

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

RIDE THE DUCKS OF SEATTLE,  
L.L.C. d/b/a SEATTLE DUCK TOURS,

Respondent.

DOCKET TE-151906

ORDER 08

ORDER APPROVING SETTLEMENT  
AGREEMENT WITH CONDITIONS  
AND CANCELING EVIDENTIARY  
HEARING

**BACKGROUND**

- 1 On September 28, 2015, the Washington Utilities and Transportation Commission (Commission) conducted emergency adjudicative proceedings pursuant to RCW 34.05.479 and entered Order 01, Notice of Emergency Adjudication and Order Suspending Certificate (Order 01). Order 01 suspended Certificate No. ES-00146 to operate and provide excursion services held by Ride the Ducks of Seattle, LLC d/b/a Seattle Duck Tours (Ride the Ducks or Company) pending the results of a Commission staff (Staff) investigation and inspection of Ride the Ducks' entire fleet of vehicles, drivers, and operations. The Commission found such swift action was necessary to prevent or avoid immediate danger to the public health, safety, and welfare in the wake of the incident on September 24, 2015, in Seattle involving a Ride the Ducks vehicle that resulted in the death of five people and serious injuries to scores of others. The Commission subsequently entered Order 05, Order Approving Joint Stipulation, Lifting Suspension on Provision of Excursion Service Using "Truck Ducks," and Continuing Suspension on Use of "Stretch Ducks."
- 2 In parallel with the emergency proceedings, Staff filed a complaint on September 29, 2015, alleging that Ride the Ducks operated at least one of its vehicles, Duck 6, in an unsafe manner resulting in the incident on September 24. Staff alleges that Ride the Ducks has violated state and federal safety regulations and requested that the

Commission take such action as warranted once Staff completed its investigation of the Company. On January 27, 2016, the Commission entered Order 07, Prehearing Conference Order, permitting Staff to amend the complaint to reflect the results of its investigation report and establishing a procedural schedule for adjudication of the amended complaint.

3 On March 17, 2016, Ride the Ducks and Staff (collectively parties) filed a Settlement Agreement (Settlement)<sup>1</sup> that includes the following terms:

1. For settlement purposes, the Company admits the 463 violations alleged in the amended complaint.<sup>2</sup>
2. The Company agrees to a penalty of \$222,000, all but \$110,400 of which is suspended on the condition that the Company commits no new violations of the following laws or regulations for a period of 24 months commencing on the effective date of the Settlement:
  - a. 49 CFR Part 383.37 Drivers must possess valid commercial driver's licenses;
  - b. 49 CFR Part 391.45 Drivers must be medically examined and certified;
  - c. 49 CFR Part 391.51(b)(7) Company must maintain medical examiner's certificates in each driver's qualification file;
  - d. 49 CFR Part 395.5 Company must enforce maximum driving time rules;
  - e. 49 CFR Part 395.8 Drivers must record their duty status for each 24-hour period; and
  - f. RCW 81.04.530 Company must establish and maintain a controlled substance and alcohol testing program that complies with the requirements of 49 CFR Part 382.<sup>3</sup>
3. If the Company incurs any new violations of the specified laws or regulations during the suspension period, or fails to follow the terms of the plan for paying the portion of the penalty that is not suspended, the full

---

<sup>1</sup> The parties represent that the Public Counsel Unit of the Washington State Attorney General's Office (Public Counsel) participated in the settlement negotiations but did not sign, and does not oppose, the Settlement Agreement.

<sup>2</sup> Settlement ¶ 4.

<sup>3</sup> *Id.* ¶ 5.

penalty becomes due and payable, without interest. If the Company incurs no new violations during the suspension period and fully and timely pays the non-suspended penalty, Staff will ask the Commission to enter a notice waiving enforcement of the suspended penalty.<sup>4</sup>

4. The Company must pay the \$110,400 that is not suspended within 24 months after the effective date of this Agreement, without interest. The Company must pay equal monthly installments due by the fifteenth day of each month, with the final installment to include the remaining balance. The Company will default on this payment plan if any installment is more than ten calendar days late. In the event of default, the full penalty becomes due and payable immediately, without interest. The Company may prepay any portion of the penalty balance at any time.<sup>5</sup>

4 The parties filed a Narrative Supporting Settlement Agreement (Narrative). The Narrative explains that the parties calculated the penalty amounts using a formula that assigns greater weight to the 159 acute, critical, and controlled substance and alcohol testing violations, and lesser weight to the 304 recordkeeping violations.<sup>6</sup> The Narrative also includes an analysis of the nonexclusive factors the Commission considers when taking enforcement action and determining the amount of any penalty for violations.<sup>7</sup>

5 The parties agreed to suspend the \$111,600 associated with the recordkeeping violations based on their belief “that it would be overly punitive for the Commission to impose the \$111,600 suspended penalty imposed under the Agreement merely for imperfect recordkeeping.”<sup>8</sup> The parties state that they do not minimize the importance of the Commission’s recordkeeping regulations, and they agree that proper recordkeeping is integral to safety. However, “[t]he agreed penalty structure reflects the parties’ belief that the Commission will most effectively protect the traveling public by linking the

---

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* ¶ 6.

