant of the public stock or funds of a state for a valuable consideration.

176 Wash. at 490 (*quoting Charles River Bridge*, 36 U.S. at 607-08 (Story, J., *dissenting*)).

Upon considering the statutory schemes giving authority to the state to grant CPCN's that result in exclusive franchises, the Washington Supreme Court has opined that such grants are not unconstitutionally monopolistic or oppressive. *State v. Inland Forwarding Corp.*, 164 Wash. 412, 416, 2 P.2d 888 (1931). This is because the use of the franchise is "subject to regulation and may be canceled whenever the holders fail to adequately and satisfactorily perform the duties of a common carrier." 164 Wash, at 417 (considering Chapter 111 § 1, eventually codified as RCW 81.68.020, regulation of common carriers over public highways).

> The relation of the holders of certificates towards the public, as to whether it is monopolistic, must be measured, not by their inclination or choice of possible oppression, but by ascertaining if they can be compelled to render fair and reasonable service at proper

> rates to the 'satisfaction of the commission,' the state[.]
>
> . . .
>
> The monopoly interdicted by the Constitution is one whose activities are hostile and oppressive to the common welfare, rather than those which at all times are subject to the dominion, judgment, and immediate regulation by the state.

164 Wash. at 417.

This line of historical precedential cases recognizes that the protection conveyed by the granting of a CPCN permitting exclusive service is in return for the state's right to promote the public welfare by exercising its authority to cancel, suspend, revoke, alter, or amend the terms of any certificate in its regulation of ferry services for the common good. Because the Boat Company has enjoyed since 1983 such an exclusive grant, it is now subject to the Courtney's challenge. However, the provisions of RCW 81.84.020 and RCW 81.84.060 allow the Commission to affect the status of the Boat Company including its rates if it fails to provide reasonable and adequate service, or violates the orders, decisions, or regulations of the Commission. Therefore, the Commission's actions in permitting exclusive ferry service do not violate Art. XII, Sec. 22 of the Washington Constitution.

"The Public Use"

A commercial ferry is required to obtain a CPCN to operate a vessel or ferry for the public use for hire between fixed termini or over a regular route. RCW 81.84.010 (1). The term "commercial ferry" includes any corporation, company, partnership, or person "owning, controlling, leasing, operating, or managing any vessel over and upon the waters of this state." RCW 81.04.010(13); WAC 480-51-020(1). "'For hire' means transportation offered to the general public for compensation." WAC 480-51-020(7).

The Courtneys' claim that the WUTC has acted outside its statutory authority. They allege that the described proposed services in Options No. 1-5 are sufficiently restricted by the limitations of being a reserved customer of a business to be excluded from "for the public use for hire." The parties have utilized dictionary definitions and cases involving eminent domain to define "public use." The intervenor, Arrow Launch Service, offers a number of dictionary definitions which boil down to a use which is open to all members of the community. (*See* Brief of Intervenor, pp. 7-9). When the Court is determining terms within a statute, the intent of the legislature must be considered. *Vance v. Dept of Retirement* Systems, 114 Wn. App. at 577. When more than one meaning of statutory language is possible, a reviewing court will apply the definition that promotes the purpose of the statute. 114 Wn. App. at 577.

In *Terminal Taxicab Company, Inc., v. Kutz*, 241 U.S. 252 (1916), was held to be a common carrier coming

under the jurisdiction of the District of Columbia Public Utility Act despite private contracts with hotels which gave it the exclusive right to solicit in and about the hotels, but limiting its service to guests of the hotel. The contracts also required the company to furnish enough cabs to meet the needs of guests of the hotels. 241 U.S. at 254-55. The Supreme Court observed that the public was free to lodge at the hotel if it could afford to as well as to go "through the hotel door to call on the plaintiff for a taxicab." 241 U.S. at 255. The Court held that the service affected such a considerable fraction of the public that it remained a common carrier despite the contracts. "The public does not mean everybody all the time." 241 U.S. at 255.

Commercial ferry service has existed "for time immemorial" to provide a benefit to the general public. *Kitsap County Transp. Co.*, 176 Wash. at 489. The users of the ferry in *Kitsap County Transp. Co.*, were members of the general public. They had not been segregated into a particular class of identifiable individuals. All passengers desired to travel between Bainbridge Island and Seattle. 176 Wash. at 494. The Association's ferry would merely be using the same members of the general public which would have been traveling on the certificated ferry. Likewise, the Courtneys will be servicing the same members of the public who had been traveling on Chelan Boat Company boats. The public will merely be moving to another boat for travel.

The manner of purchasing passage exhibits the transaction with the general public. At the time a member of the general public purchases activities from one of

the Courtney or Stehekin businesses, they are given the "option" to purchase a boat ticket. Common law would classify the Courtneys' boat service as a "common carrier." A common carrier is one whose business is to transport persons or property from place to place for compensation and who holds himself out to serve the public indifferently. *Cushing v. White*, 101 Wash. 172, 181, 172 P.229 (1918). The Courtneys will serve the public indifferently. Customers are able to make a reservation regardless of their identity.

The Courtneys have cited cases from other jurisdictions wherein transportation is provided by or arranged by a business as an incidental to the principal activity. When examining the facts, it is apparent that the Courtneys' boat service is more than incidental. Options No.'s 1 through 4 involve customers separately paying for the voyage at a rate which presumably provides for the payment of debt, operation, upkeep, and maintenance of the vessel. At $37.00, one-way, or $74.00, round-trip, the boat service is not incidental to the purchased Stehekin activities, but stands alone. *See Meisner v. Detroit, B.I. & W. Ferry Co.*, 154 Mich. 545, 548-49, 118 N.W. 14 (1908)(defendant owner of amusement park and boats allowing access to park was not a common carrier in that boat service was incidental to the business); *see also State ex rel. Public Utilities Comm'n v. Nelson*, 65 Utah 457, 238 P. 237 (1925)(automobile omnibus owner transporting only persons attending campground, for $20 a day regardless of the number of passengers, not a common carrier and not required to obtain certificate; transportation

was incidental or secondary to the business of the camp).

D. Option 5 is not a Charter Service

Through its regulations, the WUTC has exempted "charter services" from the requirement of obtaining a CPCN. WAC 480-51-022(1).[2] " '[C]harter service' means the hiring of a vessel, with captain and crew, by a person or group for carriage or conveyance of persons or property." WAC 480-51-020(14).

In determining that the Courtneys' fifth option was not a "charter service", the Courtneys argue that the WUTC relied on an invalid definition of charter services by relying on a dissenting opinion in *Iron Horse Stage Lines, Inc. v. Public Utilities Commission*, 125 Or. App. 671, 866 P.2d 516 (1994). The dissenting justice wrote, that pursuant to ORS 767.005(5), a charter service required a common trip purpose and "a complete, cohesive group." 125 Or. App. at 677 (Muniz, J.,

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[2] The language of WAC 48-51-022(1) is taken from Washington Laws, 1995, Chap. 361, § 3. This statute, codified at RCW 81.84.007, was repealed, effective July 1, 2002, pursuant to Laws 2000, Chap. 53, § 1. The laws were of limited duration requiring excursion services to have CPCN's. *See* Wash. Laws 1995, Chap. 361, §§ 2, 3; Wash. Laws 2000, Chap. 53, § 2. Testimony for ESHB 1922 reflected a concern to ensure service by those who, at considerable time and expense, had obtained UTC operating authority. Senate Bill Report, ESHB 1922, pg 2 (http://lawfilesext.leg.wa.gov/biennium/1995-96/Pdf/Bill%20Reports/Senate/1922-S.SBR.pdf). The exemption of "charter services" from the CPCN requirement is redundant when considering the *fixed termini* or *regular route* language of RCW 8184.010(1).

dissenting). Washington's Legislature has not provided such a definition.[3]

However pursuant to RCW 81.04.010(13), a commercial ferry is defined broadly to include any person or company "owning, controlling, leasing, operating, or managing any vessel over and upon the waters of this state." A commercial ferry is subject to obtaining a CPCN if the ferry operates *between fixed termini or over a regular route.* RCW 81.84.010(1).

"Regular" is defined by Merriam-Webster as "recurring, attending, or functioning at fixed, uniform, or normal intervals <a *regular* income> <a *regular* churchgoer> <*regular* bowel movements> . . . ." www.merriam-webster.com/dictionary/regular. Option No. 5 would involve a vessel running regular routes between federally-owned docks at Stehekin and either the federally-owned dock at Fields Point Landing or the Manson Bay Marina. (Admin. Record, pg 27). "Operations under private charter are not conducted between fixed termini, nor upon any regular schedule." *North Bend Stage Lines, Inc. v. Schaaf et al.*, 199 Wash. 621, 627, 92 P.2d 702 (1939). Consequently, Option No. 5 is not a charter service.

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[3] *But see* RCW 81.70.020 ("charter party carrier" means every person engaged in transportation over the public highways of a group pursuant to a common purpose and under a single contract).

