

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Investigation of STILLAGUAMISH SENIOR CENTER For Compliance with WAC 480-31-130	DOCKET TN-170131 <i>(Consolidated)</i> ORDER 01
In the Matter of the Penalty Assessment Against STILLAGUAMISH SENIOR CENTER In the amount of \$3,600	DOCKET TN-170130 <i>(Consolidated)</i> ORDER 01 ORDER OF CONSOLIDATION; ORDER UPGRADING SAFETY RATING; ORDER IMPOSING AND SUSPENDING PENALTIES

BACKGROUND

- 1 On March 31, 2017, the Washington Utilities and Transportation Commission (Commission) issued a Notice of Intent to Cancel Certificate as a Private, Nonprofit Transportation Provider and Notice of Brief Adjudicative Proceeding; Setting Time for Oral Statements In the Matter of the Investigation of Stillaguamish Senior Center (Stillaguamish or Company) For Compliance with Washington Administrative Code (WAC) 480-31-130 in Docket TN-170131 (Notice of Intent to Cancel). The Notice of Intent to Cancel set a Brief Adjudicative Proceeding for May 15, 2017.
- 2 Also on March 31, 2017, the Commission assessed a \$3,600 penalty (Penalty Assessment) in Docket TN-170130 against Stillaguamish for 67 violations of WAC 480-31-130, which adopts by reference Title 49 of the Code of Federal Regulations (49 C.F.R.) Part 391 related to driver qualifications, Part 395 related to driver hours of service, and Part 396 related to vehicle inspection, repair, and maintenance.¹

¹ WAC 480-15-570 adopts by reference sections of Title 49 C.F.R. Accordingly, Commission safety regulations with parallel federal provisions are hereinafter referenced by the applicable part of 49 C.F.R.

- 3 On April 20, 2017, Stillaguamish filed an application for mitigation of the penalty, admitting the violations and requesting a hearing.
- 4 On May 15, 2017, the Commission conducted a brief adjudicative proceeding before Administrative Law Judge Rayne Pearson. The parties agreed that the Commission should address the Penalty Assessment in Docket TN-170130 concurrently with the Company's proposed safety management plan in Docket TN-170131. Accordingly, the Commission consolidated Dockets TN-170130 and TN-170131.
- 5 Staff presented testimony from Sandi Yeomans, special investigator, and Mathew Perkinson, motor carrier safety supervisor, Transportation Safety. Ms. Yeomans testified about the critical safety violations that resulted in Staff's proposed unsatisfactory safety rating for Stillaguamish. Following a March 2017 compliance review, Staff documented 33 violations of 49 C.F.R. Part 391.45(a), which requires that drivers be medically examined and certified by a qualified provider prior to operating company vehicles. The Company allowed four employees to drive its vehicles on 33 occasions between August 2016 and January 2017 without a valid medical certificate.
- 6 Staff also documented five violations of 49 C.F.R. Part 391.51(a), which requires carriers to maintain a driver qualification file for each driver it employs. Stillaguamish failed to maintain driver qualification files for its five drivers.
- 7 Staff also documented 13 violations of 49 C.F.R. Part 395.8(a), which requires drivers to make a record of duty status. The Company allowed five of its employees to drive without making a record of duty status on 13 occasions between August 2016 and January 2017.
- 8 Finally, Staff documented 16 violations of 49 C.F.R. Part 396.11(a), which requires drivers to prepare a driver vehicle inspection report (DVIR). The Company failed to require two of its drivers to prepare DVIRs on 16 occasions between August 2016 and January 2017.
- 9 Mr. Perkinson testified that the Company has since submitted a proposed safety management plan that Staff finds acceptable. Staff recommends the Commission upgrade the Company's safety rating to "conditional," and allow the Company to maintain its certificate. With respect to the penalty assessed in Docket TN-170130, Staff recommends the Commission suspend a \$2,600 portion of the penalty for a period of one year, and then waive it, subject to the condition that the Company may not incur any repeat critical violations of WAC 480-31-130 upon re-inspection in one year.

