

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

|                                    |   |                            |
|------------------------------------|---|----------------------------|
| In the Matter of the Delegation of | ) | DOCKET A-042090            |
| Authority to the Secretary of the  | ) |                            |
| Commission Pursuant to RCW         | ) | DOCKET T-101661            |
| 80.01.030                          | ) |                            |
|                                    | ) | ORDER 05                   |
| And                                | ) |                            |
|                                    | ) |                            |
| Fuel Surcharge Inquiry             | ) | ORDER RESCINDING ORDERS 03 |
|                                    | ) | AND 04 AND AMENDING ORDER  |
|                                    | ) | 02                         |
| .....                              | ) |                            |

**BACKGROUND**

- 1 On April 27, 2005, the Utilities and Transportation Commission (Commission) issued Order 02 in this docket, delegating authority to the Commission Secretary, pursuant to RCW 80.01.030, to order temporary fuel surcharges for auto transportation companies, commercial ferries, and household goods companies and prescribing the procedures and requirements for such surcharges.
  
- 2 On September 30, 2010, the Commission issued Order 03, which rescinded Order 02 effective January 31, 2011. The Commission also initiated an inquiry in Docket T-101661 to determine whether and how to permit these companies, as well as solid waste companies that are authorized to apply for temporary fuel surcharges under a procedure comparable to the mechanism in Order 02, to impose temporary fuel charges after Order 02 is no longer in effect.
  
- 3 On January 26, 2011, the Commission issued Order 04, which modified paragraph 14 in Order 03 to extend the effective date for rescission of Order 02, as well as the comparable temporary fuel surcharge mechanism for solid waste companies, to May 2, 2011, to give Commission Staff the opportunity to develop its fuel surcharge proposal more fully and to provide interested parties with a reasonable period of time to review and comment on that proposal.

4 On February 18, 2011, the Commission received a filing entitled “Petition of Seatac Shuttle, LLC d/b/a Whidbey Seatac Shuttle (‘Seatac Shuttle’) to Rescind Order(s) 3 and 4 and to reinstate Order No. 2.”<sup>1</sup> Seatac Shuttle identifies the following bases for its request and responses to the concerns that the Commission and Commission Staff have expressed about the fuel surcharge mechanism in Order 02:

- World events have increased the volatility of fuel prices, which have steadily increased over the last six months. The stated rationale for rescinding Order 02 – that fuel prices have become more stable – is inconsistent with these facts, which emphasize the need for the simplified, expedited fuel surcharge process established in that Order.
- A surcharge is not a “rate,” and auto transportation companies charge “fares,” not “rates.” The Commission’s ratemaking methodology thus is inapplicable to auto transportation companies, and in contrast to other industries the Commission regulates, the Commission is not authorized to regulate auto transportation company “profits.”
- The date of an auto transportation company’s last rate case does not negatively impact fares. Rather, the older the rate case, the more the public takes advantage of changes in the consumer price index to pay less in current dollars for service than when the fares were established.
- Orders 03 and 04 conflict with the letter and intent of Executive Order 10-06, which placed a moratorium on agency rulemakings through the end of 2011. Elimination of the temporary fuel surcharge mechanism established in Order 02 would contribute to the climate of uncertainty for small businesses that the Executive Order was intended to minimize.

5 On March 18, 2011, the Commission issued a Notice to Auto Transportation Companies of Staff Recommendation For Fuel Surcharges, Opportunity to File

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<sup>1</sup> Seatac Shuttle’s filing would have been more appropriate in the form of a motion, which seeks relief in an existing docket, *see* WAC 480-07-375, rather than filed as a petition, which is used to request that the Commission initiate an adjudicative proceeding, *see* WAC 480-07-305(3), but we will use our authority to construe pleadings liberally to overlook the procedural deficiencies of the company’s request. *See* WAC 480-07-395(4).

Written Comments, and Open Meeting (Notice). The Commission issued a similar Notice to Solid Waste Companies on the same date, and a Notice to Commercial Ferry Companies on March 25, 2011. Seatac Shuttle and other interested parties filed written comments in response to the Notices, and the Commission considered Staff's recommendations and interested parties' written and oral comments submitted in this docket and in Docket T-101661 during the Commission's Open Meeting on April 14, 2011.