E. Commission's Action not Arbitrary and Capricious

The Courtneys final argument for reversing the Order by the WUTC is that its decision was arbitrary and capricious. When considering a claim that agency action was arbitrary and capricious, a reviewing court examines "whether the decision constitutes 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 565-66, 309 P.3d 673 (2013), *rev. denied*, 179 Wn.2d 1015 (2014). The Courtneys argue that the Order is arbitrary and capricious in that it does not utilize exemptions authorized by the legislature for auto transportation companies.

RCW 81.68.040 provides that an "auto transportation company" must obtain a CPCN if it transports persons between fixed termini or over a regular route. The automobile transportation act does not apply to persons who own taxicabs, hotel buses, school buses, or any other carrier which is not an auto transportation company. RCW 81.68.015.[4] Consistent with these

[4] RCW 81.68.015 provides other exceptions: (1) Persons operating a vehicle within the city limits of towns and for a distance not exceeding 3 miles beyond the limits; (2) commuter ride sharing; (3) if commission finds that service does not serve and essential transportation purpose, is solely for recreation, and would not adversely affect the holder of a certificate; and (4) the service is provided pursuant to a contract with a state agency or funded by a grant issued by the department of transportation and exemption is otherwise in the public interest.

exclusions, the WUTC has identified exempt operations such as taxi cabs, hotel buses, or school buses. WAC 480-30-011 (6). The WUTC also exempts private carriers who utilize their own cars as an incidental adjunct to a private business. In addition, the WUTC exempts vehicles transporting transient air flight crews or in-transit airline passengers between an airport and temporary hotel accommodations under an arrangement between an airline and a passenger transportation company. WAC 480-30-011 (8), (9).

The WUTC has not carved out similar exemptions for water transportation. However, it has adopted regulations exempting certain vessels and operations: (1) Charter services; (2) passenger-carrying vessels departing and returning to the point of origin without intermediate stops; (3) historical vessels or replicas operated by non-profits or governmental agencies; and (4) excursion services. WAC 480-51-022.

"It is a well settled rule of statutory construction that exceptions to legislative enactments must be strictly construed," *Hall v. Corporation of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 801, 498 P.2d 844 (1972). The Courtneys have the burden of proving that they qualify for an exception to the commercial ferry act. *See* 80 Wn.2d at 847 (proponent has the burden of proving every fact essential to qualify for the exception).

The exemptions concerning auto transportation companies are not available for commercial ferries. *See* RCW 81.68.015 The legislature has elected not to authorize such exemptions for commercial ferries. The

regulations adopted by the WUTC are consistent with the directives of the legislature. *Compare* RCW 81.84.010 (requiring CPCN for vessels for public use traveling between fixed termini or a regular route) *with* WAC 480-51-022 (exempting certain operations of vessels for public use). The Court must give substantial weight to the legal interpretations of the agency when it is acting within its realm of expertise. *See Vance v. Dep't of Retirement Sys.*, 114 Wn. App. at 576. Therefore, the Courtneys have not proven that the actions by the WUTC are arbitrary and capricious.

CONCLUSION

The Courtney's petition for review is denied. The Court finds that each of the Options Nos.1-5 offered by the Courtney's is "for the public use". In addition, Option No. 5 is not a charter service exempt from the necessity of obtaining a certificate of public convenience and necessity.

The Court requests that counsel prepare the Court's Order.

Sincerely,

/s/ Alicia H. Nakata

Alicia H. Nakata
Judge

[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

Steheki n 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 PL LC, 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

[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.

> 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 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.

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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.").

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

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[5] Petition ¶ 131

> rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand. We certainly may assume that in its own interest it does not attempt to do so. *The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. The public does not mean everybody all the time*.[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.

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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").

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 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.

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[7] WAC 480-30-011(g), (i) & (j).

[8] RCW 81.84.010(1).

[9] RCW 81.84.010(2).

[10] RCW 81.84.010(3).

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

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[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.").

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]

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

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

[15] WAC 480-51-022(1).

[16] WAC 480-51-020(14).

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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[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

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

> 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 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

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[19] *Id*. at 678-79.

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

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

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[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

their core arguments or ultimate decisions, alters our interpretation of Washington law.

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).

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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.

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

134 S.Ct. 2697

Supreme Court of the United States

James COURTNEY, et al., petitioners,
v.
David DANNER, Chairman and Commissioner of the Washington Utilities and Transportation Commission, et al.

No. 13–1064.

June 2, 2014.

Case below,
736 F.3d 1152.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES COURTNEY and CLIFFORD COURTNEY, *Plaintiffs-Appellants*, v. JEFFREY GOLTZ, chairman and commissioner; PATRICK OSHIE, commissioner; PHILIP JONES, commissioner, in their official capacities as officers and members of the Washington Utilities and Transportation Commission; DAVID DANNER, in his official capacity as executive director of the Washington Utilities and Transportation Commission, *Defendants-Appellees*.	No. 12-35392 D.C. No. 2:11-cv-00401-TOR OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Thomas O. Rice, District Judge, Presiding

Argued May 6, 2013
Submitted December 2, 2013
Seattle, Washington

Filed December 2, 2013

Before: Michael Daly Hawkins, Sidney R. Thomas, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

COUNSEL

Michael Eugene Bindas (argued) and Jeanette Motee Petersen, Institute for Justice, Bellevue, WA, for Plaintiffs-Appellants.

Fronda Colleen Woods (argued), Assistant Attorney General, Office of the Attorney General, Olympia, WA, for Defendants-Appellees.

David Wiley, Williams Kastner, Seattle, WA, for Amicus Curiae.

OPINION

NGUYEN, Circuit Judge:

James and Clifford Courtney challenge Washington statutes that require a certificate of "public convenience and necessity" ("PCN") in order to operate a ferry on Lake Chelan in central Washington state. The Courtneys claim that these state laws abridge their right to use the navigable waters of the United States, in violation of the Privileges or Immunities Clause of the Fourteenth Amendment. The Washington Utilities and Transportation Commission and its various officers and directors (collectively, "WUTC") successfully moved to dismiss the case and this appeal followed.

The Courtneys' first claim for relief challenges the constitutionality of the PCN requirement as applied to the provision of public ferry service on Lake Chelan. We hold that the Privileges or Immunities Clause of the Fourteenth Amendment does not encompass a right to operate a public ferry on intrastate navigable waterways and affirm the district court's dismissal of this claim. The Courtneys' second claim challenges the PCN requirement as applied to the provision of boat transportation services on Lake Chelan solely for patrons of specific businesses. As to this claim, we find that the district court properly abstained from deciding the issue under the *Pullman* doctrine, but that it should have retained jurisdiction instead of dismissing the claim. Therefore, we vacate and remand the second claim with instructions that the district court retain jurisdiction over the constitutional challenge.

BACKGROUND

I

James and Clifford Courtney are fourth-generation residents of Stehekin, a small unincorporated community on the northwest end of Lake Chelan in central Washington state. Lake Chelan is a narrow, fifty-five-mile long lake, which has been designated by the Army Corps of Engineers as a "navigable water of the United States." The northwest portion of Lake Chelan, including Stehekin, is part of the Lake Chelan National Recreation Area. Although it is only accessible by boat, plane, or foot, Stehekin has long been a

summer destination for tourists. *See* WUTC, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan* 3–4 (2010), *available at* http://www.wutc.wa.gov/webimage.nsf/0/d068a7290f85512a882576ac007e2d73/ ("Ferry Report"). The Courtneys and their siblings own and operate several businesses in Stehekin, which provide lodging and recreational activities such as white water rafting tours and horseback riding.

Most tourists and residents reach Stehekin by way of a public ferry operated by the Lake Chelan Boat Company. The state has regulated ferry service on Lake Chelan since 1911. By the 1920s, there were at least four different ferry companies offering services on Lake Chelan. Then, in 1927, the Washington legislature enacted a law that conditioned the right to operate a ferry service upon certification that such service was required by "public convenience and necessity."[1]

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[1] The Courtneys cite a 1927 *Seattle Daily Times* article in support of their argument that the legislature's goal in passing the PCN requirement was to protect existing ferry owners from competition, and have asked that we take judicial notice of this article. Because we do not rely upon the article, we deny the motion.

The Ferry Report describes the rationale for the regulation as follows: for certain industries that "typically have very high capital costs, benefit from economies of scale, and provide an indispensable service to the public[,] . . . the legislature has made a judgment that the public's interest in reliable and affordable service is best served by a single, economically regulated provider whose owners can make the sizeable investments needed to

II

A

In its current form, Washington Revenue Code § 81.84.010 dictates that a "commercial ferry may not operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within [Washington] . . . without first applying for and obtaining from the [WUTC] a certificate declaring that public convenience and necessity require such operation." Wash. Rev. Code § 81.84.010(1). In order to obtain a PCN certificate, a potential ferry operator must prove that its proposed operation is required by "public convenience and necessity," and that it "has the financial resources to operate the proposed service for at least twelve months." *Id.* § 81.84.020(1)–(2). If the territory in which the applicant desires to set up operation is already served by a commercial ferry company, no PCN certificate may be granted unless the applicant proves that the existing certificate holder: "[(a)] has failed or refused to furnish reasonable and adequate service[; (b)] has failed to provide the service described in its certificate or tariffs after the time allowed to initiate service has elapsed[;] or [(c)] has not objected to the issuance of the certificate as prayed for." *Id.* § 81.84.020(1).

