

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application of
SHUTTLE EXPRESS, INC.,
For Extension of Certificate No. C-975,
Shuttle Express, Inc. d/b/a Shuttle Express

Docket No. TC-091931

Permit No. C-975

MOTION TO STRIKE PROTEST, CANCEL
PREHEARING CONFERENCE, AND
TERMINATE ADJUDICATIVE
PROCEEDING

INTRODUCTION

Applicant Shuttle Express hereby moves to strike the protest of SeaTac Shuttle, LLC dated and "submitted" January 20, 2010—but never properly filed. The grounds for this motion is that the protest was not timely filed or served under WAC 480-30-116(2)(a)(i).

DISCUSSION

1. The Commission Does Not Accept Late-filed Protests.

2. The Commission’s rules on the filing and service of protests are clear, and have been strictly enforced for many decades. The rule applicable to autotransportation companies, WAC 480-30-116(2)(a)(i), requires that “protests must . . . be filed within 30 days of the date the commission mailed the application.” The rule makes it clear that late filed protests may not be considered: “A person who fails to file a protest within the thirty-day protest period may not in any way participate further in the proceeding....” WAC 480-30-116(5). For decades the Commission has consistently and strictly enforced the 30-day protest

requirement found in this rule and analogous rules applicable to other industries, such as motor carriers.

3 The Commission simply will not and does not consider protests that are late-filed under longstanding precedent. For example, in *In Re Application of Joseph & D'Amico*, Order M.V. No. 147856 (May 1994), the Commission granted interlocutory review denying the attempt of a late protester to intervene in the docket or have its protest accepted late. The full Commission upheld the ALJ's decision to deny the participation by the untimely protestant:

The administrative law judge properly denied the petitioner's motion to intervene and/or be considered a protestant. WAC 480-12-045 [the motor carrier analog to WAC 480-30-116] requires protests to be filed within 30 days after publication of the application in the commission's weekly application docket. The same rule bars firms who failed to file protests from participating in any hearing that might be held on the application.

Id. at 1.

4 Similarly, the Commission stated in *H&K Trucking, Inc.*, Order N.V. No. 140715 (January 1990) that "[t]he Commission has traditionally required strict compliance with the requirements for service of pleadings or other documents." *Id.* at 2. And, in *In Re E.C. Browne*, Order M.V. No. 135089 (December 1986), the Commission made clear that late filing of a protest is not a mere technicality that can be excused:

The rule in question is a procedural rule. It merely defines the point at which an objection to an application for authority must be made to the commission in order to perfect a party's right to participate in the proceeding. There is sound basis for the rule.

...

Although the commission may have the right to "waive" its own rules, it should not subject a clearly mandatory rule to exceptions which are not supported by an overriding public purpose.

Id. at 2-3 (emphasis added).

5 The Commission is no more inclined to grant leniency on late filings under any of its deadlines, as the Commission made clear in *In Re Application of Punctual Transportation, Inc.*, Order N.V. No. 138131 (August 1988). There, the Commission granted the motion of a party to reject the late-filed exceptions filed by the applicant to the proposed order, even though they were only filed one day late. The Commission stated:

WAC 480-08-240(5) requires that exceptions be filed within 20 days from the entry of a proposed order; exceptions were therefore due February 11, 1988. The applicant's exceptions were not filed with the commission until February 12, 1988. [Footnote omitted] The commission requires strict compliance with filing deadlines.

Id. at 3 (emphasis added).

II. Sea-Tac Shuttle Failed to Timely File or Serve Its Protest In This Docket.

6 As noted above, for autotransportation certificates and extensions, “protests must . . . be filed within 30 days of the date the commission mailed the application.” WAC 480-30-116(2)(a)(i)(emphasis added). Attached hereto as Attachment A is a copy of the Commission’s docket mailed December 22, 2009. Thus, to be timely protests had to be filed on or before January 21, 2010. On January 20th, SeaTac Shuttle electronically “submitted” its protest through the Commission’s Web Portal. A “submission” is not a filing:

You may submit documents electronically using the commission's records center web portal (see WAC 480-07-125) or e-mail if you are submitting documents in an adjudicative proceeding. Electronic submission means the commission allows submission of electronic versions of documents, but requires a paper copy of the document as the official filing.

WAC 480-07-140(1)(b) (emphasis added). SeaTac Shuttle did not file a paper copy of its protest until January 27, 2010, almost a week late. Harlow Declaration, ¶¶ 3-4.