### DECISION

- 6 The Commission agrees with the majority of commenting parties that during this time of rapidly rising fuel prices, the temporary fuel surcharge mechanism established in Order 02 and the comparable mechanism for solid waste companies serves a useful purpose and should continue to be available. We nevertheless agree with Staff that the methodology used to calculate such surcharges has some fundamental flaws. We rescind Orders 03 and 04 but direct Staff to investigate the earnings of all companies that apply for fuel surcharges and have not had a rate case within the three years prior to filing their temporary fuel surcharge application. We also exercise the superseding oversight and direction we reserved in paragraph 1 of Order 02 to direct the Commission Secretary to deny all applications for fuel surcharges that demonstrate that the company's requested surcharge would recover more than the additional fuel costs that the company is entitled to recover.
- 7 We explained in Order 03 that in previously deciding to rescind Order 02, we perceived the need to determine whether eligible companies' rates, in conjunction with a fuel surcharge, were just, fair, reasonable, and sufficient as required by statute:

RCW 81.28.010 requires that "[a]ll charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier subject to regulation by the commission as to rates and service, or by any two or more such common carriers, must be just, fair, reasonable, and sufficient." It is in the public interest to rescind Order 02 to allow an opportunity to determine whether rates charged by auto transportation companies,

commercial ferries, and household goods companies satisfy the statutory requirements.<sup>2</sup>

8 The issue is not whether companies subject to Order 02 or solid waste companies eligible for a comparable temporary fuel surcharge mechanism are entitled to recover their fuel costs. They are, to the extent that those costs are prudently incurred. The Commission, however, must determine how best to provide these companies the opportunity to recover such costs consistent with statutory requirements that any such recovery must be just, fair, reasonable, and sufficient. Having investigated this issue, we agree with Staff that the temporary fuel surcharge mechanisms as currently established in Order 02 and as currently established for solid waste companies do not comply with those requirements.

9 Seatac Shuttle’s petition and the auto transportation company data in the Notice concerning that industry illustrate our concerns. The legislature has charged the Commission with the “duty to supervise and regulate every auto transportation company in this state,” including the obligation to “[f]ix, alter, and amend just, fair, reasonable, and sufficient rates, fares, [and] charges.”<sup>3</sup> The legislature has used the same language to describe the Commission’s responsibility to regulate the rates of virtually all, if not all, of the companies the Commission oversees.<sup>4</sup> The Commission complies with this legislative directive by using a methodology for establishing rates that affords companies the opportunity to earn an authorized return<sup>5</sup> on the prudently

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<sup>2</sup> Order 03 ¶ 13.

<sup>3</sup> RCW 81.68.030 (originally enacted as 1921 Wash. Laws ch. 111, § 3).

<sup>4</sup> See RCW 80.28.010(1) (“All charges made, demanded, or received by any gas company, electrical company, or water company . . . shall be just, fair, reasonable, and sufficient.”); RCW 80.36.080 (“All rates, tolls, contracts and charges . . . of telecommunications companies . . . shall be fair, just, reasonable, and sufficient”); RCW 81.28.010 (“All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier subject to regulation by the commission as to rates and service, or by any two or more such common carriers, must be just, fair, reasonable, and sufficient.”).

<sup>5</sup> For auto transportation companies and commercial ferry companies, the Commission uses an operating ratio methodology to calculate a company’s authorized revenue requirement, which includes interest, taxes and return. For solid waste companies, the Commission uses the Lurito-Gallagher methodology to calculate a company’s authorized revenue requirement, which includes interest, taxes and return.

incurred investment and costs the companies incur to provide their regulated services. The Commission departs from such ratemaking with express legislative authority,<sup>6</sup> but whether viewed as “rates” or “fares,” the Commission has consistently used this methodology to set the charges that Seatac Shuttle and all other auto transportation companies currently levy on their customers.

- 10 Seatac Shuttle, however, now claims that the Commission is not authorized to regulate the company’s “profits” and that the Commission is limited to determining whether Seatac Shuttle’s fares are just, fair, reasonable, and sufficient “by comparing them to regional or national rates and their effect and acceptance by the consumer.”<sup>7</sup> Seatac Shuttle does not cite any authority to support its arguments, and we are not aware of any such authority. In fact, the governing statute and Commission rules do not recognize, much less authorize, any such limitation on the Commission’s ability to implement the statutory requirements. The legislature has specifically authorized the Commission to consider an auto transportation company’s need for a “reasonable profit” when the Commission prescribes just and reasonable rates.<sup>8</sup> We should not – and, indeed, may not – adopt Seatac Shuttle’s proposed “comparison and customer acceptance” basis for setting fares without a legislative mandate to do so.
- 11 Staff’s review of the relationship between Seatac Shuttle’s reported revenues and expenses using the Commission’s standard methodology shows that the company may be earning well in excess of its authorized rate of return.<sup>9</sup> These circumstances highlight the primary flaw in the current temporary fuel surcharge mechanism: it does not require a company to demonstrate that its rates or fares do not afford the company sufficient opportunity to generate its authorized rate of return in the absence of a surcharge. We also agree with Staff that the longer the period of time since a

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<sup>6</sup> See, e.g., RCW 80.36.320-330 (reducing rate regulation for telecommunications companies and services that the Commission classifies as competitive).