<sup>6</sup> Narrative ¶ 17. “Acute” violations are those “where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall safety posture of the motor carrier.” 49 C.F.R. § 385, Appendix B(II)(b). “Critical” violations are those “where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier’s management controls.” *Id.* Appendix B(II)(c).

<sup>7</sup> *Id.* ¶¶ 25-36.

<sup>8</sup> *Id.* ¶ 20.

suspended penalty to compliance with the Commission's motor carrier regulations that most directly impact public safety."<sup>9</sup>

- 6 Patricia K. Buchanan and Duncan K. Fobes, Patterson Buchanan Fobes & Leitch, Inc., P.S., Seattle, represent Ride the Ducks. Sally Brown, Senior Assistant Attorney General, Olympia, represents Staff. Simon ffitch, Senior Assistant Attorney General, Seattle, represents Public Counsel.

### DISCUSSION AND DECISION

- 7 "The commission will approve settlements when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the commission."<sup>10</sup> The Commission may approve the Settlement, with or without conditions, or reject it. We approve the Settlement with conditions.

- 8 The primary goal of any enforcement action the Commission takes is to ensure compliance with applicable statutes, rules, and orders. This proceeding arose from the tragic incident on September 24, 2015, that claimed the lives of five people and seriously injured many more. The courts and the National Transportation Safety Board, not the Commission, will determine the cause of, and appropriate remedies for, that incident. Our regulatory authority is limited, and our duty here is to enforce compliance with operational standards for excursion carriers to protect the public health, safety, and welfare.

- 9 The events of September 24, however, provide context for our review of the Settlement and the 463 violations the parties' agreement would resolve. Those violations individually may or may not have contributed to the events on the Aurora Bridge, but collectively such violations represent management's lack of sustained attention to safety and a failure to adhere to the Commission's regulatory requirements designed to protect the travelling public. We are concerned that the Company's attitude toward safety, at a minimum, may have fostered an environment in which the September 24 incident was more likely to occur.

---

<sup>9</sup> *Id.* ¶ 21.

<sup>10</sup> WAC 480-07-750(1).

- 10 The Settlement does not adequately reflect that concern. The parties agreed to a penalty amount for each type of acute or critical violation alleged in the amended complaint that is at or near the statutory maximum. Ordinarily, using such a violation by violation approach yields a reasonable penalty amount, but under the circumstances presented here, we find that anything less than the maximum amount the statute permits is insufficient.
- 11 The acute and critical violations include allowing a driver to operate a vehicle without a license or valid medical certificate, failing to conduct the requisite number of random drug and alcohol tests, allowing drivers to drive more than 70 hours during an eight day period, and failing to require drivers to log their duty status. These violations taken as a whole reflect an insufficient approach to public safety that the Commission cannot tolerate. Accordingly, we condition our approval of the Settlement on assessment of the maximum penalty for each of the 159 acute, critical, and controlled substance and alcohol testing violations alleged in the amended complaint for a total penalty for these violations of \$156,000.
- 12 The parties agreed to a collective penalty for the “recordkeeping” violations that is approximately one-third of the total statutory maximum. We also find this amount insufficient. Particularly in conjunction with the other violations, these 304 infractions are indicative of a company that failed to take seriously its recordkeeping obligations or recognize the importance of accurate recordkeeping as part of its overall safety obligations. The parties’ consideration of these violations as a whole is the correct approach, but we find that the more appropriate sanction is half of the maximum authorized by the legislature or \$152,000.
- 13 We nevertheless agree with the parties that fairness supports suspension of the penalty amount associated with the recordkeeping violations according to the terms of the Settlement. We condition approval of the Settlement on modification of this provision only to reflect the increased penalty amounts discussed above.
- 14 Finally, we are not willing to permit the Company to make payments under the payment plan up to ten days late without consequence. A payment deadline is a payment deadline. We are being sufficiently lenient by suspending almost half of the total penalty amount and allowing the Company to pay the remainder over a period of two years. If Ride the Ducks is unable to make a payment on time, it may petition the Commission in advance for a waiver of that deadline. Otherwise, we expect the Company to make payments when they are due or be in default, and we condition approval of the Settlement on that requirement.

15 With the conditions we adopt in this Order, we find that the Settlement is lawful,  
supported by an adequate record, and consistent with the public interest in light of the  
information available to the Commission.