- 10 Stillaguamish presented testimony from Danette Klemens, executive director, who acknowledged the violations but requested the penalty be mitigated. Ms. Klemens explained that all of the Company's drivers are now medically certified and are required to complete and submit records of duty status and DVIRs. Ms. Klemens further testified that the Company has created driver qualification files for each driver that contain the necessary forms and certifications. Finally, Ms. Klemens explained that the violations occurred because she did not receive training from the person who previously held her position, and explained that the Company has since developed a compliance plan to prevent the violations from reoccurring.
- 11 Andrew J. O'Connell, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Danette Klemens, Executive Director, Arlington, Washington, represents Stillaguamish.

DISCUSSION AND DECISION

1. Docket TN-170131 – Nonprofit Transportation Provider Certificate

- 12 Washington law requires private, nonprofit transportation carriers to comply with federal safety requirements and undergo routine safety inspections. Staff's March 2017 compliance review of Stillaguamish found 67 violations of critical regulations, 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 higher-than-average accident rates.
- 13 On May 2, 2017, the Company submitted its proposed safety management plan and requested the Commission upgrade its safety rating. Staff found that Stillaguamish'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.
- 14 Based on the testimony and evidence presented at the hearing, the Commission finds that the Company has achieved compliance by correcting the violations that led to the proposed unsatisfactory safety rating. Accordingly, the Commission agrees with Staff's recommendation and grants the Company's request to upgrade its safety rating to conditional.

2. Docket TN-170130 – Penalty Assessment

- 15 Violations discovered during safety inspections are subject to penalties of \$100 per violation.² In some cases, Commission requirements are so fundamental to safe operations that the Commission will assess penalties for first-time violations.³ Critical violations meet this standard.⁴ While the Commission is typically more lenient with nonprofit companies that commit paperwork violations – such as failing to meet the deadline for filing an annual report – transportation safety rules are enforced uniformly, regardless of a company’s nonprofit status.
- 16 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 The Commission also considers whether the violations were promptly corrected, a company’s history of compliance, and the likelihood the violation will recur.⁶ The Penalty Assessment cited 67 violations in four categories. We address each category in turn.
- 17 **49 C.F.R. Part 391.45(a).** The Penalty Assessment includes a \$3,300 penalty for 33 violations of 49 C.F.R. Part 391.45(a) because Stillaguamish allowed four drivers who were not medically examined and certified to drive on 33 occasions between August 2016 and January 2017. Ms. Klemens testified that the Company was unaware of this requirement, and the Company now has controls in place to ensure that all drivers maintain valid medical certificates.
- 18 Staff recommends no mitigation of this portion of the penalty because these are repeat violations. We agree. Although we appreciate the Company’s efforts to correct the violations, we find that a “per violation” penalty is appropriate here because medical certification is fundamental to safe operations. Drivers who are not medically certified

² See RCW 80.04.405.

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 Docket A-120061, Enforcement Policy for the Washington Utilities and Transportation Commission (January 7, 2013).

may have an undocumented medical condition that puts the traveling public at risk. Accordingly, we decline to mitigate this portion of the penalty.

19 **49 C.F.R. Part 391.51(a).** The Penalty Assessment also includes a \$100 penalty for five violations of 49 C.F.R. Part 391.51(a) because the Company failed to maintain driver qualification files for each of its five drivers. In its response, the Company explained that the violation has since been corrected, and provided copies of driver qualification files for each employee.

20 We decline to mitigate this portion of the penalty. The Commission could have assessed a \$500 penalty, but, because these are first-time violations, assessed a “per category” rather than “per violation” penalty. Accordingly, we find that no further penalty reduction is warranted.

21 **49 C.F.R. Part 395.8(a).** The Penalty Assessment also includes a \$100 penalty for 13 violations of 49 C.F.R. Part 395.8(a) because Stillaguamish allowed its employees to drive without making a record of duty status on 13 occasions in the six months preceding the compliance review. Ms. Klemens testified that the Company now has controls in place to ensure drivers complete records of duty status.

22 We decline to mitigate this portion of the penalty. The Commission could have assessed a \$1,300 penalty, but, because these are first-time violations, assessed a “per category” rather than “per violation” penalty. Accordingly, we find that no further penalty reduction is warranted.

