

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

In re Application TC-091931 of)	DOCKET TC-091931
)	
SHUTTLE EXPRESS, INC.)	ORDER 01
)	
For Extension of Authority under)	INTERLOCUTORY ORDER
Certificate No. C-975, For a Certificate)	GRANTING MOTION TO STRIKE
of Public Convenience and Necessity to)	PROTEST; CANCELING
Operate Motor Vehicles in Furnishing)	PREHEARING CONFERENCE;
Passenger and Express Service as an)	INITIAL ORDER TERMINATING
Auto Transportation Company)	ADJUDICATIVE PROCEEDING
.....)	

1 ***Synopsis.** This is an Administrative Law Judge’s Interlocutory Order that is subject to review pursuant to the notice at the end of this Order; this is also an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. If this Interlocutory/Initial Order becomes final, Shuttle Express, Inc.’s, motion to strike SeaTac Shuttle, LLC’s protest as not timely filed or served will be granted and this adjudicative proceeding will be terminated without a prehearing conference or any other form of adjudicative hearing.*

2 **NATURE OF PROCEEDING.** Docket TC-091931 involves an Application filed by Shuttle Express, Inc. (Shuttle Express or Applicant) with the Washington Utilities and Transportation Commission (Commission) on December 16, 2009, seeking an extension of Certificate No. C-975 for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles in Furnishing Passenger and Express Service as an Auto Transportation Company (Application). The Commission published notice of the Application in its weekly Docket of Tuesday, December 22, 2009.

3 On Wednesday, January 20, 2010, SeaTac Shuttle, LLC d/b/a Whidbey SeaTac Shuttle (SeaTac Shuttle), electronically submitted a protest to the Application via the Commission’s web portal. The Commission received a copy of the protest by mail one week later, on Wednesday, January 27, 2010.

4 **APPEARANCES.** Brooks E. Harlow, Seattle, Washington, represents Shuttle Express. John Solin, Oak Harbor, Washington, represents SeaTac Shuttle.

5 **MOTION TO STRIKE PROTEST AS UNTIMELY FILED OR SERVED.** On Thursday, February 4, 2010, Applicant Shuttle Express filed a motion challenging the timeliness and propriety of SeaTac Shuttle's protest.¹ On Wednesday, February 10, 2010, SeaTac Shuttle electronically submitted its response to the Shuttle Express motion via the Commission's web portal. The Commission received a copy of SeaTac Shuttle's response by mail one week later, on Wednesday, February 17, 2010.

6 **ANALYSIS.** The Commission publishes a notice of pending certificate applications (including applications for extension of existing certificate authority) in its application docket, mailing a copy to each existing auto transportation company certificate holder and various other interested persons.² According to the Commission's rules, existing auto transportation company certificate holders may file a protest to an application published in the application docket but must do so within thirty days of the date the Commission mails the application docket.³ Failure to timely file a protest bars that person from participating further in the proceeding in any way unless that person can show that the Commission failed to provide proper notice of the pending application or that good cause exists for the failure to make a timely protest.⁴

7 In this case, the Commission mailed the application docket containing notice of Shuttle Express' application for extension of certificate authority on Tuesday, December 22, 2009. The thirty day deadline to file protests expired on Thursday, January 21, 2010. SeaTac Shuttle electronically submitted its protest through the Commission's web portal on Wednesday, January 20, 2010, the day before this deadline. However, the Commission did not receive a paper copy of SeaTac Shuttle's protest until the following week, on Wednesday, January 27, 2010. In essence, the question presented is whether or not SeaTac Shuttle's electronic submission satisfied the Commission's filing requirement for protests of certificate applications.

¹ Shuttle Express submitted its motion electronically via the Commission's web portal on Wednesday, February 3, 2010.

² Washington Administrative Code (WAC) 480-30-116(1).

³ WAC 480-30-116(2)(a).

⁴ WAC 480-30-116(2)(b).