**FINDINGS AND CONCLUSIONS**

- 16 (1) The Commission is an agency of the State of Washington vested by statute with  
authority to regulate motor carriers providing excursion services.
- 17 (2) The Commission has jurisdiction over the subject matter of this proceeding and  
over Ride the Ducks.
- 18 (3) The primary goal of any Commission enforcement action is to ensure compliance  
with applicable statutes, rules, and orders.
- 19 (4) The Commission's regulatory authority is limited in this proceeding to enforcing  
compliance with operational standards for excursion carriers to protect the public  
health, safety, and welfare.
- 20 (5) The penalty amounts in the Settlement for each type of acute or critical violation  
alleged in the amended complaint do not adequately address the Company's  
insufficient approach to public safety these violations represent.
- 21 (6) The Commission should condition its approval of the Settlement on assessment of  
the maximum penalty for each of the 159 acute, critical, and controlled substance  
and alcohol testing violations alleged in the amended complaint for a total penalty  
for these violations of \$156,000.
- 22 (7) The penalty amount in the Settlement for the recordkeeping violations alleged in  
the amended complaint does not sufficiently address the Company's failure to  
take seriously its recordkeeping obligations or recognize the importance of  
accurate recordkeeping to the Company's overall safety obligation.
- 23 (8) The Commission should condition its approval of the Settlement on assessment of  
half of the maximum penalty for the 304 recordkeeping violations alleged in the  
amended complaint for a total penalty for these violations of \$152,000.

- 24 (9) The Settlement reasonably suspends the portion of the total penalty attributable to the recordkeeping violations under the terms established in the Settlement except for the amount to be suspended.
- 25 (10) The Commission should condition its approval of the Settlement on revising the amount of the suspended portion of the penalty to \$152,000, consistent with the conditions in this Order.
- 26 (11) The Settlement reasonably permits the Company to make monthly payments of the penalty amount that is not suspended over a period of two years as described in the Settlement with the exception of allowing the Company to make each payment within 10 calendar days after the payment due date without consequence. The payment plan is sufficiently lenient that no additional latitude for making the payments is warranted.
- 27 (12) The Commission should condition its approval of the Settlement on requiring the Company to make payments under the payment plan by the date each payment is due or be in default of the payment plan.
- 28 (13) With the conditions the Commission adopts in this Order, the Settlement is lawful, supported by an adequate record, and consistent with the public interest in light of the information available to the Commission.
- 29 (14) The Commission should give the parties five business days from the date of this Order either to accept the Commission's conditions on the Settlement, or reject those conditions and proceed with adjudicating the amended complaint.

**ORDER**

THE COMMISSION ORDERS That

- 30 (1) The Commission conditionally approves and adopts the Settlement Agreement between Ride the Ducks of Seattle, LLC d/b/a Seattle Duck Tours and Commission Staff as modified by the terms of this Order to redress the 463 violations of Commission rules alleged in the amended complaint.
- 31 (2) The Commission assesses a total penalty of \$308,000 against Ride the Ducks of Seattle, LLC d/b/a Seattle Duck Tours.

(3) The Commission suspends \$152,000 of the total penalty amount on the condition that Ride the Ducks of Seattle, LLC d/b/a Seattle Duck Tours commits no new violations of the following laws or regulations for a period of 24 months commencing on the effective date of this Order:

- (a) 49 CFR Part 383.37;
- (b) 49 CFR Part 391.45;
- (c) 49 CFR Part 391.51(b)(7);
- (d) 49 CFR Part 395.5;
- (e) 49 CFR Part 395.8; or
- (f) RCW 81.04.530.

If the Commission finds that Ride the Ducks of Seattle, LLC d/b/a Seattle Duck Tours has committed a new violation of any of these laws or regulations within that time period, the suspended penalty amount will become immediately due and payable. If Ride the Ducks of Seattle, LLC d/b/a Seattle Duck Tours does not commit a new violation of any of these laws or regulations within that time period, the Commission will waive the suspended penalty amount.

32 (4) Ride the Ducks of Seattle, LLC d/b/a Seattle Duck Tours must pay the \$156,000 that is not suspended within 24 months after the effective date of this Order in equal monthly installments due by the fifteenth day of each month, with the final installment to include the remaining unpaid balance. If Ride the Ducks of Seattle, LLC d/b/a Seattle Duck Tours fails to pay any installment by the due date, the remaining balance of payments due plus the suspended portion of the penalty will become due and payable immediately without further Commission action.

33 (5) Within five business days from the date of this Order, Ride the Ducks of Seattle, LLC d/b/a Seattle Duck Tours and Commission Staff each must notify the Commission that the party either accepts the conditions in this Order or rejects those conditions and elects to proceed with adjudication of the amended complaint. If both parties accept the conditions, this Order will be the final order of the Commission without further Commission action.

34 (6) The Commission cancels the remainder of the procedural schedule established in Order 07, including but not limited to the evidentiary hearings on May 18, 2016.



If either party rejects the conditions in this Order and elects to proceed with adjudication of the amended complaint, the Commission will schedule a prehearing conference to establish a new procedural schedule.

- 35 (7) The Commission retains jurisdiction over this matter and the parties to ensure compliance with this Order.
- 36 (8) The Commission delegates authority to the Secretary to review and approve compliance with this Order.

DATED at Olympia, Washington and effective May 3, 2016.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

ANN E. RENDAHL, Commissioner