

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Investigation of FRIDAY HARBOR JOLLY TROLLEY, INC., d/b/a FRIDAY HARBOR JOLLY TROLLEY and LEAVENWORTH JOLLY TROLLEY,	DOCKETS TE-191003 and TE-191002 (<i>Consolidated</i>) ORDER 01
For Compliance with WAC 480-30-221 In the Matter of the Penalty Assessment against FRIDAY HARBOR JOLLY TROLLEY, INC., d/b/a FRIDAY HARBOR JOLLY TROLLEY and LEAVENWORTH JOLLY TROLLEY, in the amount of \$6,100	CONSOLIDATING DOCKETS; APPROVING SAFETY MANAGEMENT PLAN; UPGRADING SAFETY RATING; IMPOSING AND SUSPENDING PENALTIES

BACKGROUND

- 1 On December 19, 2019, the Washington Utilities and Transportation Commission (Commission) issued a Notice of Intent to Cancel and Notice of Brief Adjudicative Proceeding; Setting Time for Oral Statements in the Matter of the Investigation of Friday Harbor Jolly Trolley, Inc., d/b/a Friday Harbor Jolly Trolley and Leavenworth Jolly Trolley, (Jolly Trolley or Company) for Compliance with Washington Administrative Code (WAC) 480-30-221 (Notice).
- 2 The Notice explained that Commission staff (Staff) conducted a compliance review of Jolly Trolley's operations in November and December of 2019 and cited the Company for 146 critical violations of federal and state safety regulations, which resulted in a proposed "unsatisfactory" safety rating. Based on its review, Staff recommends the Commission cancel Jolly Trolley's charter and excursion carrier certificate unless the Company obtains Commission approval of a safety management plan. The Notice directed Jolly Trolley to file a proposed safety management plan by January 2, 2020. The Commission also set a brief adjudicative proceeding (BAP) for January 9, 2020, at 1:30 p.m. to determine whether the Commission should cancel Jolly Trolley's charter and excursion carrier certificate.

**Pursuant to RCW 80.01.060(3)
This packet is the final
Order in this docket.**

3 On December 19, 2019, the Commission assessed a \$6,100 penalty (Penalty Assessment) against Jolly Trolley for the safety violations discovered during Staff's compliance review.¹ The Penalty Assessment includes:

- A \$5,800 penalty for 58 violations of 49 C.F.R. § 391.45(a) for using drivers who were not medically examined and certified on 58 occasions between July 2 and August 31, 2019.
- A \$100 penalty for 5 violations of 49 C.F.R. § 391.51(b)(2) for failing to maintain driving record inquiries in driver qualification files for each driver.
- A \$100 penalty for 83 violations of 49 C.F.R. § 395.8(a)(1) for failing to require drivers to prepare a record of duty status using the appropriate method.
- A \$100 penalty for one violation of 49 C.F.R. § 396.3(a)(1) for using a commercial motor vehicle with drag link movement to its steering system.

4 On January 2, 2020, Jolly Trolley filed with the Commission a request for mitigation of the penalty based on the written information provided and waived its right to a hearing.

5 On January 8, 2020, Jolly Trolley submitted a proposed safety management plan. That same day, Staff filed with the Commission its evaluation of the Company's safety management plan and penalty recommendation (Evaluation).

6 Staff determined, based on its review of the Company's proposed plan, that the Company took all of the required steps to bring its safety operations into compliance with Commission regulations. Staff recommends that the Commission upgrade the Company's safety rating to "conditional." Staff further recommends that the Commission assess a reduced penalty of \$3,200. Finally, Staff recommends the Commission suspend a \$2,000 portion of the penalty for a period of two years, and then waive it, subject to the following conditions: 1) Staff will conduct a follow-up safety investigation at least six months from the date of this Order, 2) the Company must not incur any repeat critical violations upon re-inspection, 3) the Company must maintain a conditional safety rating, and 4) the Company must pay the \$1,200 portion of the penalty that is not suspended.

