

[Service Date July 26, 2005]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In re Application No. D-07294 of	)	DOCKET NO. TC-041340
	)	DOCKET NO. TC-041593
PENNCO TRANSPORTATION, INC.	)	<i>(consolidated)</i>
)	
For Extension of Authority under)	
Certificate No. C-01054, For a	)	ORDER NO. 04
Certificate of Public Convenience and)	
Necessity to Operate Motor Vehicles)	
in Furnishing Passenger and Express	)	INITIAL ORDER DENYING
Service as an Auto Transportation	)	PENNCO APPLICATION;
Company.	)	GRANTING IN PART, DENYING
	)	IN PART, OLYMPIC BUS LINES
.....	)	APPLICATION
)	
In re Application No. D-079302 of)	
)	
HECKMAN MOTORS, INC., d/b/a)	
OLYMPIC BUS LINES)	
)	
For Extension of Authority under)	
Certificate No. C-992, For a)	
Certificate of Public Convenience and)	
Necessity to Operate Motor Vehicles)	
in Furnishing Passenger and Express)	
Service as an Auto Transportation)	
Company.)	
)	
.....)	

Synopsis: The application of Olympic Bus Lines to provide auto transportation is granted in part and denied in part. The application of Pennco Transportation, Inc. is denied.

I. INTRODUCTION

- 1 **NATURE OF PROCEEDING.** Docket No. TC-041593 is an application filed by Heckman Motors, Inc. d/b/a Olympic Bus Lines (Olympic) for an extension of its authority to provide passenger service as an auto transportation company. Olympic seeks: 1) to add stopping points to its existing certificate of authority that it has actually been serving for some time under its filed tariff; and 2) to add an entirely new stopping point to its existing certificate of authority.
- 2 Docket No. TC-041340 is an application filed by Pennco Transportation, Inc. (Pennco) for an extension of its authority to provide passenger service as an auto transportation company. Pennco seeks: 1) to add stopping points to its existing door-to-door service;¹ 2) to add a scheduled service from Port Angeles to Kingston; and, 3) to eliminate a requirement for passenger advance reservations.
- 3 **APPEARANCES.** Jack Heckman, President, represents Olympic. Kevin Harris, President, represents Pennco. David L. Rice, Seattle, Washington, represents protestant Evergreen Trails, Inc. d/b/a Gray Line of Seattle (Gray Line) and Shuttle Express, Inc. (Shuttle Express). James K. Sells, attorney, Silverdale, Washington, represents protestant Bremerton-Kitsap Airporter, Inc. (Bremerton-Kitsap). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff ("Commission Staff" or "Staff"). All protestants, except Olympic and Pennco, who are protesting each other's applications, entered into restrictive amendments that satisfy their

¹ Two types of service are at issue in this case. Door-to-door service, provided under Pennco's existing authority, requires passengers to make reservations with Pennco and for Pennco to pick up those passengers at their doors and take them to destinations that Pennco is authorized to serve. Scheduled service, provided by Olympic under its tariff, requires the carrier to pick passengers up at a designated stop and to deliver them to another designated stop, within the carrier's certificate of authority. In Olympic's case, however, its tariffed stops do not correspond to its certificated stops. Olympic filed its application in large measure to ensure that all its tariffed stops were included in its certificate of authority.

interests in the proceeding. Appendix A to this order is the amended authority applied for by Olympic. Appendix B to this order is the amended authority applied for by Pennco.

4 **BACKGROUND.** The Commission consolidated these applications for hearing because the applications were filed contemporaneously and seek authority to provide the same or overlapping service.² Under the Ashbacker doctrine,³ the Commission conducts a comparative review of two such applications when the granting of one application might preclude the Commission from granting the other.⁴

5 The Commission convened an evidentiary hearing on these applications on March 11, 2005. The parties filed post-hearing briefs. The parties also had an opportunity to file additional supporting documentation for their applications after briefs were filed. Only Olympic filed additional support. The Commission reopened the record on June 24, 2005 to allow presentation of evidence regarding the status of Pennco's current operations. Only Commission Staff and Olympic participated in the June 24 reopening.

² The currently provided services of Olympic and Pennco do not overlap because they are different services. Olympic provides a scheduled service that involves picking up passengers at predetermined stops on a posted schedule. Pennco provides a door-to-door, advance reservation service, which is a type of service that does not rely on predetermined stops or schedules. The Commission has found that door-to-door service and scheduled, fixed termini services are distinct and not overlapping, even if performed in the same geographic area. *See*, Order M.V.C. No. 1809, In re San Juan Airlines, Inc. d/b/a Shuttle Express, Order No. D-2566 (April 1989) at 17; Order M.V.C. No. 2241, In re Jeffrey Lynn Porter d/b/a Pennco Transportation, Hearing No. 78706 (December 1998). However, because both Pennco and Olympic are now seeking authority to provide scheduled service on the Olympic Peninsula, their applications overlap.