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initiate and maintain service without the threat of having customers drawn away by a competing provider." Ferry Report 11.

B

Since the statute's enactment, only one PCN certificate has been issued for providing ferry services on Lake Chelan. It is now held by Lake Chelan Recreation, Inc. d/b/a Lake Chelan Boat Company.[2] In 1997, James Courtney applied for a PCN certificate to operate a commercial ferry out of Stehekin. The Lake Chelan Boat Company objected, and the WUTC denied Courtney's application, finding that the Lake Chelan Boat Company provided "reasonable and adequate service," the proposed service might "tak[e] business from" the company, and Courtney failed to satisfy the financial responsibility requirement. Courtney did not seek judicial review of the WUTC's decision. *See* Wash. Rev. Code §§ 34.05.570, 34.05.574.

In 2006, James Courtney explored the possibility of starting an on-call boat service out of Stehekin, which he thought might fall within the "charter service" exemption to the PCN requirement. Because the proposed service would need to utilize federally owned docks, Courtney applied to the United States Forest Service for a special-use permit, which required confirmation that the proposed service was actually exempt from the PCN requirement. The WUTC initially opined that a PCN certificate would not be needed for the proposed on-call boat service, but changed its mind after the Lake Chelan Boat Company objected to the

[2] At least four potential ferry operators have applied for a PCN certificate over the last sixty years, but all were denied by the WUTC after Lake Chelan Boat Company objected to the applications.

proposal. Several months later, the WUTC again reversed course, indicating that the proposed service would be exempt from the PCN requirement. However, no formal decision was ever rendered. WUTC's executive director, David Danner, did not respond to the Forest Service's request for an advisory opinion on this issue.

In 2008, Clifford Courtney wrote to David Danner, inquiring whether various other kinds of boat transportation services (distinct from the proposed on-call service) would require a PCN certificate. The suggested services included (a) one in which Clifford would charter a boat and offer transportation as part of a package for guests who intended to stay at his ranch and go river rafting, and (b) a scenario in which he would purchase his own vessel in order to transport patrons of his various Stehekin-based businesses. Danner responded that such services would require a certificate because they would still be "for the public use for hire," and that it "[did] not matter whether the transportation [Clifford] would provide [was] 'incidental to'" other businesses. However, Danner noted that his response merely reflected the opinion of the WUTC staff and Courtney was free to pursue a formal declaratory ruling by the commissioners provided that "the existing certificate holder . . . agree[d] to participate" in the proceeding. Were Courtney simply to proceed with the proposed service, the WUTC could initiate a "classification proceeding," during which Clifford would be required to testify and prove that his activities did not require a PCN certificate. The WUTC

also orally confirmed to Courtney that his proposed services would likely require a PCN certificate.

C

In 2009, after Clifford Courtney wrote to the governor and several state legislators regarding the PCN requirement, the legislature directed the WUTC to conduct a study on the regulation of commercial ferry services on Lake Chelan. The report by the WUTC, which issued in January 2010, concluded that Lake Chelan Boat Company was providing satisfactory service and recommended that there be no change to the existing laws and regulations. The WUTC noted that there might be flexibility under the existing law to permit some competition by exempting certain services from the PCN certificate requirement, provided that any such service would not "significantly threaten" the existing certificate holder's business.

D

In October 2011, the Courtneys sued the WUTC and various commissioners and directors in their official capacities, seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. The Courtneys claimed that the PCN requirement abridges their right to use the navigable waters of the United States under the Privileges or Immunities Clause of the Fourteenth Amendment, and is therefore unconstitutional.

The WUTC moved to dismiss the Courtneys' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court granted the motion. The district court dismissed the Courtneys' first claim—challenging the constitutionality of the PCN requirement as applied to the provision of public ferry service on Lake Chelan—with prejudice. The district court concluded that it was unclear that the "right to use the navigable waters of the United States" was "truly a *recognized* Fourteenth Amendment right," and that even if it was, it did not extend to protect the right "to operate a ferry service open to the public." The district court dismissed the Courtneys' second claim—challenging the constitutionality of the PCN requirement as applied to provision of boat transportation services on Lake Chelan solely for patrons of specific businesses—without prejudice. As to the second claim, the court held that the Courtneys lacked standing; their claim was unripe; and, notwithstanding its ripeness finding, the court would abstain pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

DISCUSSION

I

To state a claim for relief under 42 U.S.C. § 1983, the Courtneys must allege facts that, if true, constitute a violation of a right guaranteed by the United States Constitution. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Their claim for declaratory relief under 28 U.S.C. § 2201 similarly requires

that the Courtneys allege facts that, if true, would violate federal law. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950).

"We review *de novo* a district court's dismissal for failure to state a claim under Federal [Rule of] Civil [Procedure] 12(b)(6)." *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011). In doing so, we take all factual allegations in the complaint as true and construe them in the light most favorable to the Courtneys. *See id.*

II

A

The Courtneys argue that the district court erred in dismissing their first claim relating to the provision of public ferry service because the Privileges or Immunities Clause of the Fourteenth Amendment protects the right "to use the navigable waters of the United States."[3] We agree with the district court that even if the Privileges or Immunities Clause recognizes a federal right "to use the navigable waters of the

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[3] Section I of the Fourteenth Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;* nor shall any state deprive any person of liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV. § 1 (emphasis added).

United States," the right does not extend to protect the Courtneys' use of Lake Chelan to operate a commercial public ferry.

In its seminal decision interpreting the Privileges or Immunities Clause of the Fourteenth Amendment—the *Slaughter-House Cases*, 83 U.S. 36 (1872)—the Supreme Court upheld a Louisiana statute that granted a private company the exclusive right to operate a slaughter-house on the Mississippi River. *Id.* at 58–61, 83. In doing so, the Court distinguished between rights that accompany state citizenship and those that exist by virtue of United States citizenship. *Id.* at 72–77. The Court explained that the Fourteenth Amendment protects "the privileges or immunities of citizens of *the United States,*" which are distinct from those that exist by virtue of *state* citizenship. *Id.* at 73–74 (emphasis in original).

The "privileges *and* immunities" referred to in Article IV are conferred by *state* citizenship and consist of those rights "which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign." *Id.* at 76 (first emphasis added, second emphasis in original). They fall under "the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may

prescribe for the general good of the whole." *Id.* (internal quotation marks omitted).

By contrast, the "privileges *or* immunities" discussed in the Fourteenth Amendment consist of rights "which ow[e] their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79 (emphasis added). In analyzing the legislative history of the Thirteenth and Fourteenth Amendments, the Court noted that "the one pervading purpose" of the amendments was to ensure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.* at 71.

B

The Supreme Court in the *Slaughter-House Cases* ultimately concluded that the rights asserted by the butchers were rights "which belong to citizens of the States as such," and therefore the Court did not need to "defin[e] the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges [made] it necessary to do so." *Id.* at 78–79. However, the Court suggested some examples of inherently federal privileges, such as the right "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas . . . [,][t]he right to peaceably assemble and petition for redress of grievances, . . .

[and t]he *right to use the navigable waters of the United States*, however they may penetrate the territory of the several States." *Id.* at 79 (emphasis added).

The Courtneys' case is predicated entirely on the Supreme Court's passing reference to a "right to use the navigable waters of the United States"—a phrase that has yet to be interpreted by a single federal appellate court in the privileges or immunities context. As such, the boundaries of the term "use" have not been established. Still, we are not faced with an entirely blank slate. The historical backdrop upon which the Supreme Court enunciated the navigable waterway right strongly suggests that the Court did not intend a panoptic definition of the term. Moreover, our Privileges or Immunities Clause jurisprudence does not support an interpretation that would foreclose states from regulating public transportation upon their intrastate navigable waterways. Thus, even if we assume that the examples of rights deriving from national citizenship set forth by the Supreme Court in the *Slaughter-House Cases* are not mere dicta, we nevertheless find that the right "to use the navigable waters of the United States" does not include a right to operate a public ferry on Lake Chelan.

Turning to the historical context, Article 4 of the Northwest Ordinance of 1787 established navigable waters within newly federal territory as "common highways" that would be "forever free," even in the event portions of the Northwest Territory were incorporated into newly formed States. Ordinance of 1787 art. IV; *Econ. Light & Power Co. v. United States*, 256

U.S. 113, 118–19 (1921) ("The public interest in navigable streams . . . does not arise from custom or implication, but has a very definite origin[;] [b]y article 4 of the compact in the Ordinance of July 13, 1787 . . . it was declared: 'The navigable waters . . . shall be common highways, and forever free . . . as to the citizens of the United States. . . .' ").