7 On January 8, 2020, Staff sent an email to the presiding officer representing that the Company waives its right to a hearing, and recommending that the brief adjudicative proceeding be cancelled. That same day, the Commission issued a Notice cancelling the

¹ The Penalty Assessment cites violations of Washington Administrative Code (WAC) 480-30-221, which adopts by reference sections of Title 49 Code of Federal Regulations (C.F.R.). Accordingly, Commission safety regulations with parallel federal rules are hereinafter referenced only by the applicable provision of Title 49 C.F.R.

January 9, 2020, hearing and informing the parties that the Commission would enter an order based on the parties' written submissions.

DISCUSSION AND DECISION

1. Consolidation

8 Because the violations cited in Staff's investigation gave rise to the enforcement actions taken in both dockets, the Commission exercises its discretion to consolidate these proceedings. Accordingly, Docket TE-191003 and Docket TE-191002 are consolidated.

2. Safety Rating

9 Washington Law requires charter and excursion carriers to comply with federal safety requirements and undergo routine safety inspections. Staff's compliance review of Jolly Trolley found 167 violations of Commission safety regulations; 146 of the violations were "critical," which resulted in a proposed "unsatisfactory" safety rating. Violations classified as "critical" are indicative of a breakdown in a carrier's management controls. Patterns of noncompliance with a critical regulation are quantitatively linked to inadequate safety management controls and usually higher-than-average accident rates.

10 On January 8, 2020, the Company submitted its proposed safety management plan and requested the Commission upgrade its safety rating to "conditional." Staff determined that Jolly Trolley's safety management plan addresses each violation, identifies how each violation occurred, describes the steps taken to correct each violation, and describes the controls put in place to ensure compliance going forward. Staff concludes that Jolly Trolley's safety management plan is acceptable and satisfies the legal requirements of 49 CFR Part 385. We agree.

11 Based on Staff's Evaluation, the Commission finds that the Company has achieved compliance with WAC 480-30-221 by correcting the violations that led to the proposed "unsatisfactory" safety rating. Accordingly, the Commission agrees with Staff's recommendation that the Company's safety rating should be upgraded to "conditional."

3. Penalty

12 Violations discovered during safety inspections are subject to penalties of \$100 per violation.² In some cases, Commission requirements are so fundamental to safe

² See RCW 80.04.405.

operations that the Commission will issue penalties for first-time violations.³ Critical violations meet this standard.⁴

- 13 The Commission considers several factors when entertaining a request for mitigation, including whether the company introduces new information that may not have been considered in setting the assessed penalty amount, or explains other circumstances that convince the Commission that a lesser penalty will be equally or more effective in ensuring the company's compliance.⁵
- 14 Here, Staff recommends the Commission assess a reduced penalty of \$3,200. We agree with Staff's recommendation. The Company provided a comprehensive safety management plan that details the steps it has taken to bring its operations into compliance with applicable regulations. The safety management plan includes documentation of driver medical certification, driver qualifications, hours of service records, and controlled substances and alcohol testing. Accordingly, we are satisfied that Jolly Trolley has cured the violations that gave rise to the Penalty Assessment and has put adequate controls in place to prevent the violations from reoccurring.
- 15 **Suspended Penalty.** The Commission considers several factors in determining whether to suspend a portion of a penalty, including whether it is a first-time penalty for the same or similar violations, and whether the company has taken specific actions to remedy the violations and avoid the same or similar violations in the future, such as purchasing new technology, making system changes, or training company personnel.⁶ Another factor we consider is whether the company agrees to a specific compliance plan that will guarantee future compliance in exchange for suspended penalties.⁷
- 16 In this case, penalties were assessed for first-time violations. In addition, the Company has taken action to prevent each of the violations from reoccurring. Suspending a portion of the penalty with the conditions proposed by Staff will both increase compliance and provide a strong incentive to avoid violations in the future. Accordingly, we agree with

³ Docket A-120061, Enforcement Policy for the Washington Utilities and Transportation Commission ¶12 (Jan. 7, 2013) (Enforcement Policy).