³ *Ashbacker Radio Corp. v. FCC*, 326 US 327, 66 S.Ct. 148 (1945).

⁴ Order M.V.G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (Nov. 1990); Order M.V.G. 1452, In re American Environmental Management Corp., Hearing No. GA-874 (November 1990); Order S.B.C. No. 467, In re Jack Rood and Jack L. Harmon Jr., d/b/a Arrow Launch Service, App. No. B-308; Order S.B.C. No. 468, In re Belairco, Inc., App. No. B-313 (May 1990).

II. MEMORANDUM

A. STANDARD FOR DETERMINATION.

6 The Commission must determine whether granting these applications is in the public interest and whether the applications meet the public convenience and necessity standard set forth in RCW 81.68.040. Under that statute, when an applicant requests a certificate of public convenience and necessity to serve a territory already served by a certificated holder, the Commission may deny the application if the existing certificate holder provides service to the satisfaction of the Commission.

7 The Commission reviews each application to determine whether:

1. The applicant meets the public convenience and necessity standard:
 - a. Do public convenience and necessity require the proposed service?
 - b. Does the existing auto transportation company operating in the territory at issue provide service to the satisfaction of the Commission?
2. Fitness:
 - a. Is the company financial fit and able to provide the service proposed?
 - b. Does the company exhibit regulatory fitness?⁵

⁵ In re Application No. D-079116 of CWA, Inc., d/b/a Central Washington Airporter, For a Certificate of Public Convenience and Necessity, Docket No. TC 021402, April 14, 2003 at 3 (CWA).

B. PUBLIC CONVENIENCE AND NECESSITY

1. Background.

8 **Olympic's current authority.** Olympic currently has authority to provide passenger service between:

- Port Angeles and Seattle, with an intermediate stop in Sequim.
- Port Angeles and SeaTac with an intermediate stop in Sequim.
- Port Townsend and Hood Canal Bridge with connections to Seattle and SeaTac via Highway 20 in Port Townsend, southbound to Highway 19, southbound to Highway 104, eastbound to Hood Canal Bridge, connecting with buses at Hood Canal Bridge and return to Port Townsend by the same route. No service is permitted between Seattle and SeaTac.

9 **Olympic's application.** Olympic seeks to expand its existing certificated scheduled bus service between Port Angeles and Seattle, and between Port Angeles and SeaTac, to include stops that it already makes based on its tariff: Discovery Bay, Kingston, and Edmonds. In addition, Olympic seeks to include Silverdale as a named stop.

10 The proposed expanded service would be restricted against service between Silverdale and Seattle, Edmonds and Seattle, Edmonds and SeaTac, and Silverdale and SeaTac.

11 **Pennco's current authority.** Pennco currently is authorized to provide passenger service on a door-to-door basis, by reservation only, between:

- Port Angeles and points in Clallam and Jefferson Counties;
- Clallam and Jefferson Counties, and Seattle and Tacoma hospitals, Amtrak stations, Greyhound stations and Seattle-Tacoma International Airport (Sea-Tac), on a closed door basis (no service to locations between points);
- Clallam and Jefferson Counties and Port Townsend, Port Ludlow, and Silverdale for passengers whose trips originate or terminate in Clallam or Jefferson counties.

12 Pennco is prohibited from providing service to passengers from any point served by Olympic unless the passengers have one-hour advance reservations.

13 **Pennco's application.** As amended,⁶ Pennco seeks to expand its door-to-door authority:

- To serve passengers between Clallam and Jefferson counties on the one hand, and Seattle hotels and Tacoma hotels and Seattle cruise terminals on the other hand, with no service between Seattle hotels and Tacoma hotels and Seattle cruise terminals, with closed door service between the identified points.
- To serve passengers between Kitsap county and Kingston and Bainbridge ferry terminals.

14 In addition, Pennco seeks to provide scheduled passenger service between Clallam and Jefferson counties and Kitsap County ferry terminals.

15 Pennco also seeks removal of the restriction against providing service to passengers from points served by Olympic without an hour's advance reservation.

⁶ Olympic and Pennco entered into restrictive amendments with protestants in this case. The amended applications are set forth in Appendices A and B respectively.