<sup>7</sup> Seatac Shuttle Petition at 7.

<sup>8</sup> RCW 81.04.250(3); see RCW 81.04.010; *State ex rel. Allied Daily Newspapers v. Wash. Pub. Serv. Comm’n*, 44 Wn.2d 1, 265 P.2d 270 (1953).

<sup>9</sup> Auto Transportation Notice at 2, Table 1. At the April 14, 2011, Open Meeting, a company representative appeared to dispute that fact. We need not resolve it here. There will be an opportunity for the Commission Staff and company representatives to resolve that issue in the context of a future request for a fuel surcharge.

company's last rate case and the more the company's revenues have increased, the less likely a company's rates are just, fair, reasonable, and sufficient. Again, Seatac Shuttle illustrates this concern. The company's last rate case was almost six years ago, and its revenues have tripled since that time.<sup>10</sup> Little wonder, then, that rates set in 2005, when the company served far fewer customers, apparently are generating excessive revenues today, far outstripping the modest level of inflation experienced during the intervening years. Surcharges can add to the revenue and cost imbalance.

- 12 We are also concerned that the revenues temporary fuel surcharges generate may exceed the fuel costs those surcharges are intended to recover. Information provided at the April 14 Open Meeting by PNW Transportation Services (PNW) illustrates this point. A PNW representative stated that its fuel cost is approximately \$3.84 per gallon and that the company currently has \$2.32 per gallon in fuel costs embedded in rates. Therefore, a surcharge should only recover the authorized portion of the \$1.52 difference in the per gallon fuel cost.<sup>11</sup> The PNW representative also stated that the company's vans get 21 miles per gallon of fuel, the average one-way trip is 65 miles, and the average passenger count is 5.8. Therefore, the company would use approximately 3.1 gallons of fuel per trip and would need to recover \$4.71 in fuel costs (3.1 gallons times \$1.52) to reflect that amount not embedded in rates. However, the current fuel surcharge for PNW is \$2.25 per passenger per one-way trip. With an average passenger count of 5.8, the average recovery for the surcharge is over \$13.00, – over two and one-half times the amount the company should be generating with the surcharge.

- 13 Accordingly, we must determine the appropriate means by which companies can use the temporary fuel surcharge mechanism in Order 02 to recover volatile fuel costs while not exceeding their authorized rate of return or using surcharges that generate more revenue than necessary. We are constrained in making this determination by the Governor's moratorium on rulemaking, as Seatac Shuttle has repeatedly observed, but not in the manner that company contends.

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<sup>10</sup> *Id.* at 5.

<sup>11</sup> The methodology for calculating temporary fuel surcharges in Order 02 includes a one percent "dead band" and thus does not authorize a company to recover the entirety of the additional fuel costs. For the sake of simplicity, however, we have used the full amount of the additional fuel costs in these illustrative calculations.

- 14 The Commission issued Order 03 rescinding Order 02 on September 30, 2010, almost six weeks *before* the Governor issued Executive Order 10-06.<sup>12</sup> If we interpreted the Executive Order as Seatac Shuttle proposes, we would have been required to cease all activity in this docket and in Docket T-101661 on November 10, 2010, and to allow the temporary fuel surcharge mechanism to expire on January 31, 2011, as stated in Order 03. Under this reading, taking action to reinstate Order 02 would be a violation of the Executive Order.
- 15 The Commission, however, does not share Seatac Shuttle's interpretation of Executive Order 10-06. The Commission is no longer developing rules to address fuel volatility as a result of the Governor's order, but the Commission continued to investigate the issue and extended the rescission date of Order 02 to give interested parties more time to develop and propose alternatives to the temporary fuel surcharge mechanism. The opening paragraph of Order 02 expressly provides that the Commission delegated authority to the Commission Secretary to approve temporary fuel surcharges "subject to superseding oversight or direction by a majority of the Commissioners on either a general or limited basis." In amending Order 02 to address deficiencies in the temporary fuel surcharge mechanism, we are exercising "oversight and direction" as contemplated in Order 02 and as a result of our investigation. Such action is fully consistent with the Governor's directive that executive agencies suspend non-critical *rule* development and adoption through the end of this year.<sup>13</sup>
- 16 Until we can undertake a rulemaking devoted to this issue, we conclude that two amendments are necessary to the temporary fuel surcharge mechanism in Order 02 and the comparable temporary fuel surcharge mechanism available to solid waste

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<sup>12</sup> The Governor issued Executive Order 10-06 on November 17, 2010. It is published in the Washington State Register at WSR 10-24-006.