23 **49 C.F.R. Part 396.11(a).** Finally, the Penalty Assessment included a \$100 penalty for 16 violations of 49 C.F.R. Part 395.8(a) because Stillaguamish failed to require its employees to prepare DVIRs on 16 occasions between August 2016 and January 2017. Ms. Klemens testified that the Company now has controls in place to ensure drivers prepare DVIRs.

24 We decline to mitigate this portion of the penalty. The Commission could have assessed a \$1,600 penalty, but, because these are first-time violations, assessed a “per category” rather than “per violation” penalty. Accordingly, we find that no further penalty reduction is warranted.

25 **Suspended Penalty.** Because the Company has submitted a satisfactory proposed safety management plan that details the controls it put in place to prevent repeat violations of Commission safety rules, we agree with Staff that suspending a portion of the penalty is appropriate. Accordingly, we suspend a \$2,600 portion of the penalty for a period of one year, and then waive it, subject to the following conditions:

- a) Stillaguamish must maintain a conditional safety rating;
- b) Stillaguamish may not incur any repeat critical violations of WAC 480-31-130 upon re-inspection in one year;
- c) Stillaguamish must pay the remaining \$1,000 penalty within ten days of the effective date of this Order.

To reduce the financial impact of the penalty, the Company may work with Staff to establish mutually agreeable payment arrangements.

FINDINGS AND CONCLUSIONS

- 26 (1) The Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, and practices of public service companies, including private, nonprofit transportation providers, and has jurisdiction over the parties and subject matter of this proceeding.
- 27 (2) Stillaguamish is a private, nonprofit transportation provider subject to Commission regulation.
- 28 (3) Stillaguamish cured the deficiencies that led to its unsatisfactory safety rating within 45 days, as required. Accordingly, Stillaguamish's safety rating should be upgraded to conditional, and the Company should be allowed to maintain its nonprofit transportation carrier certificate.
- 29 (4) Stillaguamish violated 49 C.F.R. Part 391.45(a) by allowing drivers who were not medically examined and certified to drive company vehicles on 33 occasions.
- 30 (5) Stillaguamish should be penalized \$3,300 for 33 violations of 49 C.F.R. Part 391.45(a).
- 31 (6) Stillaguamish violated 49 C.F.R. Part 391.51(a) by failing to maintain driver qualifications files for each of its five drivers.
- 32 (7) Stillaguamish should be penalized \$100 for five violations of 49 C.F.R. Part 391.51(a).
- 33 (8) Stillaguamish violated 49 C.F.R. Part 395.8(a) by failing to require its drivers to make a record of duty status on 13 occasions.

- 34 (9) Stillaguamish should be penalized \$100 for 13 violations of 49 C.F.R. Part 395.8(a).
- 35 (10) Stillaguamish violated 49 C.F.R. Part 396.11(a) by failing to require its drivers to prepare DVIRs on 16 occasions.
- 36 (11) Stillaguamish should be penalized \$100 for 16 violations of 49 C.F.R. Part 396.11(a).
- 37 (12) The Commission should assess a total penalty of \$3,600 for 67 violations of Title 49 C.F.R. A \$2,600 portion of the penalty should be suspended for a period of one year, and then waived, subject to the conditions set out in paragraph 25, above.

ORDER

THE COMMISSION ORDERS That

- 38 (1) Stillaguamish Senior Center's safety rating is upgraded to conditional.
- 39 (2) The Commission assesses a \$3,600 penalty against Stillaguamish Senior Center. The Commission suspends a \$2,600 portion of the penalty for a period of one year, and then will waive it, subject to the conditions set out in paragraph 25, above.
- 40 (3) Stillaguamish Senior Center must either pay the \$1,000 portion of the penalty that is not suspended or file jointly with Staff a mutually agreeable payment arrangement within 10 days of the effective date of this Order.

DATED at Olympia, Washington, and effective May 17, 2017.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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 twenty-one (21) days after the entry of this Initial Order to file a *Petition for Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-610(7)(b). WAC 480-07-610(7)(c) states that any party may file a *Response* to a Petition for review within seven (7) 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.

RCW 80.01.060(3) 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 fails to 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). Any Petition or Response filed must also be electronically served on each party of record as required by WAC 480-07-140(1)(b).