2. Public Convenience and Necessity.

- 16 In deciding whether granting a transportation application serves the public interest, the Commission must consider whether the application meets the public convenience and necessity standard.⁷ This means that the applicant must demonstrate a public need for the proposed service.⁸ If there is an existing carrier providing the same service, the applicant must demonstrate that the existing service does not provide service to satisfaction of the Commission.⁹
- 17 Public need is usually shown by the presentation of live witnesses. The Commission will not consider written statements in support of a protested application because this means that the witnesses are not available for cross-examination at the hearing.¹⁰ Usually supporting witnesses are members of the public who testify that they need the proposed service and have been unable to obtain it from another existing carrier. It is not enough to have the applicant's own operator or manager testify that there is a public need.¹¹
- 18 In addition, even if an application, or part of an application, is not protested, the applicant must present evidence of need. However, the written statements of public witnesses may be sufficient to support an unprotested application.¹²
- 19 In this case, the applicants have been providing two different types of service in the same geographic area. Olympic has been providing scheduled

⁷ RCW 81.68.040.

⁸ In re App. No. D-079116 of CWA, Inc. d/b/a Central Washington Airporter, Docket No. TC-021402, (April 2003) at 8.

⁹ RCW 81.68.040.

¹⁰ Order M.V.C. No. 2139, In re Apple Blossom Lines, Inc., App. No. GA-78198.

¹¹ Order M.V.C. No. 2160, In re Ali, Abdirahman Y d/b/a Broadway Express, App. No. D-78-583 (Sept. 1997).

¹² Order M.V. C. No. 1443, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, App. No. D-2444 (May 1984).

transportation, while Pennco has been providing door-to-door service. However, Pennco now seeks to provide a scheduled service from Port Angeles to Kingston, conflicting with Olympic's service from Port Angeles to Seattle, with a stop in Kingston. Olympic filed this application because the points it has been serving between Port Angeles and Seattle were included only in its tariff but not in its certificate of authority, creating an issue whether the service it provides can be found to be an "existing" service, since the points served are not identified in Olympic's certificate of authority. This issue is discussed later in this section of the order.

a. Olympic's evidence.

20 Olympic filed its application primarily to add to its certificate of authority points that had been served for 15 years under a tariff on file with the Commission. Olympic had been operating on the mistaken belief that the tariff was sufficient authority to allow it to serve customers going from Port Angeles to Seattle, with stops at Sequim (already identified in Olympic's certificate of authority), Discovery Bay, Kingston and Edmonds (not included in the certificate of authority) along the way.¹³

21 In support of its application, Olympic presented the testimony of two public witnesses, Mr. Donald Farmer¹⁴ and Mr. Stanley Estes,¹⁵ who had regularly used Olympic's bus service from Port Angeles only to visit hospitals in Seattle. The witnesses praised the timeliness of Olympic's service and the quality of its drivers. They also stated that they had observed other passengers disembark at Olympic's Kingston stop.

¹³ TR 110-111.

¹⁴ *Id.*, 41-58.

¹⁵ *Id.*, 59-73.

- 22 Mr. Jack Heckman, Olympic's President and manager of operations, also provided post-hearing evidence that during 2004, Olympic had served 4,351 passengers between Port Angeles and Seattle (excluding Edmonds and SeaTac), 367 passengers between Port Angeles and Discovery Bay and 644 passengers between Port Angeles and Edmonds.¹⁶
- 23 Mr. Heckman provided three additional written witness support statements after the hearing.¹⁷ These statements supported service from Discovery Bay and Edmonds and from the junction of Highway 101/20.
- 24 Mr. Heckman further testified that he had lengthy experience in running transportation operations;¹⁸ that he maintained three vehicles that would be used in the proposed service;¹⁹ that Olympic had seven drivers;²⁰ and that the company had a rigorous driver hiring and safety policy in place.²¹
- 25 **Discussion and decision.** Olympic has provided sufficient evidence to support a finding of public convenience and necessity for all its proposed points of service except Silverdale. The evidence of Olympic's transportation experience, maintenance and driver safety programs shows that it has provided safe, efficient operations to all of its other requested points over the last 15 years and that the traveling public relies on that service. Because none of Olympic's witnesses or other documentary evidence addressed a need for service at

¹⁶ Exhibit 21.

¹⁷ Mr. Heckman produced written support statements from Kathy L. Shipman and G. Kessler, Safe Harbor Recovery Center, Inc. and Beacon of Hope, Inc. in Port Townsend; Lil Wickenhauser, Sequim; and Len Mandelbaum, Port Townsend. Mr. Heckman also included in Exhibit 7, letters notifying him of Olympic's receipt of Washington State Department of Transportation (WSDOT) grants, letters of support for the grant application. These letters were written in 2002 and the Commission cannot rely on them as support for this application.

¹⁸ TR 109.

¹⁹ *Id.*; TR 127.

²⁰ TR 128.

²¹ *Id.*

Silverdale, Olympic failed to show a public need for its transportation service to or from that point.

26 Pennco argues that Olympic should be required to operate on a “closed door” basis in Kingston.²² This means that Olympic would be unable to pick up and drop off passengers at that point. Pennco appears to argue that Olympic should be foreclosed from serving Kingston because Olympic has failed to capture the market for commuters who would use the Aqua Express ferry. Pennco contends that, had Olympic been providing adequate service, Olympic’s ridership would have increased when the Aqua Express ferry went into service at the beginning of this year.

