

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application of)	DOCKET TC-130708
)	
NORTHWEST SMOKING & CURING,)	
INC. d/b/a SEATAC DIRECT)	RESPONSE OF SEATAC SHUTTLE, LLC
)	TO STAFF MOTION FOR
)	CLARIFICATION
For Permanent Auto Transportation)	
Authority)	

I. SUMMARY OF RESPONSE

1 Seatac Shuttle, LLC, submits this response to that motion by staff for clarification with regard to the application of rules to the above captioned docket. No question has been raised by the Applicant, the Protesting parties or the ALJ in this matter regarding application of the rules requiring clarification. For no less than two years staff and the Auto Transportation providers in possession of Certificates of Convenience and Necessity issued by the WUTC have been working toward the common goal of deregulation of the Auto Transportation industry. Failure of the Governor to act on statute amendments proposed by the WUTC has resulted in no legislative action as a result a compromise interim rule making to affect some of the ultimate goals of such failed legislative amendments was initiated by the Commission. The rule making was approved by the Commission and Order R-572 was issued on August 21, 2013 and forwarded to the office of the Code Reviser. The revised rule under Order R-572 will not become effective until September 21, 2013 and it will not be implemented by Autotransportation providers until October 24, 2013.

II. INTRODUCTION

2 On May 7, 2013 Northwest Smoking and Curing, Inc. (Smoking) filed an incomplete application in the above referenced matter. Subsequently Smoking submitted substitute and additional pages to the commission in support and/or partial completion of its application. Staff did not provide those pages to the affected parties or the public in a timely manner. As of the date of the pre-hearing conference, August 26, 2013, the application of Smoking was still incomplete. Despite the request of both Wickkiser International Companies, Inc. (Airporter) and Seatac Shuttle, LLC., (Seatac), for a hearing date in November of 2013, Mr. Fassio, on behalf

of the commission staff, argued that the applicant should be granted an earlier hearing date. Hearing was subsequently set for October 2, 2013.

3 Mr. Fassio also argued that Seatac should not be party to the proceeding as no overlapping service existed between the applicant and Seatac. Despite Mr. Fassio's advocacy for the applicant, Seatac was granted Intervener status.

4 On August 21, 2013, the Commission issued Order R-572 after more than two years of work, preparation and participation with the affected Auto Transportation Companies. The issuance of this order was one hundred and four (104) ¹ days subsequent to the filing of Smoking's application and its effective date is one hundred thirty-five days (135) ¹ after the filing by Smoking. Smoking was not a party to the rule making.

III. DISCUSSION

5 The Motion for Clarification makes Seatac's answer for it. "The rules **will take effect** (emphasis added) on the thirty-first day after the date the Order was filed with the Code Reviser, or September 21, 2013".² Any further discussion of what the intent of the not yet implemented rules has of the preceding is moot. They were not in effect as of the date of the application filing, they were not in effect as of the pre-hearing conference, and could not have been taken into account by any party to the docket at any point during the process. There was no certain expectation by any of the parties that; (1) any rules would be revised by the Commission, (2) what the final nature, content and affect of those rules would be if issued by the Commission, and (3) what date any possible new rules would be effective.

6 The motion ventures into areas that are not germane or applicable to the question asked. The motion attempts to argue the issues of the case outside its question of clarification.

1. Order R-572 Aug. 21, 2013 Application Docket Tc-130708 May, 7, 2012
2. Letter Aug. 22, 2013 Exec. Dir. Steven King, Para. 1
Motion for Clarification TC-130708 Sept. 10, 2013 para. 3

Staff presents arguments relating to new service, same service, status to object and the operation of service to the satisfaction of the Commission ³ as it attempts to define and resolve them without the rules either being implemented and without benefit of hearing. Staff further asserts that under its interpretation, neither the protestant nor the intervener would be granted status under the not as of yet implemented rules. “Based on its review of the existing certificates and published tariffs and time schedules, Staff believes it is unlikely that under the amended 2013 rule either SeaTac (sic) Shuttle or Wickkiser would be found to have the “same service” as SeaTac direct [Smoking] and therefore a valid “objection” that would require a brief adjudicative process.” ⁴ This statement is not only inconsistent but usurps the authority of the Commission and the rights of the parties. It assumes that tariffs effective under the rules currently in effect will remain unchanged and unaffected once the 2013 rules become effective and presumes to strip both Airporter and Seatac of their status in the proceeding under rules not in effect and not tested. Seatac finds this attitude arrogant and not in the spirit or the intent of the recently adopted rules which were formulated in an atmosphere of cooperation between the Commission and the Auto Transportation Companies.