⁴ 49 C.F.R. § 385, Appendix B.

⁵ Enforcement Policy ¶19.

⁶ *Id.* at ¶20.

⁷ *Id.*

Staff's recommendation and suspend a \$2,000 portion of the penalty for a period of two years, and then waive it, subject to the following conditions:

- a) Jolly Trolley must maintain a conditional safety rating;
- b) Staff must conduct a follow-up investigation at least six months from the effective date of this Order;
- c) Jolly Trolley may not incur any repeat critical violations of WAC 480-30-221 upon re-inspection; and
- d) Jolly Trolley must pay the remaining \$1,200 penalty within 10 days of the effective date of this Order. The Company may work with Staff to establish mutually agreeable payment arrangements to pay the \$1,200 portion of the penalty that is not suspended.

FINDINGS AND CONCLUSIONS

- 17 (1) The Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including common carriers such as charter and excursion carriers, and has jurisdiction over the parties and subject matter of this proceeding.
- 18 (2) Jolly Trolley is a charter and excursion carrier subject to Commission regulation.
- 19 (3) Jolly Trolley cured the deficiencies that led to Staff's recommendation to cancel the Company's charter and excursion certificate. Accordingly, Jolly Trolley's safety rating should be upgraded to "conditional."
- 20 (4) Jolly Trolley committed 146 critical violations of WAC 480-30-221 and Title 49 C.F.R.
- 21 (5) Jolly Trolley does not dispute that the violations occurred.
- 22 (6) Jolly Trolley should be penalized \$3,200 for 146 critical violations of WAC 480-30-221 and Title 49 C.F.R. The Commission should suspend a \$2,000 portion of the penalty for two years, and then waive it, subject to the conditions set out in paragraph 16, above.

ORDER

THE COMMISSION ORDERS THAT:

- 23 (1) The Commission approves Friday Harbor Jolly Trolley, Inc., d/b/a Friday Harbor
Jolly Trolley and Leavenworth Jolly Trolley's safety management plan.
- 24 (2) Friday Harbor Jolly Trolley, Inc., d/b/a Friday Harbor Jolly Trolley and
Leavenworth Jolly Trolley's safety rating is upgraded to "conditional."
- 25 (3) The Commission assesses a \$3,200 penalty against Friday Harbor Jolly Trolley,
Inc., d/b/a Friday Harbor Jolly Trolley and Leavenworth Jolly Trolley. The
Commission suspends a \$2,000 portion of the penalty for a period of two years,
and then waives it, subject to the conditions set out in paragraph 16, above.
- 26 (4) The \$1,200 portion of the penalty that is not suspended is due and payable within
10 days of the effective date of this Order.

DATED at Lacey, Washington, and effective January 9, 2020.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ Rayne Pearson
RAYNE PEARSON
Administrative Law Judge

NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. 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. If you agree with this Initial Order and you would like the Order to become final before the time limits expire, you may send a letter to the Commission waiving your right to petition for administrative review.

WAC 480-07-610(7) provides that any party to this proceeding has 21 days after service of this initial order to file a petition for administrative review (Petition). Section (7)(b) of the rule identifies what you must include in any Petition as well as other requirements for a Petition. WAC 480-07-610(7)(c) states that any party may file a response to a Petition within 7 days after service of the Petition.

WAC 480-07-830 provides that before the Commission enters a final order any party may file a petition to reopen a contested proceeding to permit receipt of evidence that is essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will give other parties in the proceeding an opportunity to respond to a motion to reopen the record, unless the Commission determines that it can rule on the motion without hearing from the other parties.

WAC 480-07-610(9) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion.

Any Petition or response must be electronically filed through the Commission's web portal, as required by WAC 480-07-140(5).