27 Pennco’s argument is unpersuasive. Olympic has served Kingston-bound passengers for some time. The fact that Olympic’s ridership has not increased with the inception of the passenger ferry service at Kingston may be the result of a number of factors—that its trips are not timed properly, that it has not advertised its service properly, or that its fares and routes are not inviting. Although Pennco and Olympic propose in their applications to serve Kingston with a scheduled bus service, it is clear that each will be serving Kingston differently. As discussed below, Pennco will provide express service to the Kingston passenger ferry and Olympic will provide twice-daily scheduled stops in Kingston to meet the car ferry as part of its service to Seattle and SeaTac.

b. Pennco’s evidence.

28 Pennco provided one public witness at the hearing, Mr. Timothy Caldwell.²³ Mr. Caldwell is the general manager of the Port Townsend Chamber of Commerce and is a member of the Port Ludlow Chamber of Commerce, the Jefferson Transit Citizens Advisory Committee, the Olympic Peninsula Work Force Development

²² Pennco post-hearing brief at 3.

²³ TR 73-106.

Council and the Washington State Ferry Advisory Committee. Mr. Caldwell testified that he travels to Seattle frequently. Mr. Caldwell stated that he had used the Aqua Express passenger ferry to get from Kingston to Seattle and that he would use a regularly scheduled bus service allowing him to get from Port Townsend to the Aqua Express ferry terminal.²⁴

29 Mr. Caldwell believed that the need for a regularly scheduled transportation service that would bring passengers from the Olympic Peninsula to the Kingston ferry terminal was supported by a 1999 Washington State Department of Transportation (WSDOT) study. The study identified cars by license plate as they crossed the Hood Canal Bridge. The survey of identified drivers revealed that approximately 1,100 people living in Clallam and Jefferson Counties were commuting into King and Pierce counties. Mr. Caldwell estimated that about 70% of those commuters, around 700 people, were going to King county locations, and that the number had increased since the 1999 study was conducted.

30 In addition to the WSDOT study, Mr. Caldwell expressed concern that the Hood Canal Bridge was facing two 78-hour summertime closures for repairs during 2005. He worried that there would be insufficient transportation alternatives for both tourists and commuters when the closures occurred.

31 Pennco provided no other live public need witnesses but did provide several written statements from members of the community supporting the proposed service from the Port Angeles ferry terminal to the Kingston ferry terminal.²⁵

²⁴ *Id.*, 92.

²⁵ Mr. Harris presented six written support statements: Linda Germeau, Board of Directors, Port Ludlow Chamber of Commerce; Mark Jochems, President, Jefferson County Economic Development Council; Wayne Barret, District Manager, Black Ball Transport, Inc., Port Angeles; Port Angeles Chamber of Commerce; Lorne DeGirolamo, Royal Tours and Charters. Each statements expressed support for the proposed service between the Port Angeles ferry terminal and the Kingston ferry terminal, connecting to the Aqua Express passenger ferry service.

- 32 Pennco's President, Mr. Kevin Harris, testified that Pennco proposed to operate an express scheduled service that would carry passengers from Port Angeles (specifically from the Victoria, Canada ferry terminal in Port Angeles) to and from the Kingston Aqua Express ferry terminal six times per day, to match the times of the Aqua Express passenger-only ferry departures for Seattle.²⁶
- 33 Pennco's buses would pick up passengers from a Jefferson County public transit stop along the way. The stop would be near the intersection of Highways 19 and 104.²⁷ Mr. Harris predicted that with the service in place, passengers from Port Ludlow could reach Seattle in approximately one hour.²⁸ Mr. Harris identified 16 vehicles²⁹ that would be used to provide the service and that were already in use to provide other Pennco passenger services. The drivers would be hired according to Pennco's existing driver hiring and safety policies.³⁰ The fare for the Pennco portion of the trip to Kingston would be \$25. The ferry ticket would be \$10.50.³¹
- 34 With regard to the adequacy of existing service to the Kingston ferry terminal, Mr. Harris stated that Olympic's service was not an "existing" service because Olympic's certificate of authority did not include a Kingston stop. Rather, Mr. Harris claims that the chief purpose of the Olympic application was to add a Kingston stop to Olympic's certificate. Mr. Harris also pointed out that Olympic stopped in Kingston (pursuant to its tariff) only twice per day and that its

²⁶ TR 101-103; 115; 148.

²⁷ *Id.*, 159.

²⁸ *Id.*, 87.

²⁹ Mr. Harris testified at first that he had 40 vehicles available to provide the service. These vehicles were used to provide both his charter business service and in the Pennco operations. However, in Pennco's application only 14 vehicles were identified. In response to a bench request, Mr. Harris listed two additional vehicles that would be used to provide the service, for a total of 16.