8 Shuttle Express argues that the Commission does not accept late-filed protests and traditionally requires strict compliance with such rules, rejecting filings that are even a single day late unless there is some overriding public purpose.⁵ Shuttle Express contends that SeaTac Shuttle’s electronic submission via the Commission’s web portal is not the equivalent of a filing with the Commission, pointing out language in Commission rules that requires mail or hand delivery for all documents.⁶ Shuttle Express asks that we strike the protest as untimely filed, then consider and process their application as unprotested.⁷

9 SeaTac Shuttle responds by conceding that it failed to deposit a hard copy of its protest in the mail and send it to the Commission until at least January 23, 2010.⁸ SeaTac Shuttle argues that this filing, albeit several days late, is only a “minor technicality” and should not outweigh the public good served by allowing its protest to be heard.⁹ SeaTac Shuttle asks that we deny the Shuttle Express motion and conduct the prehearing conference scheduled for March 3, 2010.¹⁰

10 **COMMISSION DECISION.** The Commission’s procedural rules state deadlines clearly and set out very limited circumstances where late filings might be permitted. The rules on protesting auto transportation company applications are no exception. Persons wishing to protest an application have thirty (30) days to file their protest, measured from the date the Commission mails the application docket.¹¹

11 It is undisputed that SeaTac Shuttle electronically submitted its protest before the 30 day deadline expired. However, Shuttle Express argues that under the Commission’s procedural rules, electronic submission alone does not satisfy the filing requirement of WAC 480-30-116(2)(a).

⁵ Shuttle Express’ Motion, at ¶¶ 3-5.

⁶ *Id.*, at ¶¶ 6-7.

⁷ *Id.*, at ¶¶ 9-10.

⁸ SeaTac Shuttle Response, at page 2 (“I (Mr. Solin) was in Texas until Jan 23rd and followed up with mailing an original hard copy on the first business day after his return.”).

⁹ *Id.*, at pages 2-3.

¹⁰ *Id.*, at page 4.

¹¹ *See* WAC 480-30-116.

- 12 WAC 480-07-140 sets out the rules for communicating with the Commission, to include limitations on electronic filing. Parties in adjudicative proceedings are allowed to “*submit* documents electronically using the Commission’s records center web portal . . . or e-mail” (emphasis in original).¹² However, the rule goes on to clarify that “[e]lectronic submission means the Commission allows submission of electronic versions of documents, but requires a paper copy of the document as the official filing.”¹³ Finally, the rule also requires parties in adjudicative dockets to comply with the additional filing documents set out in WAC 480-07-145.¹⁴
- 13 WAC 480-07-145 contains the following relevant provisions (*emphasis added*):

(1) **Scope of rule.** This section governs communications to the commission by parties in adjudicative proceedings. These rules are in addition to the general rules for communicating with the commission in WAC 480-07-140 and any requirements in a specific adjudication.

(2) **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 and meet the commission's administrative needs.* The commission provides for the expedited exchange of documents among parties and the commission by e-mail and fax transmission in adjudicative proceedings.

(a) *When deemed received/filed.* A document submitted in an adjudicative proceeding is officially received for filing only when the original document, including the required certificate of service under subsection (6) of this section, and the required number of copies, are

¹² WAC 480-07-140(1)(b).

¹³ *Id.* SeaTac Shuttle acknowledges this requirement in its response (at page 2) but blatantly ignores the timing requirements for the filing of the paper copy, arguing that “the fact that it [the paper copy] was mailed 3 days late should NOT result in cancellation and termination of the Protest” (emphasis in SeaTac Shuttle’s original response).

¹⁴ WAC 480-07-140(1)(e).

physically received at the commission's records center by mail or in-hand delivery and stamped with the date and time. **The date-stamped time will determine whether a document meets any deadline that applies and will determine the timing of any later deadlines based on filing.** Documents that are delivered to the commission's records center after 5:00 p.m. are not considered officially received or filed until the next business day when they are stamped with the date and time.

* * * * *

(6) Web portal, e-mail or fax transmission may be used to expedite the filing process.

(a) ***Paper copy required.*** Parties may submit documents to the commission electronically through the web portal, e-mail or fax on the date established for paper filing under the procedural schedule in an adjudicative proceeding, subject to the following conditions:

(i) *Timing.* Electronic submissions must be completed by 3:00 p.m. on the date established for filing. The commission encourages the use of the web portal rather than via e-mail or fax.

(ii) *Paper copy required.* **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 established under the procedural schedule.**

(iii) *Exact copy is required.* The original and paper copies of the document delivered to the commission on the day following the filing deadline must conform exactly in form and content to the electronic version or the document will not be considered to have been timely filed and may be rejected on that basis.

* * * * *

(c) ***When deemed received.*** A document submitted through the commission's records center web portal is deemed received only when the sender receives notification from the commission that the document

has been received. A document submitted by e-mail or fax is deemed received when the entire document successfully reaches the commission's records center electronic mailbox or fax machine. **Documents submitted electronically are not considered officially received or filed until the commission receives the original and paper copies the next business day, when they are stamped with the date and time received.**

As the underlined sections of the above-quoted rule make clear, the official filing requirement is not met by an electronic submission alone. Only the date-and-time-stamped hard copy of a document can serve as proof of official filing.

- 14 The Commission's rules, while allowing use of electronic submissions as a convenience, comport with the Administrative Procedure Act's (APA) statutory mandate that "filing" of a required document means "delivery of the document to a place designated by the agency by rule for receipt of official documents."¹⁵
- 15 The Commission strictly enforces its filing rules, including those applicable to protests.¹⁶ Procedural rules establishing deadlines set a cut-off for entry into a proceeding and allow the Commission, the parties, and all interested persons to know the identity of all participants in a matter well in advance of any hearing.¹⁷ Although electronic submission of a document may appear to satisfy such notice concerns, the Commission has explicitly retained its requirement for delivery of a hard copy of all documents in order to achieve compliance with the APA and its own filing rules.¹⁸

¹⁵ See RCW 34.05.010.

¹⁶ See *In re Application P-77496 of Joseph N. D'Amico d/b/a Security Services / Courier Services for permit to operate as a Common Carrier*, Order M.V. No. 147856 (May 27, 1994) (upholding the Administrative Law Judge's denial of a motion to intervene by a party who failed to timely file a protest); see also *In re Application P-71023 of Punctual Transportation, Inc. for permit to operate as a Common Carrier*, Order M.V. No. 138131 (Aug 1, 1988) (rejecting exceptions to an Administrative Law Judge's proposed order that were filed one day late).

¹⁷ See *In re Application P-69188 of E.C. Brown, d/b/a A-N Auction Transport for permit to operate as a Common Carrier*, Order M.V. No. 135089 (Dec 10, 1986), at page 2.

¹⁸ See WAC 480-07-145(6), as quoted above. Given this rule's unforgiving language that "documents submitted electronically are not considered officially received or filed until the Commission receives the original and paper copies the next business day, when they are stamped with the date and time received," there is no reason to analyze whether the weeklong delay between SeaTac Shuttle's electronic submission and its subsequent filing of the hard copy of its

- 16 SeaTac Shuttle electronically submitted its protest on Wednesday, January 20, 2010. SeaTac Shuttle mailed its protest on or about Monday, January 25, 2010, as indicated by the postmark on the envelope of the copy served on Shuttle Express.¹⁹ The Commission received the required hard copy of SeaTac Shuttle's protest on Wednesday morning, January 27, 2010, as evidenced by the records center's date-and-time-stamp.²⁰
- 17 As noted above, the 30 days allotted by rule for the filing of a protest to an application published in the Commission's docket mailed on December 22, 2009, expired on Thursday, January 21, 2010. SeaTac Shuttle failed to file the required hard copy of its protest until Wednesday, January 27, 2010.²¹ In accordance with our procedural rules, WAC 480-07-140 and WAC 480-07-145, we must conclude that SeaTac Shuttle's protest was late.
- 18 WAC 480-30-116(2)(b) bars further participation in the proceeding unless a person can show that the Commission failed to provide proper notice of the pending application or that good cause exists for the failure to make a timely protest. Here, SeaTac Shuttle does not allege any improper notice of Shuttle Express' application, but SeaTac Shuttle does contend that an exception should be made in its case.
- 19 SeaTac Shuttle argues that there is no prejudice to Shuttle Express by a late filing because Shuttle Express knew in advance that SeaTac Shuttle was objecting to its

protest constitute "substantial compliance" with the Commission's filing requirement. See discussion of substantial compliance doctrine in *City of Seattle v. PERC*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991); *Petta v. Department of Labor & Indus.*, 68 Wn. App. 406, 409-10, 842 P.2d 1006 (1992); *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 620, 902, P.2d 1247 (1995); and *San Juan Fidalgo Holding Company v. Skagit County*, 87 Wn. App. 703, 711, 943 P.2d 341 (1997), *review denied*, 135 Wn.2d 1008 (1998).

¹⁹ See Exhibit D to Declaration of Brooks E. Harlow.

²⁰ See Exhibit C to Declaration of Brooks E. Harlow.

²¹ We note that SeaTac Shuttle's response to the Shuttle Express motion follows the same pattern as its earlier response to the Shuttle Express application: one full week between its initial electronic submission (Wednesday, February 10, 2010) and the subsequent delivery of the required hard copy to the Commission (Wednesday, February 17, 2010). Although SeaTac Shuttle's response could have been stricken as untimely filed, we chose not to exercise this procedural prerogative in this instance so as to have the opportunity to fully analyze the arguments put forward by SeaTac Shuttle to explain its failure to adhere to our filing rules.

application.²² SeaTac Shuttle claims that striking the protest will result in damage to the public but provides no further explanation of how the public might be harmed.²³ The only explanation SeaTac Shuttle provides with regard to why it could not timely file the required paper copy of its protest is Mr. Solin's travels to Texas.²⁴

20 Good cause requires a substantial explanation of why a person or party could not comply with a regulatory requirement. When evaluating a situation for the existence of good cause, an ordinary excuse will not do. The party asserting good cause must demonstrate something out of the ordinary and, typically, beyond that party's control.

21 SeaTac Shuttle was able to electronically submit its protest on Wednesday, January 20, 2010. There is no evidence as to why a paper copy of that submission could not have been simultaneously printed, placed in an envelope, and mailed to the Commission to effect a timely filing of the protest. We conclude that Mr. Solin's travel schedule, by itself, does not constitute good cause for SeaTac Shuttle's failure to make a timely protest.

22 We have no other grounds on which to determine good cause and grant SeaTac Shuttle an exception to our rules. Therefore, we must grant Shuttle Express' motion and strike SeaTac Shuttle's protest as untimely.

THIS SPACE INTENTIONALLY BLANK

²² SeaTac Shuttle Response, at page 3.

²³ *Id.*

²⁴ *Id.*, at page 2.

ORDER

23 THE COMMISSION ORDERS That

24 (1) Shuttle Express, Inc.'s motion to strike SeaTac Shuttle's protest is
granted.

25 (2) The prehearing conference scheduled for Wednesday, March 3, 2010,
is cancelled.

26 (3) The Commission shall consider and process Shuttle Express, Inc.'s
application as though no protest had been filed.

DATED at Olympia, Washington, and effective February 25, 2010.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

NOTICE TO PARTIES

This is an Interlocutory Order terminating a party's participation in a proceeding. In accordance with WAC 480-07-810(2)(a), the Commission may accept a petition for interlocutory review in this matter. WAC 480-07-810(3) provides that any party has ten (10) days to file and serve a *Petition for Interlocutory Review*. The Commission alters this filing deadline to twenty (20) days to be consistent with other appellate rights explained in this notice.

This is also 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 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within ten (10) 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.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and **eight (8)** copies of any Petition or Answer must be filed by mail delivery to:

Attn: David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250