7 Staff’s adversarial position with regard to the industry by arguing the issues, the facts and the law, under the revised but not effective rules, to the maximum detriment of existing and proven reliable carriers, is disappointing, particularly outside of a hearing. During the pre-conference hearing of August 26, 2013, Staff argued and prevailed in obtaining an October 2, 2013 hearing date for this matter. Airporter and Seatac both argued that an early October date would place an unfair burden on them, in that the preparation for that matter would have to take place during the busiest portion of their business season. Staff now files this late motion resulting in a delay to all parties. We find all of staff’s arguments at pre-conference hearing to be disingenuous.

3. Motion for Clarification TC-130708 Sept. 10, 2013 para. 5

4. Motion for Clarification TC-130708 Sept. 10, 2013 para. 6

8 The matter of proceeding under “new” but as of yet effective rules on transportation applications filed under existing rules and hearing those applications under not yet effective rules was resolved in TS-050443. In that particular application no protests were received and there was extensive public and governmental support for the application. The interim ALJ at the pre-hearing conference reviewed the application of not yet effective rules retro-actively ⁵, however, the presiding ALJ found that to do so was contrary to the legislation. Order No. 1 reflected the intent of the legislature that “new” rules that have an effective date subsequent to an application may not be applied retroactively. ⁶

9 The question of clarification is an either or question. Either the rules may be applied retro-actively or they may not. The effects upon the parties, whether pro or con are not at issue and discussion of them is irrelevant and should not be considered by the Commission in this motion. The motion is tainted by Staff’s arguing the application within its pleading. Through this motion and its interpretation of the 2013 revision of 480-30, Staff is attempting to strip incumbent providers of rights afforded them under current and effective WAC. The timing of the motion begs the question of who Staff is purporting to serve.

10 Staff’s citation of MacKenzie ⁷ reinforces the prohibition of retro-active application. Mackenzie spoke to “a valid emergency” involving public safety ⁸. Applying the recent, but not effective, revisions to WAC 480-30 retro-actively for the mere administrative convenience of Staff, in no way meets the test of the emergency situation cited by MacKenzie. Champagne ⁹ reaffirms the limits of retro-active application of future revisions of Rule; “... courts may apply an amendment retroactively if either (1) the agency intended the amendment to apply retroactively, (2) the effect of the amendment is remedial or curative, or (3) the amendment serves to clarify the purpose of the existing rule.”

5. Transcript TS-050443 Pre-hearing Conference June 30, 2005 Pg. 4 line 5 – Pg 6 line 20

6. TS-050443 Order No. 1, Prehearing Conference Order Establishing Procedural Schedule para. 11

7. Motion for Clarification para. 8

8. State V. MacKenzie, 114 Wash. App

9. Champagne v. Thurston County, Supreme Court of Washington No. 79209-7. Argued Sept. 27, 2007. -- February 14, 2008

None of the three conditions required apply to this situation and it must therefore be upheld that the 2013 revisions to WAC 480-30 are not applicable to a filing precedent to their effective date.

IV. PRAYER

11 Seatac Shuttle, LLC. requests that the Commission dismiss Staff's Motion for Clarification for lack of merit or in the alternative find that both precedent and rule support that the proceeding in Docket # TC-130708 be under effective rule as of the filing date of the application.

Dated this 19th day of September, 2013

Respectfully submitted,

Michael Lauver

Member, LLC

Seatac Shuttle, LLC. C-1077