³⁰ TR 184.

³¹ TR 105; 170. Mr. Harris alluded to the possibility of some adjustment of these fares for frequent commuters.

routing included many additional stops compared to the Pennco service proposal.³²

35 **Discussion and decision.** The evidence of need supports granting Pennco authority to provide an express, scheduled service from the Port Angeles ferry terminal to the Kingston ferry terminal. Mr. Caldwell's testimony as the manager of the Port Townsend Chamber of Commerce and member of other community organization, plus his expression of a personal need to use a transportation service like the one proposed by Pennco to get him from the Olympic Peninsula to Seattle via Aqua Express ferry terminal, provided evidence of public need for part of Pennco's proposed expansion of operations.

36 Mr. Caldwell's testimony additionally shows a need for service to and from the Aqua Express ferry on the part of tourists and Seattle-bound commuters from Jefferson County and also for those seeking an alternative route from the Peninsula when the Hood Canal Bridge closes for repair.

37 The evidence also shows that Olympic's service to Kingston is inadequate to serve the public need. Olympic provides only two runs per day to Kingston. The Olympic routes that service Kingston contain a number of stops and are relatively circuitous. Olympic's Kingston stops are not tailored to provide the type of commuter service appropriate to meet the Aqua Express ferry schedule.

38 Olympic contends that the low number of passengers it carries to Kingston demonstrate an insufficient market for Pennco's service. However Olympic's low ridership figures may be due to the length of the routes Olympic employs to serve Kingston and of an Olympic service schedule that does not fit the Aqua Express ferry schedule. It is acknowledged that the 1999 WDOT survey relied on by both Mr. Caldwell and Mr. Harris is somewhat dated. However, Mr. Harris testified that he had conducted more recent interviews in the community to

³² TR 114; *see also*, attachment 7 to Olympic Application.

verify the market for commuter transport. Moreover, it is reasonable to assume that there has been growth in the commuter population since the survey was done and that the number of potential commuters remains high.

39 Olympic argues that even if there are 700 potential commuters, it is highly improbable that they would actually make use of the Pennco service because of the cost. Olympic observes that at \$25 for the bus ride and \$10.50 for the ferry ride, the total for a trip would be approximately \$35. For a regular commuter to Seattle, this would add up to \$700 per month. However, Mr. Harris testified that there may be some way to adjust the fares offered to frequent travelers. Also, the cost of the fare should be compared to the cost of parking in Seattle and of the ferry ticket for automobiles. With these costs in mind, the \$35 total trip cost may not seem as high.

40 It is concluded that the Pennco has met the public convenience and necessity criteria for at least a portion of its proposed service—to and from the Kingston ferry terminal. Pennco otherwise provided no proof to support the remainder of its requested authority, and the unsupported portions of the application should be denied. Moreover, as discussed below, Pennco failed to meet the financial fitness standard for a grant of authority, causing its application to be denied for that reason.

C. FINANCIAL FITNESS.

41 The Commission judges an applicant's financial fitness according to the level of responsibility to the public involved in the type of service to be provided, the risks to the public if the applicant's operations fail, and the firm's financial history.³³ For example, the Commission may be more concerned about financial

³³ RCW 81.68.040; see also, CWA at 10, citing Order M.V.C. No. 1899, In Re San Juan Airlines, Inc., d/b/a Shuttle Express, App. No. D-2589 (March 1991), modified, Order M.V. C. No. 1909 (May 1991).

fitness for an operation to provide a scheduled service upon which people rely daily for transport to work. The Commission does not consider an applicant's financial condition to be a critical element in granting authority if there is credible evidence that the applicant has sufficient financing to begin operations and continue them for a reasonable period while its business is building.³⁴

1. Pennco's financial fitness.

42 Pennco submitted a profit and loss statement for the period April 2003 through March 2004. The statement showed that Pennco's combined regulated and unregulated operations³⁵ lost \$342,981 over the twelve-month period based on income of \$919,392. Mr. Harris testified during the hearing that he personally subsidized the loss. However, Pennco did not provide a balance sheet and Mr. Harris only stated in a general way his personal ability to provide further coverage of the company's losses.³⁶

43 Mr. Harris also testified that Pennco has been providing door-to-door service for seven years, without any government-provided financial assistance.³⁷ In addition, he stated that the company would not need to acquire new assets to perform service under the application, because it has enough drivers, vehicles and financial resources from its current operations to perform the new service.³⁸ Finally, Mr. Harris indicated that the new service would save the company additional money because he would shift door-to-door passengers over to the Port Angeles-Kingston run³⁹ and because the Port Angeles to Kingston service involved less driving and used fewer resources than the bus service directly to

³⁴ *Id.*, citing *In re Application of Valentinetti*, App. No. D-78932, Docket No. TC-001566 (2002).