<sup>13</sup> In any event, the Office of Financial Management guidelines implementing Executive Order 10-06 make clear that a rulemaking may proceed if an agency or commission determines it is "beneficial to or requested or supported by the regulated entities" it affects. *Implementation of Executive Order 10-06*, Letter from Kari Burrell to State Agency Directors, November 17, 2010. Given that most if not all stakeholders requested and supported reinstatement of the previously-rescinded fuel surcharge mechanism, the Commission determined that the proceeding met this standard. We note, too, that the Executive Order itself states that it is "not intended to, and does not confer any legal rights and shall not be used as a basis for legal challenges to rules or other actions or to any inaction of the governmental entity subject to it."

companies to satisfy the statutory requirement that all charges for the regulated service companies provide “must be just, fair, reasonable, and sufficient.”<sup>14</sup> First, only companies whose current rates or fares were established within three years prior to their application for a temporary fuel surcharge should apply for such a surcharge. We do not adopt this as a prerequisite for a temporary fuel surcharge but direct Staff to investigate the earnings of companies whose rates or fares were established more than three years prior to their application.

- 17 We do not envision this earnings review to be burdensome, particularly as the Staff commences implementation of this Order. We expect that the Commission Staff will be able to ascertain, based on company annual reports and other readily accessible information, whether a given company is clearly overearning. Companies seeking fuel surcharges should be motivated to provide the Staff with the necessary information to enable such a determination.<sup>15</sup> It may be that a company will seek a more formal rate review, and, in some cases, the Staff may deem it appropriate to have the Commission commence such a rate review if it appears that a company’s rates are above the “fair, just, and reasonable” level.
- 18 We emphasize that this earnings review will of necessity be less intense in the initial months of operation under this order. We expect that during a transition period, which may last through the end of this calendar year, the Staff will err on the side of providing surcharges where they appear warranted. As stated above, fuel surcharges serve an important purpose to protect the company from financial stress during periods of volatile and rising fuel costs. We should not let intensive earnings reviews get in the way of effecting that purpose.
- 19 The second amendment to the Order 02 and solid waste company process is a requirement that a company applying for a temporary fuel surcharge must demonstrate in its application that the surcharge will not recover more than the additional fuel costs that the company is entitled to recover. The temporary fuel surcharge is intended to enable a company to recover only the authorized portion of

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<sup>14</sup> RCW 81.28.010.

<sup>15</sup> One solid waste company representative at the April 14 Open Meeting talked about the “good faith” working relationship between the Staff and the companies that is necessary to make the regulatory functions workable. We concur and appreciate the good faith exhibited by many of the companies involved in the fuel surcharge process.



the difference between current fuel prices and the fuel costs embedded in its rates or fares. A temporary fuel surcharge that generates revenues in excess of that amount is not just, fair, reasonable and sufficient and should be rejected.

20 Accordingly, we rescind Order 03 and Order 04. Order 02 remains in effect, along with the comparable temporary fuel surcharge mechanism currently available to solid waste companies, with the amendments adopted in this Order.

## ORDER

### THE COMMISSION ORDERS:

- 21 (1) Seatac Shuttle's request to rescind Order 03 and Order 04 and to reinstate Order 02 is granted in part and denied in part.
- 22 (2) Order 02 and the comparable temporary fuel surcharge mechanism currently available for solid waste companies remain in effect with the following two amendments:
- (a) Only companies whose current rates or fares were established within three years prior to the application for a fuel surcharge should apply for such a surcharge, and companies whose rates or fares were established more than three years prior to the application will be subject to an earnings review and a possible formal proceeding to reduce those rates or fares; and
  - (b) A company applying for a temporary fuel surcharge must demonstrate as part of its application that the surcharge will not generate revenues in excess of the authorized portion of the difference between current fuel prices and the fuel costs embedded in the company's rates or fares that the surcharge is intended to recover, and the Commission Secretary shall reject any application that fails to make the requisite demonstration.
- 23 (3) The Commission Staff is directed to implement these new procedures in a manner that appropriately balances the purposes of the temporary fuel surcharge mechanism with the statutory requirement that all rates and fares

must be just, fair, reasonable, and sufficient as the Commission has described in this Order.

- 24 (4) The Commission retains jurisdiction over the subject matter of this Order to enforce or amend its terms.
- 25 (5) This Order shall guide the Commission Secretary's exercise of delegated authority under WAC 480-07-904(1)(3).

DATED at Olympia, Washington, and effective April 20, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner