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VIA E-MAIL & U.S. MAIL

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
Post Office Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, Washington 98504-7250

Subject: Docket No. TC-020497 - Passenger Transportation Company Rulemaking Rulemaking Issues Paper

Dear Ms. Washburn:

This letter responds to Staff's requests at the September 12, 2002, workshop for additional informal comments from the Washington Airporter Operators Association ("WAOA").

Can WAOA provide legal analysis of the WUTC's ability to look at competition from unregulated modes of transportation in determining rates of regulated carriers?

We have not located any cases that address this question precisely. In Cole v. WUTC, 79 Wn.2d 302, 485 P.2d 71 (1971), the fuel oil industry wanted to show the adverse impact that the gas company's rates and practices would have upon fuel oil dealers. Stated in another way, the petitioner wanted the commission to consider the regulated company's impact on an unregulated business. The Washington Supreme Court held that the commission does not have jurisdiction to consider the regulated company's impact on an unregulated business because the Commission only regulates the "rates, services, facilities and practices" to the extent "provided by the public service laws." See RCW 80.01.040(2). The Commission does not have jurisdiction to consider the concerns of unregulated industries in regulating rates of public service companies. 485 P.2d at 74.

In this docket, we are asking the Commission to do the reverse of what the fuel dealers sought in the Cole case. We ask that the Commission consider the impact that unregulated activities upon a regulated business. We are asking the commission to consider the

impact of airport parking rates, taxis, public transit, rental cars, and other unregulated modes of transportation, upon the reasonableness of the rates of regulated airporters.

The holding of the Cole case clearly does not apply in reverse. This docket will deal directly with regulation of the rates of public service companies. RCW 81.68.030 directs the Commission to ensure "just, fair, reasonable and sufficient" rates. The Commission cannot do this in a vacuum. The most common and longstanding example is found on the cost side. If the price of fuel doubles, most carriers will require rate increases. The Commission gives no consideration to the fact it does not regulate fuel prices in taking this cost factor into account in setting rates. Less, common, but clearly accepted by the Commission, is the situation where the carrier cannot charge the full amount the regulatory process might allow because competitive pressures from unregulated transportation modes would cause higher rates to depress demand to the point that the carrier would not earn "sufficient" rates. The Commission does not force carriers to raise rates in such circumstances. Several of the WAOA members are already in this situation.

The Commission is given substantial deference in its determination of what is "in the public interest." E.g., Wash. Ind. Telephone Assn. v. WUTC, 110 Wn.App. 498, 516 (2002). Its jurisdiction is sufficiently broad to reduce rate regulation or develop flexible regulation if external (i.e. non-regulated) market pressures provide an effective substitute for some or all of the traditional Commission regulatory role. If the Commission finds that the market can do as well at protecting the public interest, the Commission is not abdicating its obligation to ensure fair, just, reasonable and sufficient rates by reducing day to day regulation, as long as it retains the ability to increase regulation again if evidence of market failures should arise.

The ultimate goal should be to promote the overall public interest, not to perpetuate heavy regulation where it is not needed. The Commission should reduce or eliminate rate regulation where it can because regulatory costs are significant and ultimately are passed through to the public through rates, on the carrier side, and taxes, on the Commission side.

Can WAOA provide more specific suggestions regarding potential financial statement minimum requirements?

Applicants should be required to project, and to provide evidence of ability to pay, for at least the first three months of the proposed operations, the following expenses:

Vehicle purchase prices, loan payments, or lease payments, as applicable, for all vehicles required for the proposed operations.

Maintenance costs for all scheduled maintenance for a three-month period for each of the vehicles listed in the application that will be used in the proposed operations.

Liability and casualty insurance premiums.

Rent or loan payments on any physical facilities to be used by the applicant in provision of the proposed service.

Projected salaries for drivers, mechanics, clerical personnel, and officers related to the proposed operations.

Projected fuel costs for the proposed operations.

"Evidence of ability to pay" should be limited to a bank statement showing cash on hand; firm loan or equity financing commitments, provided that if such commitment is not from an FDIC insured bank current financial statements of the person or company making the commitment must also be provided; or current financial statements of the existing business of the applicant showing free cash flow of at least the required amount based on an average three months calculated based on the most recent 12 months for which financial statements are available. Projected revenues from the proposed new operations should not constitute or be considered, in whole or in part, "evidence of ability to pay."

Comments: The rationale for choosing three months is that it ensures that an applicant has enough working capital to get its commence operations and continue them for a minimal time period without having to sacrifice safety for financial reasons. The rule should not let applicants use projected revenues from the new operations to meet the requirement because such projections are too speculative for new operations. The suggested rule is a pre-filing requirement rather than a pre-operation requirement so as not to waste considerable time and resources of the Commission and protestants on application where the applicant has no serious prospect of obtaining financing.

Identify what violations would bar entry. Provide more concrete suggestions; for example, would a driving record that would bar getting a CDL be a good test?

Suggested language: No person who has convictions or has been found or determined to have committed crimes, violations, or infractions that would, at the time of the filing of the application or any time before the application is granted or denied, cause that person to be ineligible to drive a commercial motor vehicle under RCW 46.25.090 may own more than a 10 percent beneficial interest of an applicant or control an applicant.

Comments: This suggested approach would disqualify and applicant who could not obtain a CDL at the time of the application (for reasons relating to commission of crimes or violations, not for other reasons, such as health reasons). Also, the applicant could become disqualified from obtaining or holding a CDL while the application is pending due to commission or conviction of violations detailed in RCW 46.25.090. If so, it would require their application to be withdrawn or dismissed. Commission of the crimes and violations in RCW 46.25.090 reflects a disregard for safety, history of non-compliance with laws and regulations intended to promote safety, and substance abuse problems. The suggested rule language is somewhat awkward, due to the language it tracks in RCW 46.26.090. The advantage of tracking the CDL provision is avoiding having to "reinvent the wheel."

Recommend insurance minimums.

$3,000,000 for 15 or fewer passenger vehicles.
$5,000,000 for greater than 15 passenger vehicles.

Comments: This increases the minimum for smaller vehicles over the Federal minimums, which were adopted over 15 years ago. It does not vary from the Federal requirement for larger vehicles, since some carriers have experience difficulty getting larger policies at times.

How should carriers should notify passenger of how to contact the WUTC with complaints of complements?

Notice should be provided in up to three ways:

Posting in a conspicuous location at the carrier's principal place of business in the state.

Providing a link to the WUTC or listing the WUTC's toll free consumer affairs number on the carrier's Internet website, if the carrier has one.

At the carrier's option: posting the WUTC's toll free consumer affairs number in a conspicuous location in each of its passenger carrying vehicles, including it on its printed schedules, or including it on its tickets or receipts.

Comments: These three methods of notice are efficient because they make it likely that a very high percentage of passengers will receive the notice, but do not cause carriers to incur high costs to provide notice to the public at large, most of whom are not passengers.

Provide examples of free and reduced service.

Promotions or special fares to increase traffic
Reductions or special fares to meet competitive demands
Resolve passenger complaints
Compensate passengers for service quality issues
Employees and family
Religious, educational, charitable, or eleemosynary purposes

Comments: Only family, religious, educational, charitable, or eleemosynary purposes should be borne by the shareholders under Washington law. See Jewell v. WUTC, 90 Wn.2d 775 (1978). All the other examples are legitimate business expenses intended to increase load factors, reduce average costs, and otherwise benefit the public interest. The Commission has distinguished between offering reduced rates for charitable purposes as opposed to using reduce rates as a competitive tool. Declaratory Order, Dkt. TG-970532 (August 14, 1998).

Very truly yours,

Brooks E. Harlow