³⁵ Pennco also operates a charter transportation service, and Mr. Harris, Pennco's owner, operates a computer software business.

³⁶ TR 186-187.

³⁷ TR 187; 150.

³⁸ TR 167.

³⁹ TR 168.

Seattle. Thus, during the hearing, Mr. Harris assured the Commission that Pennco was financially able to provide the proposed service.

44 However, after the initial evidentiary hearing, the Commission suspended Pennco's authority because Pennco failed to file the required annual proof of liability and property damage insurance covering Pennco's operations.⁴⁰ As a result of the Commission's action, Mr. Harris suspended Pennco's transportation services.⁴¹ Although the Commission reinstated Pennco's certificate of authority after Pennco filed the required proof of insurance,⁴² Mr. Harris stated that Pennco's operations remained in a "temporarily suspended" status.⁴³

45 At the June 24, 2005 hearing reopening the record, Commission Staff provided the testimony of Bonnie Allen, a Regulatory Analyst and senior transportation staff in the Commission's Transportation and Water Division. Ms. Allen described the status of Pennco's insurance filings. Ms. Allen testified that Pennco's insurance had been reinstated and that the Commission had lifted the suspension of Pennco's authority.⁴⁴

46 Staff also provided a copy of Mr. Harris' May 10, 2005 letter to the Commission's Executive Secretary⁴⁵ and newspaper articles that shed some light on Pennco's current operating status.⁴⁶ In the May 10 letter, Mr. Harris states: "I have decided to suspend indefinitely the operations of Pennco Transportation, Inc." and describes his reasons for "closing the business." Mr. Harris closes his letter by asking his customers to "accept my apology for not being able to continue on"

⁴⁰ Docket No. TC-030791, Order Suspending Certificate No. C-1054, April 14, 2005.

⁴¹ Letter to Commission Executive Secretary Carole Washburn, May 9, 2005 and attached Open Letter to Olympic Peninsula Residents, May 10, 2005.

⁴² Docket No. TC-0307901, Order Lifting Suspension, May 4, 2005.

⁴³ Email to the Commission from Kevin Harris, dated May 31, 2005.

⁴⁴ TR 216

⁴⁵ Exhibit 24.

⁴⁶ Exhibit 25-26.

and says to his employees that he “cannot continue to operate and support Pennco...”⁴⁷

47 The newspaper articles submitted by Staff indicated variously that Pennco was going to “shutter” shuttle service to SeaTac⁴⁸ and that Mr. Harris questioned why he should continue to provide his own money to fund Pennco operations, adding that no decision had been made about disbursing the company’s assets.⁴⁹ One of the newspaper articles also stated that there were financial problems with at least one of Mr. Harris’ other business projects that might lead to foreclosure and pursuit of Mr. Harris’ other assets.⁵⁰

48 **Discussion and decision.** In past transportation cases, the Commission has found that when the applicant does not clearly show its assets and liabilities or provide financial information that demonstrates an ability to conduct operations, the Commission has insufficient information to find that the applicant is financially fit to conduct operations.⁵¹

49 In addition, the Commission has ruled that when a corporate applicant provides financial information that is a mixture of corporate and shareholder finances, if the operating witness (the company’s owner or manager) cannot testify in detail about the corporation’s assets (as opposed to shareholder assets), and if the financial documentation is incomplete, inconsistent, and unclear, the Commission does not have sufficient information to find the applicant financially fit.⁵²

⁴⁷ Mr. Harris also raises allegations of unfairness and bias towards Pennco by the WUTC and by other government agencies. These allegations are not related to the issues before the Commission in this application for authority and are not addressed here.

⁴⁸ Exhibit 25.

⁴⁹ Exhibit 26.

⁵⁰ Exhibit 26.

⁵¹ Order M.V. No 146379, In re Brian C. McCulloch, d/b/a Parallax Moving Systems, App. No. P-76085 (April 1993).

⁵² Order M.V. No 145701, In re Safeco Safe Transport, Inc., Appl. No. P-73623 (October 1992).

50 Finally, the Commission has found that when an applicant has significant, unexplained operating losses, past operations have not been shown to be profitable, there is no evidence of a plan to correct the carriers' financial situation or of a source of funding to support continued operations, the applicant has not shown that it is financially fit.

51 In this case, the evidence is not sufficient to support a finding that Pennco is financially fit to conduct the operations proposed. The only financial document Pennco supplied was a profit and loss statement⁵³ that showed a significant loss related to Pennco's combined regulated and unregulated business for the year ending March 2004. Pennco provided no information as to which of its operations incurred losses. The losses were covered by Mr. Harris personally and no information was provided as to his own financial capabilities. Although Mr. Harris explained the reasons for the company's past losses and gave the Commission general assurances that he would be able to continue to support Pennco, that Pennco would incur no additional costs to provide the proposed service, and that the service would be profitable, Mr. Harris failed to refute Staff's evidence on reopening that Pennco's service was being shut down because it was not financially viable. Thus, the evidence about Pennco's corporate and shareholder finances was limited and unclear.

52 Mr. Harris also failed to refute statements to the press that Pennco's financial viability is in doubt because of his apparent inability to obtain financial assistance from government and that it was uncertain whether he would continue to pour his own money into Pennco's operations. Thus the financial information on the record is contradictory and insufficient to provide the Commission with the assurance it needs that Pennco is financially fit to conduct a scheduled transportation on which the public relies. Pennco has failed to meet the financial fitness criteria for a grant of authority and Pennco's application should be denied.

2. Olympic's financial fitness.

53 No party challenged Olympic's financial fitness to conduct its proposed service. The record shows that Olympic, for some years, has been providing a tariffed service that is the same as what it seeks in its application and would require no additional vehicles, drivers, or facilities to perform service under the application. Olympic's application showed that it has assets of \$1,244,384 and liabilities of \$519,563. In 2003, Olympic received two WSDOT grants. One grant allowed Olympic to purchase two new 15 passenger minibuses. The second provided \$113,270 in operating assistance for the enhancement of intercity bus transportation. The evidence supports a finding that Olympic is financially fit to provide the proposed service.

D. REGULATORY FITNESS

54 None of the parties explicitly raised regulatory fitness as an issue. Pennco raised the issue indirectly by arguing that because Olympic has been providing the service it proposes in this application without Commission authority, the Commission should not consider Olympic's existing operations adequate. Conversely, Olympic questioned whether Pennco was actually providing the 24-hour, door-to-door service it was authorized to provide.⁵⁴

55 **Discussion and decision.** To qualify for authority, an applicant must establish that it is willing and able to comply with Washington laws and Commission rules.⁵⁵ In this case, when Olympic purchased its current authority, the listed service points were contained in the tariff, but not in the certificate of authority

⁵³ Exhibit 11.

⁵⁴ The record showed that for passengers that who require delivery to the airport at times other than one of Pennco's scheduled delivery times, Pennco assigns those passengers to its charter service for delivery to the airport at a higher rate.

⁵⁵ Order M.V.C. No. 1892, In re Lloyd's Connection, Inc. d/b/a Airport Connection Airporter, Hearing No. D-2556 (December 1990).

itself. The carrier from which Olympic purchased the authority had been conducting the transportation service to these points based on its tariff. Olympic simply continued the practice. When Commission Staff pointed out that Olympic's tariffed points of service must also appear in Olympic's certificate of authority, Olympic immediately applied for the authority in this application. Olympic's willingness and promptness in remedying the discrepancy between its tariff and its certificate demonstrates its regulatory fitness to provide the requested service.

56 With regard to Pennco, the parties did not address whether Pennco conducts its door-to-door 24-hour service in such a way as to violate Commission regulations. Pennco has operated under Commission authority for seven years. There is some evidence that Pennco is willing to abide by Commission regulations as demonstrated by the company's effort to provide proof of insurance shortly after being notified that its insurance had lapsed.

57 For these reasons, both applicants are found to meet the regulatory fitness criteria for a grant of authority.

III. FINDINGS OF FACT

58 (1) Pennco and Olympic are auto transportation companies conducting intrastate operations in the state of Washington that are regulated by the Washington Utilities and Transportation Commission.

59 (2) On September 2, 2004, Olympic filed an application for an extension of its certificate of authority to furnish passenger and express service. The application, as amended, is set forth in Appendix A to this order. Olympic primarily seeks to add points to its certificate of authority that it has been serving under its tariff (Discovery Bay, Edmonds and Kingston), and to add Silverdale as an additional service point.

- 60 (3) On July 23, 2004, Pennco filed an application for an extension of its certificate of authority to furnish passenger and express service. The application, as amended, is set forth in Appendix B to this order. Pennco primarily seeks authority to provide a scheduled transportation service from the Port Angeles ferry terminal to the Kingston ferry terminal.
- 61 (4) The Pennco and Olympic applications overlap because they both seek to provide a scheduled transportation service between Port Angeles and Kingston.
- 62 (5) The following transportation companies filed protests to the applications, but entered into restrictive amendments that satisfied their interests: Bremerton-Kitsap Airporter, Evergreen Trails d/b/a Gray Line of Seattle, and Shuttle Express, Inc.
- 63 (6) Pennco and Olympic each protested each other's application.
- 64 (7) The Commission consolidated the two applications for review under the Ashbacker doctrine which requires contemporaneous applications for overlapping authority to be reviewed together to determine whether the applications are mutually exclusive.
- 65 (8) The testimony of Timothy Caldwell, manager of the Port Townsend Chamber of Commerce, demonstrates a public need for Pennco's proposed scheduled passenger and express service between the Port Angeles ferry terminal and the Kingston ferry terminal, with stops in Sequim, Discovery Bay and an intermediate stop near the intersection of Highways 19 and 104.