Cases interpreting the language in the Northwest Ordinance emphasize the states' responsibility to avoid destroying navigable waters or rendering them *unnavigable.*[4] The Supreme Court has explicitly held that the Ordinance did not prevent states from

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[4] *See*, *e.g.*, *Ill. River Packet Co. v. Peoria Bridge Ass'n*, 38 Ill. 467, 479 (1865) ("The ordinance does not mean that the river and its navigation shall be . . . free from all and every condition, but only that it shall be free from obstruction. . . ."); *Nedtweg v. Wallace*, 237 Mich. 14, 20 (1926) ("[T]he [1787] ordinance accomplished no more than to preserve the rivers and lakes as common highways and in no sense prevents the state from granting the soil under navigable waters to private owners. The state is sovereign of the navigable waters within its boundaries, bound, however, in trust, to do nothing in hindrance of the public right of navigation, hunting, and fishing." (citation omitted)); *Sewers v. Hacklander*, 219 Mich. 143, 150 (1922) (holding that Article 4 of the Northwest Ordinance has "no bearing upon riparian rights and ownership, except [if] there is an interference with navigation"); *Hogg v. Zanesville Canal & Mfg. Co.*, 5 Ohio 410, 416 (1832) ("Every citizen of the United States has a perfect right to its free navigation. A right derived, not from the legislature of Ohio, but from a superior source. With this right the legislature can not interfere. In other words, they can not, by any law which they may pass, impede or obstruct the navigation of this river."); *Spooner v. McConnell*, 22 F. Cas. 939, 945 (Ohio C.C. 1838) ("[T]he legislature may improve . . . the navigable rivers of the state, and authorize the construction of any works on them which shall not materially obstruct their navigableness.").

granting exclusive ferry franchises, so long as such franchises did not encroach on the federal commerce power. *See Fanning v. Gregoire*, 16 How. (U.S.) 524, 534 (1853) (holding that "the free navigation of the Mississippi river . . . does not . . . interfere with the police power of the States, in granting ferry licenses"); *Conway v. Taylor's*, 66 U.S. 603, 635 (1861) (noting that "[since] before the Constitution had its birth, the States have exercised the power to establish and regulate ferries," not Congress, and that "the authority [to do so] lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the States respectively[ ]' ").

In light of the foregoing, a reasonable interpretation of the right to "use the navigable waters of the United States," and the one we adopt, is that it is a right to *navigate* the navigable waters of the United States. Here, it is clear that the Courtneys wish to do more than simply navigate the waters of Lake Chelan. Indeed, they are not restrained from doing so in a general sense. Rather, they claim the right to utilize those waters for a very specific professional venture. While navigation of Lake Chelan is a necessary component of the Courtneys' proposed activity, it is neither sufficient to achieve their purpose nor the cause of their dissatisfaction. The Supreme Court in the *Slaughter-House Cases* declined to define the plaintiffs' asserted rights broadly, finding that the statute did not prohibit the butchering of animals in general because it was specifically "the slaughter-house privilege, which [was] mainly relied on to justify the charges of gross injustice

to the public, and invasion of private right." *Slaughter-House Cases*, 83 U.S. at 61. Similarly here, the district court correctly identified the actual privilege at stake as a ferry operation privilege, not a broad navigation privilege. Were navigation all the Courtneys wished to do, they would not need the WUTC's permission and this dispute would never have arisen. We find it exceedingly unlikely that the Supreme Court in the *Slaughter-House Cases* contemplated operation of a public ferry as part of the right "to use the navigable waters of the United States," so as to divest the states of their historic authority to regulate public transportation on intrastate navigable waterways.

Indeed, the *Slaughter-House* decision, itself, contains suggestions that contradict such an understanding. In discussing the nature of the states' police power, the majority noted that, with respect to "laws for regulating the internal commerce of a State, and those which respect . . . ferries . . . [, n]o direct general power . . . is granted to Congress; and consequently they remain subject to State legislation." *Id.* at 63 (quoting *Gibbons v. Ogden*, 22 U.S. (Wheaton) 1, 203 (1824)) (internal quotation marks omitted). Moreover, while the dissenting minority disagreed with the majority's acceptance of a slaughter-house monopoly, it seemed to approve of ferry franchises, stating that

> [i]t is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent . . . upon particular individuals or corporations, it may

> of course stipulate for such exclusive privileges . . . as it may deem proper, without encroaching upon the freedom or the just rights of others.

Id. at 88 (Field, J., dissenting).

Further, the driving force behind this litigation is the Courtneys' desire to operate a particular business using Lake Chelan's navigable waters—an activity driven by economic concerns. We have narrowly construed the rights incident to United States citizenship enunciated in the *Slaughter-House Cases*, particularly with respect to regulation of intrastate economic activities. *See*, *e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 983–84 (9th Cir. 2008).[5]

C

Finally, although the *Slaughter-House* Court acknowledged that "the right to engage in one's

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[5] In *Merrifield*, we upheld a pest-control licensing requirement under the Privileges or Immunities Clause, despite the appellant's contention that the license requirement "infringe[d] on his right to practice his chosen profession." 547 F.3d at 983. We noted that the Supreme Court's decision in *Saenz v. Roe*, 526 U.S. 489 (1999), "represents the Court's only decision qualifying the bar on Privileges or Immunities claims against 'the power of the State governments over the rights of [their] own citizens,'" *id.* at 983 (quoting *Slaughter-House Cases*, 83 U.S. at 77); that "[*Saenz*] was limited to the right to travel[,]" *id.* at 984; and that "[t]he Court has not found other economic rights protected by [the Privileges or Immunities C]lause," *id.* We have made clear that this "limitation on the Privileges or Immunities Clause" remains in effect. *See id.*

profession of choice" was a "fundamental" privilege belonging to "citizens of all free governments," it "made it very clear" that such a right "[was] *not* protected by the Privileges or Immunities Clause if [it was] not of a 'federal' character." *Id.* at 983 (emphasis added) (citations omitted). Operation of a ferry service is not inherently "federal" in character. To the contrary, the regulation of ferry operation has traditionally been the prerogative of state and local authorities. *See*, *e.g.*, *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 215–17 (1885) (recognizing that "[t]he power of the states to regulate matters of internal police includes the establishment of ferries" so long as regulations do not burden interstate commerce); *Can. Pac. Ry. Co. v. United States*, 73 F.2d 831, 833 (9th Cir. 1934) (explaining that "[a]t common law a franchise was necessary to the creation of a ferry and . . . an integral part of the definition"); *Kitsap Cnty. Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n*, 30 P.2d 233, 234–35, 237 (1934) (finding a state PCN requirement to be within the state's police power in order to serve "the best interests of the traveling public at large").

In this case, the state of Washington has a vital interest in regulating traffic on its navigable waterways. As the WUTC noted in its Ferry Report, "[t]he combination of statutory protection from competition, on the one hand, and stringent regulation of rates and terms of service, on the other, has historically been adopted for industries believed to have characteristics of a 'natural monopoly.'" Ferry Report 11 (citing Charles F. Phillips, Jr., *The Regulation of Public*

Utilities 49–73 (3d ed. 1993)). The PCN requirement creates precisely the kind of ferry franchise that has existed with approval since before the *Slaughter-House Cases* were decided. *See*, *e.g.*, *Conway*, 66 U.S. at 633–35.

The Courtneys contend that ferry operation on Lake Chelan is "nationalized" because of the "national character of the forum in which such a ferry operates," and that Lake Chelan is "uniquely federal" due to its incorporation into "the federal Lake Chelan National Recreation Area." However, the Courtneys provide no actual authority for the proposition that the Lake Chelan National Recreation Area renders unconstitutional state regulation of ferry service on wholly intrastate waterways. The Lake Chelan National Recreation Area does not appear to contemplate preemption of state ferry regulations, and the federal government has in the past refrained from exercising exclusive jurisdiction over its National Recreation Areas. *See* 16 U.S.C. § 90a-1; *see also Silas Mason Co. v. Tax Comm'n of Wash.*, 302 U.S. 186, 244 (1937) (finding that "the evidence is clear that the Federal Government contemplated the continued existence of state jurisdiction consistent with federal functions" with respect to the federal Grand Coulee Dam site in Lake Roosevelt); 36 C.F.R. § 7.55 (setting forth regulations for Lake Roosevelt as a National Recreation Area).

D

At the end of the day, the state legislation the Courtneys challenge is narrow in scope, merely restricting the operation of commercial public ferries to those who obtain a PCN certificate. The PCN requirement does not constrain the Courtneys from traversing Lake Chelan in a private boat for private purposes. *See* Wash. Rev. Code § 81.84.010(1) (restricting ferry operation "for the public use for hire"). Nor does it affect their ability to operate a commercial freight transportation service. *See id.* For that matter, the Courtneys are free to operate a commercial ferry service so long as they apply for and obtain a PCN certificate. *See id.* Although the Courtneys have apparently found the PCN requirement to be a difficult hurdle to surmount, "the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity." *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 520–21 (1885). Because we hold that the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan, we affirm the district court's dismissal of the Courtneys' first claim for relief.

III

The district court declined to express an opinion as to whether the right to use the navigable waters of the United States covers the use of such waters for private boat services for patrons of specific businesses or groups of businesses. Instead, it found that the

Courtneys lacked standing, the claim was unripe, and the issue was appropriate for abstention under the doctrine enunciated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). We disagree as to standing[6] and need not reach the ripeness issue because we find that the district court did not abuse its discretion in abstaining from considering the claim under the *Pullman* doctrine. However, we conclude that the district court should have retained jurisdiction over the Courtneys' case and vacate and remand with instructions that it do so.

The *Pullman* doctrine is "based on the avoidance of needless friction between federal pronouncements and state policies." *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970) (internal quotation marks omitted). It vests federal courts with discretion[7] to abstain from adjudicating disputes that hinge on significant and unsettled questions of state law. *See Pullman*, 312 U.S. at 499–500.

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[6] Although a close question, the threat of a classification proceeding, Washington Supreme Court precedent, and the economic loss the Courtneys have already suffered from having to refrain from purchasing a vessel for which they had negotiated favorable terms make their fear of enforcement and injury sufficiently actual to confer standing here.

[7] The district court incorrectly stated that a federal court "must abstain" from considering a federal constitutional question if the *Pullman* requirements are satisfied. To the contrary, its ultimate decision to abstain is discretionary under such circumstances. *See Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 889 (9th Cir. 2011) ("*Pullman* is a discretionary doctrine that flows from the court's equity powers.").

Abstention under *Pullman* is an appropriate course where

> (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the possible determinative issue of state law is uncertain.

Confederated Salish v. Simonich, 29 F.3d 1398, 1407 (9th Cir. 1994). The court "has no discretion to abstain in cases that do not meet the requirements." *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 939 (9th Cir. 2002).

A

The array of cases dealing with waterways and waterbased transportation in Washington state suggests that regulation of water traffic is indeed a sensitive issue of social policy in Washington. *See Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1094 (9th Cir. 1976) (pointing to the "array of state constitutional provisions and statutes" involving land use planning as evidence that it is "a sensitive area of social policy" in California). Given the ubiquity of waterways in Washington, and the unique importance of water navigation in the Lake Chelan area specifically, it follows that regulation of water routes and resources in the area would be of great concern to the state. *See Reetz*, 397 U.S. at 87 (noting that "fish

resources" was "an asset unique in its abundance in Alaska," and that "the management [of fish resources was] a matter of great state concern").

B

In addition, "[a] state court decision . . . could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." *Id.* at 86–87. If, for example, the WUTC issues a declaratory order that the "charter" boat service proposed by the Courtneys is not "for the public use for hire," within the meaning of Washington Revised Code § 81.84.010(1), the PCN requirement would not apply to them and the claim would be rendered moot. The Courtneys have challenged the state statutory scheme *as applied* to their proposed transportation services. A decision by the WUTC that the Courtneys do *not* need a PCN certificate to operate their proposed services would obviate the need for this constitutional challenge.

Moreover, even if the WUTC concludes that the PCN requirement applies to the Courtneys' proposed services, a contrary ruling by the Washington Supreme Court could also potentially render their constitutional challenge unnecessary. *See England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 424 (1964) (Douglas, J., concurring) ("Where state administrative action is challenged, a federal court will normally not intervene where there is an adequate state court review which is protective of any federal constitutional claim.").

C

Finally, as discussed above, it is not clear whether the PCN requirement applies to the private boat transportation services the Courtneys wish to provide. An issue of state law is "uncertain" if "a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." *Pearl Inv. Co. v. City and Cnty. of S.F.*, 774 F.2d 1460, 1465 (9th Cir. 1985).

The PCN requirement in Washington Revised Code § 81.84.010 only applies to vessels or ferries "for the public use for hire." That phrase has yet to be applied in a formal agency opinion or by any state court to the services the Courtneys propose. The WUTC's 2010 Ferry Report indicated that it "might reasonably conclude that a boat service offered on Lake Chelan (and elsewhere) in conjunction with lodging at a particular hotel or resort, and which is not otherwise open to the public, does not require a certificate under [Washington Revised Code § 81.84.010]," but also that "the commission could . . . decide not to adopt that interpretation." Ferry Report 15. Notwithstanding allegations in the Courtneys' complaint that suggest the WUTC would hold them subject to the PCN requirement, it remains unclear how the Washington Supreme Court would interpret the statutory provision at issue with respect to the Courtneys' proposed services.[8]

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[8] The Washington Supreme Court's decision in *Kitsap* dealt with a private club that initiated a boat transportation service reserved for its members and their guests only. 30 P.2d at 235.

D

In light of the foregoing, the district court did not abuse its discretion in abstaining from adjudication of the Courtneys' second claim for relief. Nevertheless, the district court should have retained jurisdiction over the case pending resolution of the state law issues, rather than dismissing the case without prejudice. We have generally considered dismissal inappropriate following *Pullman* abstention. *See Fireman's Fund Ins. Co.*, 302 F.3d at 940 ("If a court invokes *Pullman* abstention, it should stay the federal constitutional question until the matter has been sent to state court for a determination of the uncertain state law issue." (internal quotation marks and citation omitted)); *Columbia Basin Apt. Ass'n v. City of Pasco*, 268 F.3d 791, 802 (9th Cir. 2001) (same); *Int'l Bhd. of Elec. Workers, Loc. Union No. 1245 v. Pub. Serv. Comm'n of Nev.*, 614 F.2d 206,

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The court concluded that the service was still considered a "common carrier" and was subject to the PCN requirement. *Id.* In doing so, the court emphasized that the "club boat" was, in practice, essentially a competing public ferry service. *Id.* at 236. *Kitsap* is the only Washington case to have disapproved of a "private charter" service, and the WUTC recognized that "a boat service offered . . . in conjunction with lodging at a particular hotel or resort, and which is not otherwise open to the public, [might] not require a certificate." Ferry Report 15. The "shuttle" and "charter" services proposed by the Courtneys would be appurtenant to their Stehekin-based businesses and presumably be operated solely for patrons of these businesses. However, the Courtneys' complaint does not provide specific details regarding their proposed boat services, and it is therefore difficult to compare those services to the "club boat" scenario. Thus, the *Kitsap* case does not help us predict with any confidence how the Washington Supreme Court would rule on this issue.

213 (9th Cir. 1980) (finding dismissal following *Pullman* abstention improper pending Nevada courts' resolution of state issues); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir. 1979) ("If the court abstains under *Pullman*, retention of jurisdiction, and not dismissal of the action, is the proper course.").

The Supreme Court has found dismissal without prejudice following *Pullman* abstention to be appropriate where Texas law precluded a grant of state declaratory relief if a federal court retained jurisdiction. *See Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 88 n.14 (1975). The same does not appear to be true, however, in Washington. *See Rancho Palos Verdes Corp.*, 547 F.2d at 1096 (distinguishing California law from Texas law and the *Harris* decision in holding that the district court should have retained jurisdiction following *Pullman* abstention); *Brown v. Vail*, 623 F. Supp. 2d 1241, 1247 (W.D. Wash. 2009) (retaining jurisdiction following exercise of *Pullman* abstention, citing, *inter alia, Columbia Basin*, 268 F.3d at 802).

Despite its proper invocation of the *Pullman* doctrine, the district court erred in dismissing the Courtneys' second claim. Therefore, we vacate and remand the Courtneys' second claim with directions that the district court enter an order retaining jurisdiction over the constitutional claim. *See Isthmus Landowners Ass'n, Inc. v. California*, 601 F.2d 1087, 1090–91 (9th Cir. 1979) (finding failure to retain jurisdiction after *Pullman* abstention to be reversible error).

CONCLUSION

The district court's dismissal of the Courtneys' first claim for relief is **AFFIRMED**. The dismissal of their second claim for relief is **AFFIRMED** in part, **VACATED** in part, and **REMANDED** with instructions that the district court retain jurisdiction over the constitutional question.

The parties shall bear their own costs of appeal.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JAMES COURTNEY and CLIFFORD COURTNEY, Plaintiffs, v. JEFFREY GOLTZ, et al., Defendants.	NO: 11-CV-0401-TOR ORDER GRANTING MOTION TO DISMISS [Filed Apr. 17, 2012]

BEFORE THE COURT is Defendants' motion to dismiss for failure to state a claim (ECF No. 7). The Court heard oral argument on the motion on April 12, 2012. Michael E. Bindas and Jeanette Petersen appeared on behalf of the Plaintiffs, James Courtney and Clifford Courtney. Assistant Attorney General Fronda Woods appeared on behalf of the Defendants, Jeffrey Goltz, Patrick Oshie, Philip Jones, and David Tanner. The Court has reviewed the motions, the responses, the record and files herein and is fully informed.

BACKGROUND

This lawsuit is a challenge to certain Washington statutes and administrative regulations that require an operator of a commercial ferry to obtain a certificate of "public convenience and necessity" from the Washington Utilities and Transportation Commission ("WUTC") before commencing operations. Plaintiffs

allege that these statutes and regulations, as applied to their proposed ferry services on Lake Chelan, violate their right "to use the navigable waters of the United States" under the Privileges or Immunities Clause of the Fourteenth Amendment. Defendants, all members of the WUTC, have moved to dismiss the Complaint for failure to state a claim on the ground that Plaintiffs do not have a Fourteenth Amendment right to operate a commercial ferry on Lake Chelan.