7 In contrast to “submission,” “filing” with the Commission is governed by WAC 480-07-145, which, in adjudicative proceedings,¹ must be made in hard copy to be deemed proper and effective:

Mail or hand delivery service is required for all documents. Parties to adjudicative proceedings before the commission must file original, signed documents and paper copies by mail or hand delivery (e.g., courier delivery service) as provided in this rule to satisfy official filing requirements

WAC 480-07-145(2). There is a narrow exception that allows a party to submit via the Web Portal, but then the “commission must physically receive the original and required number of copies by 12:00 noon on the first business day following the filing deadline. . . .” WAC 480-07-145(6)(a)(ii) (emphasis added). Thus, for SeaTac Shuttle’s protest to be deemed filed and timely, it had to file its original, signed protest by mail or hand delivery by noon on January 22, 2010. SeaTac Shuttle did not file its protest until a full week after its web submission. Harlow Declaration, ¶¶ 3-4.

8 SeaTac also failed to serve its protest in accordance with the Commission’s rules.

Under WAC 480-07-150(8), service is not “deemed complete” until “a copy of the document is properly addressed, stamped, and deposited in the United States mail.” As Exhibit C to the Harlow Declaration shows, the service copy was not deposited in the mail until January 25, 2010, three days late.²

¹ An application for authority that has been protested is adjudicative proceeding. WAC 480-07-305(3)(g)

² There was no certificate of service, as required by WAC 480-07-145(5). However, the postmark is dated January 25, 2010. Moreover, the envelope contained two documents; the protest as well as a complaint *signed on January 25th*. The inescapable conclusion is that it was not deposited in the mail until the 25th.

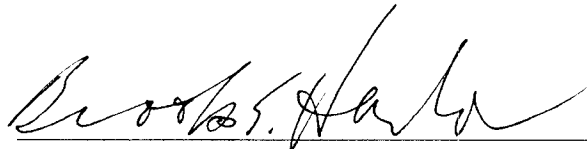
Under the Commission's rules, no protest was properly and timely filed against Shuttle Express' application. The electronic submission is a nullity, since no paper original was timely filed as a follow up. The filing was also not timely served. Accordingly, the Commission does not need to commence an adjudicative proceeding on this application. See WAC 480-07-305(2)(g). The Commission does not need to hold a hearing on an un-protested application. RCW 80.68.040. The application should be reviewed by Staff and the Commission should grant the application at a regular open meeting.

CONCLUSION AND RELIEF REQUESTED

Because SeaTac Shuttle did not timely and properly file its protest, Shuttle Express' application should be deemed unopposed. SeaTac's submission should be stricken or simply disregarded.³ Since no adjudicative proceeding is needed, the prehearing conference should be cancelled and the adjudicative proceeding closed so that the application can be reviewed by Staff and the Commission at an open meeting.

DATED this 3rd day of February, 2010.

MILLER NASH LLP



Brooks E. Harlow, P.C.
WSB No. 11843
brooks.harlow@millernash.com
(206) 622-8484

³ This result is also in the public interest. SeaTac Shuttle's real issue is disclosed in its "Complaint." It is seeking to oust Shuttle Express from Island County. See Harlow Declaration, Exhibit C. SeaTac's issues cannot and should not be raised in this docket, which merely seeks to conform Shuttle Express' authority to long-standing practice.


CERTIFICATE OF SERVICE
Docket No. Docket No. TC-091931

I hereby certify that a true and correct copy of the foregoing was forwarded via electronic mail and first class mail, postage fully prepaid, in a sealed envelope, to the following:

John Solin
Mike Lauver
SeaTac Shuttle, LLC
d/b/a Whidbey Seatac Shuttle
P.O. Box 2895
Oak Harbor, WA 98277
E-mail: mike@seatacshuttle.com

John Rowley
General Manager
Shuttle Express, Inc.
800 SW 16th Street
Renton, WA 98055
jrowley@shuttleexpress.net

Dated at Seattle, Washington, this 3rd day of February, 2010.



Carol Munnerlyn, Secretary

ATTACHMENT A

Docket

December 22, 2009

This list of permanent operating authority applications pending and temporary operating authority applications granted is issued under the provisions of Title 81 and WAC 480 of the Commission's Laws and Rules.

PERMANENT Auto Transportation Authority Application Pending

As provided in WAC 480-30-Auto Transportation Authority application filings are subject to protest for 30 days from the date they appear on this docket. Protests must be filed according to the provisions of rule and must set out the specific grounds for opposing the application and must contain a concise statement of the protestant's interest in the proceeding.

<u>Application</u>	<u>Date Filed</u>	<u>Applicant & Service Desired</u>
--------------------	-------------------	--

Docket No. TC-091931	12/17/09	Shuttle Express, Inc. 800 SW 16th St Renton WA 98057
-------------------------	----------	--

Application for an extension of Certificate C-975, standing in the name of Shuttle Express, Inc., to remove the following restriction:

RESTRICTIONS:

- 1) Service may be provided in vehicles no larger than a seven passenger van.

NOTICE: Due to the extensive operating authority contained in Certificate C-975, the existing authority to be retained will not be delineated hereon; however, interested parties may obtain copies of said Certificate C-975 by verbal or written request to the Washington Utilities and Transportation Commission.