- 66 (9) Olympic's existing service from Port Angeles to the Kingston ferry terminal is not satisfactory because it provides insufficient scheduled service to meet the Kingston Aqua Express passenger ferry schedule.
- 67 (10) Pennco provided no evidence of public need for any other service proposed in its application.
- 68 (11) The testimony of Donald R. Farmer and Stanley Estes established a need for Olympic's scheduled service between Port Angeles and Seattle. Olympic's history of service and ridership statistics for 2004 for intermediate points between Port Angeles and Seattle, including Sequim, Discovery Bay, and Edmonds, established a public need for Olympic's service to those points.
- 69 (12) Olympic provided no evidence in support of its request to serve Silverdale or SeaTac.
- 70 (13) Pennco's financial evidence was insufficient to support a conclusion that Pennco is financially fit to be granted auto transportation authority.
- 71 (14) Olympic provided sufficient evidence to show that it is financially fit to be granted auto transportation authority.
- 72 (15) Both Pennco and Olympic demonstrated their regulatory fitness to be granted auto transportation authority.

IV. CONCLUSIONS OF LAW

- 73 (1) The Washington Utilities and Transportation Commission has jurisdiction over the parties to and subject matter of this application.

- 74 (2) Pennco has not demonstrated sufficient financial fitness to be granted a certificate of authority.
- 75 (3) Olympic is fit, willing and able to provide service in accord with the findings in this order as contained in Appendix C to the order.

V. ORDER

IT IS ORDERED That:

- 76 (1) Application No. D-07924 of Pennco Transportation, Inc. is denied;
- 77 (2) Application No. D-079302 of Heckman Motors, d/b/a Olympic Bus Lines is granted as stated in Appendix C to this order. Except as stated in Appendix C, the application is denied.

Dated at Olympia, Washington, and effective this 26th day of July, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THEODORA M. MACE
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a *Petition to Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

One copy of any Petition or Answer filed must be served on each party of record, with proof of service as required by WAC 480-07-150(8) and (9). An Original and twelve copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia Washington 98504-7250.

APPENDIX A

Heckman Motors, Inc.
D/b/a Olympic Bus Lines
111 East Front Street
Port Angeles, WA 98362

Application No. D-079302
Docket No. TC-041593

AMENDED PROPOSED AUTHORITY:

PASSENGER SERVICE:

BETWEEN: Port Angeles, Sequim, Discovery Bay, Kingston, Edmonds,
Silverdale and Seattle.

No service shall be rendered between Seattle and Seattle-Tacoma International Airport, Silverdale and Seattle, Edmonds and Seattle, Edmonds and Seattle-Tacoma International Airport, and Silverdale and Seattle-Tacoma International Airport.

APPENDIX B

Pennco Transportation, Inc.
933 Carlsborg Rd.
Carlsborg, WA 98382

Application No. D-079294
Docket No. TC-041340

AMENDED PROPOSED AUTHORITY:

PASSENGER SERVICE: Door-to-door, by reservation only:

BETWEEN: Clallam and Jefferson Counties on one hand, and Seattle hotels and Tacoma hotels and Seattle cruise terminals on the other hand, with no service between Seattle hotels and Tacoma hotels and Seattle cruise terminals, and with closed door service between the indicated points.

BETWEEN: Clallam and Jefferson Counties and Kingston and Bainbridge Ferry Terminals.

BETWEEN: Kitsap County and Kingston and Bainbridge Ferry Terminals.

Removal of restriction against providing service:

To passengers from any point served by Heckman Motors, Inc. d/b/a Olympic Bus Lines, under Certificate No. C-992 without advance reservations made at least one hour in advance of the pick-up times at each such point indicated by Heckman Motors, Inc., d/b/a/ Olympic Bus Lines, schedule as published from time-to-time in accordance with WAC 480-30-060.

PASSENGER SERVICE:

BETWEEN: Clallam and Jefferson Counties and Kitsap County Ferry Terminals.

APPENDIX C

Heckman Motors, Inc.
D/b/a Olympic Bus Lines
111 East Front Street
Port Angeles, WA 98362

Application No. D-079302
Docket No. TC-041593

AUTHORITY GRANTED:

PASSENGER SERVICE:

BETWEEN: Port Angeles, Sequim, Discovery Bay, Kingston, Edmonds, and Seattle.

No service shall be rendered between Seattle and Seattle-Tacoma International Airport, Edmonds and Seattle, and Edmonds and Seattle-Tacoma International Airport.