FACTS

The following facts are drawn from Plaintiff's Complaint and are accepted as true for purposes of this motion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Plaintiffs James Courtney and Clifford Courtney ("the Courtneys") live in Stehekin, Washington. Stehekin is a small, unincorporated community of approximately 75 residents located at the northwestern-most tip of Lake Chelan. Stehekin is a very isolated community: the only means of accessing the town are by boat, seaplane, or on foot. Most residents and visitors reach Stehekin via a ferry operated by Lake Chelan Boat Company. At present, this is the only commercial ferry operating on the lake.

The Courtneys would like to establish a competing ferry service on Lake Chelan. They believe that a competing service is needed for two main reasons. First, they believe that a second ferry, based in Stehekin, would better serve the needs of Stehekin residents

than the existing ferry based in Chelan.[1] Second, they believe that a second ferry would allow more tourists and visitors to reach Stehekin, thereby increasing patronage of Stehekin businesses—many of which are owned by the Courtneys. To date, however, the Courtneys have been unable to obtain the requisite certificate of "public convenience and necessity" from the WUTC or otherwise obtain permission to operate a ferry on Lake Chelan.

The Courtneys' efforts to establish a competing ferry service have taken several forms. First, in 1997, James Courtney submitted a formal application to the WUTC for a certificate of "public convenience and necessity" pursuant to RCW 81.84.010 and 020. The WUTC's evaluation of this application culminated in a two-day evidentiary hearing at which the WUTC took testimony from James and others about (1) the need for an additional ferry; and (2) the financial viability of the proposed service.[2] The WUTC ultimately denied James's application, finding that the proposed service

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[1] The city of Chelan is located at the southeastern-most tip of Lake Chelan. The distance between Chelan and Stehekin is approximately fifty-five (55) miles by boat.

[2] Before issuing a certificate of "public convenience and necessity," the WUTC is required to determine that an applicant "has the financial resources to operate the proposed service for at least twelve months" and to evaluate "[r]idership 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." RCW 81.84.020(2).

was not required by "the public convenience and necessity," and that, in any event, James lacked the financial resources to sustain the proposed service for twelve months. The WUTC further concluded that James had failed to carry his statutory burden of establishing that the incumbent carrier "ha[d] failed or refused to furnish reasonable and adequate service." *See* RCW 81.84.020(1).

Second, beginning in 2006, James attempted to establish an "on-call boat transportation service" based in Stehekin. Because James intended to use docks owned by the United States Forest Service in conjunction with this service, he applied to the Forest Service for a "special use permit." The Forest Service subsequently contacted the WUTC to verify that James's proposed use of its docks would comply with state law. In October of 2007, WUTC staff advised the Forest Service that the proposed service was exempt from the statutory "public convenience and necessity" requirement. In March of 2008, however, WUTC staff reversed course and advised James directly that he would need to obtain a certificate before commencing his on-call service.

Four months later, in July of 2008, WUTC staff reversed course once again and advised James that the on-call service would be exempt from the certificate requirement. The Forest Service, recognizing the apparent confusion among the WUTC staff, subsequently requested an "advisory opinion letter" on the issue from Defendant David Danner in August of 2009. For

reasons that are unclear from the existing record, Defendant Danner declined to respond.

Also in 2008, Clifford Courtney contacted the WUTC and proposed two alternative boat transportation services. The first proposal was a "charter" service whereby Clifford would hire a private boat to transport patrons of his lodging and river rafting businesses between Chelan and Stehekin. The second proposal was a service whereby Clifford would "shuttle" his customers between Chelan and Stehekin in his own private boat.

In September of 2008, Clifford sent a letter to Defendant Danner seeking guidance about whether either proposed service would require a certificate of "public convenience and necessity." Defendant Danner responded that, in his opinion, both services would require a formal certificate. Specifically, Defendant Danner opined that even private boat transportation, offered exclusively to paying customers of Clifford's lodging and river rafting businesses, would be a service "for the public use for hire" for which a formal certificate was required pursuant to RCW 81.84.010. Defendant Danner did, however, inform Clifford that his opinion was merely advisory in nature and that Clifford was free to seek a formal ruling on the issue from the full Commission.

Frustrated by the WUTC's responses to their formal application and subsequent proposals, the Courtneys contacted the Governor of the State of Washington and several state legislators in February

of 2009. The Courtneys explained the perceived need for a competing ferry service on Lake Chelan and urged their legislators to relax the ferry operator certification requirement. In response, the State Legislature directed the WUTC to study the appropriateness of statutes and regulations governing commercial ferry operations on Lake Chelan. Pursuant to this mandate, the WUTC studied the issue and delivered a formal report to the State Legislature in January of 2010. *See* Washington Utilities and Transportation Commission, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan: Report to the Legislature Pursuant to ESB 5894*, January 14, 2010 (hereinafter "Ferry Report").[3]

In this report, the WUTC concluded, *inter alia*, that the existing ferry operator was providing satisfactory service and that no modification of the existing regulations was therefore necessary. The WUTC did, however, discuss the potential for "limited competition" by private carriers within the confines of the existing statutory and regulatory framework:

> There are three ways for the Commission to allow some limited competition with an incumbent provider's service: (1) by defining an incumbent's protected geographic territory in a narrow fashion, (2) by concluding that the

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[3] Available at: http://www.wutc.wa.gov/webdocs.nsf/d94adfab95672fd98825650200787e67/bl8a8709b0fbaba2882576bl00799b46/$FILE/Appropriateness%20of%20Rate%20&%20Service%20Regulation%20of%20Commercial%20Ferries%20Operating%20on%20Lake%20Chelan_2010.pdf

> incumbent has failed to meet a public need that the applicant proposes to meet, or (3) by declining to require a certificate for certain types of boat transportation services that are arguably private rather than for public use.

Ferry Report at 12. Although the WUTC believed that it was "unlikely that . . . any of these theories could be relied upon to authorize competing services on Lake Chelan," it nevertheless concluded that,

> [T]here may be flexibility within the law for the Commission to take an expansive interpretation of the private carrier exemption from commercial ferry regulation. For example, the Commission might reasonably conclude that a boat service offered on Lake Chelan (and elsewhere) in conjunction with lodging at a particular hotel or resort, and which is not otherwise open to the public, does not require a certificate under RCW 81.84.[010].

Ferry Report at 15.

On October 19, 2011, the Courtneys filed this lawsuit challenging Washington's regulation of commercial ferry activity under the Fourteenth Amendment to the United States Constitution. The Courtneys' Complaint alleges that the applicable statutes and administrative regulations, as applied to their attempts to establish a competing ferry service on Lake Chelan, violate their right to "use the navigable waters of the United States" under the Privileges or Immunities Clause. The Courtneys have specifically limited their

causes of action to their rights under the Fourteenth Amendment's Privileges or Immunities Clause and have expressly disclaimed reliance upon the Commerce Clause or any other constitutional provision. Accordingly, the court will limit its analysis to whether the Courtneys have stated a claim for relief under 42 U.S.C. § 1983 or 28 U.S.C. § 2201 *et seq.* for violations of a right guaranteed by the Privileges or Immunities Clause of the Fourteenth Amendment.

DISCUSSION

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a [plaintiff's] claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive such a motion, a plaintiff must allege facts which, when taken as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation and citation omitted). In order for a plaintiff asserting a cause of action under 42 U.S.C. § 1983 to satisfy this standard, he or she must allege facts which, if true, would constitute a violation of a right guaranteed by the United States Constitution. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Similarly, a plaintiff seeking declaratory relief under 28 U.S.C. § 2201 must allege facts which, if true, would violate federal law. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950) (holding that Declaratory Judgment Act did not expand subject-matter jurisdiction of federal courts). As discussed below, Plaintiffs' Complaint fails to satisfy these standards.

A. The "Right to Use the Navigable Waters of the United States"

The Courtneys have asserted two related causes of action. First, they allege that the State of Washington's ferry licensing laws infringe upon their right to provide a commercial ferry service open to the general public on Lake Chelan. Second, they claim that these same laws infringe upon their right to provide a *private* ferry service for patrons of their Stehekin-based businesses. Plaintiffs contend that their right to provide these services is guaranteed by the Fourteenth Amendment's Privileges or Immunities Clause, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV. § 1.

In support of their claims, the Courtneys note that the Supreme Court has specifically delineated "[t]he right to use the navigable waters of the United States" as one of the "privileges or immunities" guaranteed to citizens of the United States under the Fourteenth Amendment. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1872). Defendants apparently do not dispute that *Slaughter-House* established a Fourteenth Amendment right "to use the navigable waters of the United States." Defendants argue, however, that this right does not extend to operating a commercial ferry service because regulation of such services has traditionally been reserved exclusively to the individual states.

At the outset, it is important to note that no federal court has ever directly examined the "right to use the navigable waters of the United States" referenced by the Supreme Court in *Slaughter-House.* Given the absence of applicable precedent, this Court must attempt to define the "right to use the navigable waters of the United States" before determining whether, on the facts alleged in the Complaint, the right could have been violated. The logical starting point for this analysis is the *Slaughter-House* decision itself.

In *Slaughter-House*, the Supreme Court was asked to decide whether a Louisiana statute which granted to a single corporation the exclusive right to operate a centralized slaughterhouse—to which all merchants were required to bring their animals for slaughter—violated the Thirteenth or Fourteenth Amendments. 83 U.S. (16 Wall.) at 66-67. Before embarking on that task, Justice Miller, writing for a 5-4 majority, emphasized that the Court's consideration of the newly-adopted Thirteenth and Fourteenth Amendments must be informed by the history and purpose of their adoption. *Id.* at 67-68, 71-72. According to Justice Miller, "the one pervading purpose" of these amendments at the time of their adoption was to ensure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.* at 71.

With the history and purpose of the amendments thus established, the Court proceeded to consider

whether the Louisiana statute violated the Privileges or Immunities Clause of the Fourteenth Amendment. At the outset, the Court drew a crucial distinction between rights and privileges created by *state* citizenship and rights and privileges created by *United States* citizenship. *See id.* at 72-77. Specifically, the Court noted that the Fourteenth Amendment protects only "privileges or immunities of citizens of the *United States*" and that these rights are *separate from* the "Privileges and Immunities" guaranteed to *state* citizens referenced in Article IV. *Id.* at 78.

According to the *Slaughter-House* majority, the "privileges or immunities" referenced in the Fourteenth Amendment are a narrow category of rights "which ow[e] their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. The "Privileges and Immunities" referenced in Article IV. by contrast, are a broad category of "fundamental" rights conferred by *state* citizenship, such as "protection by the government . . . the right to acquire and possess property of every kind, and [the right] to pursue and obtain happiness and safety." *Id.* at 76, (emphasis omitted). Notably, the Court further emphasized that the latter category of rights "embraces nearly every civil right for the establishment and protection of which organized government is instituted." *Id.* (citing *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870)).

After drawing this crucial distinction between rights conferred by state citizenship and rights conferred by United States citizenship, the Court

concluded that the right asserted by the petitioners—*i.e.*, the right to operate competing slaughterhouse facilities[4]—was not a privilege of United States citizenship. *Id.* at 79. Rather, the Court concluded that this was an economic right conferred by *state* citizenship—a right that must yield to the lawful exercise of the state's "police power." *Id.* at 62, 78. Accordingly, the Court held that the Louisiana statute did not implicate the "privileges or immunities" protected by the Fourteenth Amendment. *Id.* at 80.

Before concluding its analysis of the "privileges or immunities" issue, however, the *Slaughter-House* majority took an unusual step: it enumerated certain rights which, though not implicated by the challenged statute, might nevertheless be protected under the Fourteenth Amendment.

> Having shown that the privileges and immunities relied [upon by the petitioners] are those which belong to the citizens of the States as

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[4] The majority carefully noted that the Louisiana statute did not "deprive[ ] a large and meritorious class of citizens . . . of the right to exercise their trade," but merely required all butchers "to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodation furnished to him at that place." 83 U.S. (16 Wall.) at 60-61. Accordingly, the Court framed the right at issue not as the right to butcher animals in general, but rather the right of to operate competing slaughterhouse *facilities. Id.* at 61 ("[I]t is not true that [the statute] deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit . . . [i]t is, however, *the slaughter-house privilege*, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.") (emphasis added).

> such, and that they are left to the State governments for security and protection, and not by [the Fourteenth Amendment] placed under the care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.
>
> But lest it should be said that no such privileges and immunities are to be found . . . we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws.

Id. at 78-79. The Court then proceeded to list several examples of rights that could potentially be guaranteed by the Fourteenth Amendment. One such example was "[t]he right to use the navigable waters of the United States, however they may penetrate the territory of the several States." *Id.* at 79.

B. Plaintiffs' First Cause of Action: Operation of a Commercial Ferry Service Open to the Public

Given the limited holding of the *Slaughter-House* case, this Court cannot definitively conclude that the Fourteenth Amendment does in fact protect "the right to use the navigable waters of the United States." Because the *Slaughter-House* majority merely "venture[d] to suggest" a number of rights that could be protected under the Fourteenth Amendment—ostensibly to prevent the Privileges or Immunities Clause

from becoming a legal nullity—there is reason to question whether "the right to use the navigable waters of the United States" is truly a *recognized* Fourteenth Amendment right. The fact that no federal court has ever directly examined the "right" further reinforces this uncertainty.

Nevertheless, even if the right does in fact exist, the court Cannot conclude that the right extends to operating a commercial ferry open to the public on Lake Chelan. At the Courtneys' urging, the Court has thoroughly reviewed the history and purpose of the Fourteenth Amendment's Privileges or Immunities Clause. The Courtneys are correct that the overarching purpose of the clause at the time of the Fourteenth Amendment's adoption was the protection of the rights of newly-freed slaves following the Civil War. *See Slaughter-House*, 83 U.S. (16 Wall.) at 71 (noting that the "one pervading purpose" of the Thirteenth, Fourteenth and Fifteenth Amendments was "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him").

There is less support, however, for the Courtneys' assertions that the Privileges or Immunities Clause was designed to protect quintessentially *economic* rights. While it is certainly likely that the oppression of former slaves in the wake of the Civil War resulted in adverse economic consequences, there is little to suggest that Congress viewed the Privileges or Immunities Clause as the primary vehicle through which former slaves would achieve economic equality. Indeed,

the Courtneys' focus on the economic underpinnings of the clause appears to give short shrift to the "one pervading purpose" of the Thirteenth, Fourteenth and Fifteenth Amendments: to eliminate *all* forms of institutional oppression of former slaves. *Id.* at 71.

Moreover, the Courtneys' assertion that they have a Fourteenth Amendment right to operate a ferry business on Lake Chelan is inconsistent with the *Slaughter-House* decision itself. Like the right to operate competing slaughterhouse facilities at issue in *Slaughter-House*, the right to operate a competing commercial ferry service on Lake Chelan appears to derive from *state* citizenship rather than United States citizenship. *Cf. Saenz v. Roe*, 526 U.S. 489, 502-03 (1999) (holding that Fourteenth Amendment Privileges or Immunities Clause protects the right to travel between states). Notwithstanding *Slaughter-House*'s suggestion that the right to "use" the navigable waters of the United States derives from United States citizenship, the holding of the case counsels that using such waters *in the manner the Courtneys have proposed—i.e.*, to operate a competing commercial ferry business—is one of the "fundamental" rights conferred by state citizenship. *See id.* at 76 (holding that "the right to acquire and possess property of every kind" originates from state citizenship and is therefore not protected under the Privileges or Immunities Clause of the Fourteenth Amendment)[5]; *McDonald v. City of Chicago*, ___ U.S.

[5] The Court also notes that the *Slaughter-House* majority tacitly approved of an exclusive ferry franchise by declining to address a portion of the Louisiana statute which granted the

___, 130 S. Ct. 3020, 3030-31 (2010) (declining to revisit *Slaughter-House's* narrow interpretation of the rights protected under the Privileges or Immunities Clause). Accordingly, the Court finds that the Courtneys do not have a Fourteenth Amendment right to operate a commercial ferry service open to the public on Lake Chelan.[6]

C. Plaintiffs' Second Cause of Action: Operation of a Private Ferry Service to Patrons of Stehekin-Based Businesses

1. *Standing*

Article III of the United States Constitution limits the jurisdiction of federal courts to cases or controversies between litigants with adverse interests. U.S. Const. art. III, § 2, cl. 1. The overarching purpose of this provision is to prevent federal courts from rendering

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slaughterhouse operator an exclusive right to run ferries on the Mississippi River between its several buildings on both sides of the river. *See* 83 U.S. (16 Wall.) at 43. The minority approved of an exclusive ferry franchise more explicitly: "It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others." *Id.* at 88 (Field, J., dissenting). However, the court expresses no opinion as to the legality of an exclusive ferry franchise at this time.

[6] The Court expresses no opinion about whether the right to use the navigable waters of the United States extends to "using" such waters for private transportation services incidental to a land-based business.

advisory opinions in the absence of an actual dispute. *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968). Consistent with this mandate, litigants in federal court must establish the existence of a legal injury that is both "concrete and particularized [and] actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (plurality opinion) (internal quotation marks and citations omitted). To satisfy this requirement in an action for declaratory and injunctive relief, a litigant must allege facts which "show a very significant possibility of future harm." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Accordingly, "[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983).

Here, the Courtneys' second claim does not present an actual case or controversy under Article III. The Courtneys' second claim is based on Clifford Courtney's proposal to the WUTC in 2008 for one of two alternative boat transportation services. The first proposal was a "charter" service whereby Clifford would hire a private boat to transport patrons of his lodging and river rafting businesses between Chelan and Stehekin. The second proposal was a service whereby Clifford would "shuttle" his customers (lodging and river rafting patrons) between Chelan and Stehekin in his own private boat.

As the Courtneys acknowledge in their complaint, the WUTC has never definitively ruled that their

proposed "private" ferry service would in fact require a certificate of public convenience and necessity under RCW 81.84.010. While the Court commends the Courtneys for their good-faith efforts to resolve this issue with the WUTC over the past several years, it cannot ignore the fact that (1) the WUTC has given directly conflicting opinions about whether a certificate would be required; and (2) neither the WUTC nor any other state adjudicative body has ever officially ruled on the matter. Accordingly, the Court finds that it lacks subject-matter jurisdiction to entertain the Courtneys' second cause of action at this time. *San Diego County Gun Rights Comm.*, 98 F.3d at 1126; *Stoianoff*, 695 F.2d at 1223.

2. *Ripeness*

Even if the Court had subject-matter jurisdiction, however, it would nevertheless decline to consider the Courtneys' second claim on prudential ripeness grounds.[7] In light of the lingering uncertainty about whether the Courtneys would be required to obtain a

[7] During oral argument, counsel for the Plaintiffs correctly noted that the Courtneys are not required to exhaust their administrative remedies before filing a § 1983 claim. *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496, 516, (1982). The lack of an exhaustion requirement, however, does not relieve the Courtneys of their obligation to establish that their claim presents a ripe controversy. *See McCabe v. Arave*, 827 F.2d 634, 639 (9th Cir. 1987) ("While there is no requirement that administrative remedies be exhausted in cases brought under 42 U.S.C. § 1983, the claim must be ripe, and not moot, to be reviewed properly.") (internal citations omitted).

certificate of public convenience and necessity to operate a private ferry service, the court concludes that further consideration of the constitutionality of the challenged statutes at this juncture would be premature. *See Renne v. Geary*, 501 U.S. 312, 323-24 (1991) (postponing ruling on whether provision of the California constitution violated the First Amendment where provision did not clearly apply to petitioners and where "permitting the state courts further opportunity to construe [the provision could] . . . materially alter the question to be decided") (internal quotation and citation omitted). This conclusion is further reinforced by the WUTC's most recent pronouncement that "there may be flexibility within the law for the commission to take an expansive interpretation of the private carrier exemption from commercial ferry regulation." *See* Ferry Report at 15. In light of the WUTC's apparent willingness to consider an interpretation of the statute that would not implicate the Fourteenth Amendment, the court concludes that the Courtneys' second claim is unripe for present adjudication.[8]

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[8] The Court acknowledges that an as-applied challenge to RCW 81.84.010—which the Courtneys have asserted in this case—is more likely to present a ripe controversy than a facial challenge. *See*, *e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985) (articulating preference for deciding constitutional questions on the facts of a specific case rather than in the abstract). Nevertheless, when a § 1983 plaintiff asserting an as-applied challenge fails to seek a conclusive determination as to whether the challenged statute will in fact be applied in the manner asserted, a ripe controversy does not exist. *See Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379-80 (9th Cir. 1988) (dismissing as unripe an as-applied constitutional challenge

3. *Abstention*

Finally, even if the Courtneys' second claim was ripe for review, the Court would abstain from deciding the constitutional question presented under the "abstention doctrine" set forth in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Under *Pullman*, a federal court must abstain from deciding a federal constitutional question when the resolution of that question hinges on competing interpretations of a state statute. *Id.* at 499-500. In such situations, the "last word" on the meaning of the state statute belongs to the state courts. *Id.* The reasons for this deference are twofold. First, deferring to a state court on a question of state law prevents a federal court's interpretation of a state statute from being "supplanted by a controlling decision of [the] state court" at a later time. *Id.* at 500. More importantly, however, this deference embodies a "scrupulous regard for the rightful independence of the state governments." *Id.* at 501.

As discussed above, Washington's ferry certification requirement applies to "commercial ferr[ies] . . . for the public use for hire." RCW 81.84.010. Whether this definition applies to the Courtneys' proposed "private" ferry service remains an open question. If the WUTC or the Washington State courts determine that the proposed service *does* qualify as a "commercial ferry . . . for the public use for hire," then enforcement

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under § 1983 where plaintiffs never formally applied for a special use permit, and, consequently, the defendant city never rendered a "final and authoritative determination as to how the [challenged land use] ordinance applied" to the plaintiffs' property).

of the certificate requirement could potentially violate the Courtneys' Fourteenth Amendment rights. On the other hand, if either entity determines that the proposed service *does not* qualify as a "commercial ferry . . . for the public use for hire," then the certificate requirement will not—indeed, cannot—be enforced against the Courtneys. In the latter scenario, the Courtneys' constitutional challenge to the certificate requirement is moot. Accordingly, the court concludes that the Courtneys' second claim must be dismissed without prejudice to afford the WUTC or the Washington State courts an opportunity to resolve this unsettled question of state law. *Pullman*, 312 U.S. at 501.

ACCORDINGLY, IT IS HEREBY ORDERED:

Defendants' motion to dismiss (ECF No. 7) is **GRANTED**. Plaintiffs' first cause of action is **DISMISSED** with prejudice. Plaintiffs' second cause of action is **DISMISSED** without prejudice. The District Court Executive is hereby directed to enter this Order and furnish copies to counsel.

s/ Thomas O. Rice

THOMAS O. RICE
United States District Judge

RCW Statutes

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.

* * *

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 chapter 5.50 RCW.

(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.

WAC REGULATIONS

WAC 480-51-020

Definitions.

For the purposes of these rules, the following definitions shall apply:

(1) The term "commercial ferry" means every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers, appointed by any court whatever, owning, controlling, leasing, operating or managing any vessel over and upon the waters of this state.

(2) The term "certificated commercial ferry" means a person required by chapter 81.84 RCW to obtain a certificate of public convenience and necessity before operating any vessel upon the waters of this state.

(3) The term "common carrier ferry vessel" means a vessel primarily engaged in transporting freight other than vehicles, whose gross earnings from the transportation of passengers and/or vehicles are not more than ten percent of the total gross annual earnings of such vessel.

(4) The term "vessel" includes every species of watercraft, by whatever power operated, for public use in the conveyance of persons or property for hire over and upon the waters within this state, excepting all towboats, tugs, scows, barges, and lighters, and excepting rowboats and sailing boats under twenty gross tons

burden, open steam launches of five tons gross and under, and vessels under five tons gross propelled by gas, fluid, naphtha, or electric motors.

* * *

(7) The term "for hire" means transportation offered to the general public for compensation.

* * *

(10) The term "person" means any natural person or persons or any entity legally capable of taking any action.

* * *

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.

* * *

WAC 480-51-030

Applications.

(1) Any person desiring to operate a commercial ferry which is required by the provisions of chapter 81.84 RCW to be certificated, to acquire a controlling interest in, or to acquire by transfer any certificate, shall file with the Washington utilities and transportation commission an application for a certificate of public convenience and necessity on a form furnished by the commission. Applications shall include, but are not limited to the following:

(a) Pro forma financial statement of operations;

(b) Ridership and revenue forecasts;

(c) The cost of service for the proposed operation;

(d) An estimate of the cost of the assets to be used in providing service;

(e) A statement of the total assets on hand of the applicant that will be expended on the proposed operation; and

(f) A statement of prior experience, if any, in providing commercial ferry service.

(2) Certificate holders wishing to issue stocks and stock certificates, or other evidences of interest or ownership, and bonds, notes, and other evidences of indebtedness and to create liens on their property in this state shall comply with chapter 81.08 RCW, as amended, and with all pertinent commission rules.

(3) Application fees:

Original application for certificate	$200.00
Application for extension of certificate	200.00
Application to transfer a certificate	200.00
Application for issuance of a duplicate certificate	3.00
Application for temporary certificate	200.00

WAC 480-51-040

Notice of application—Protests—Contemporaneous applications.

(1) The commission shall send a notice of each application for certificated commercial ferry service and each application to operate vessels providing excursion service, with a description of the terms of that application, to all persons presently certificated to provide service; all present applicants for certificates to provide service; the department of transportation; affected cities and counties; and any other person who has requested, in writing, to receive such notices. Interested persons may file a protest with the commission within thirty days after service of the notice. The protest shall state the specific grounds for opposing the application and contain a concise statement of the interest of the protestant in the proceeding. A person who is eligible to file a protest and fails to do so may not participate further in the proceeding in any way, unless it can be demonstrated that failure to file a

protest was due to an omission by the commission in providing proper notification of the pending application.

(2) If any person wishes to seek authority which overlaps, in whole or in part, with that sought in any pending application, it must apply for that authority within thirty days following mailing of the notice of filing of the initial application in order for the applications to be considered jointly. During the thirty-day period, pending applications will be on file and available for inspection in the commission's headquarters office in Olympia.

(3) The commission may consolidate overlapping pending applications, pursuant to WAC 480-07-320, for joint consideration.

(4) Overlapping applications which are not filed within thirty days of the initial application will not be jointly considered with the initial application and will not be decided until after the conclusion of proceedings resolving the initial application and any other application qualifying for joint consideration.

(5) The commission may consider and decide, on any schedule, portions of an overlapping application when:

(a) The portions to be heard do not overlap a prior pending application; and

(b) The overlapping portions may appropriately be severed from the portions to be heard.