

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In re Application of)	DOCKET TC-130708
)	
NORTHWEST SMOKING &)	
CURING, INC. d/b/a SEATAC)	ORDER 02
DIRECT)	
)	
For a Certificate of Public Convenience)	INITIAL ORDER DISMISSING
and Necessity to Operate Motor)	ADJUDICATION AND
Vehicles in Furnishing Passenger and)	REFERRING APPLICATION TO
Express Service as an Auto)	COMMISSION STAFF
Transportation Company)	
)	
.....)	

BACKGROUND

- 1 On May 7, 2013, Northwest Smoking & Curing, Inc. d/b/a SeaTac Direct (SeaTac Direct or Company) filed an application with the Washington Utilities and Transportation Commission (Commission) for a certificate of public convenience and necessity to operate as an auto transportation company. The Company proposes to provide non-stop scheduled passenger service between the Best Western Lakeway hotel in Bellingham and Seattle-Tacoma International Airport (SeaTac Airport).
- 2 On June 4, 2013, Wickkiser International Companies, Inc. (Wickkiser) filed a letter with the Commission protesting SeaTac Direct’s application. On June 6, 2013, Seatac Shuttle, LLC d/b/a Whidbey-Seatac Shuttle (Seatac Shuttle) also filed a letter with the Commission protesting SeaTac Direct’s application. The Commission permitted Wickkiser to participate as a protestant and allowed Seatac Shuttle to intervene. The Commission scheduled an evidentiary hearing on SeaTac Direct’s application for October 2, 2013.
- 3 On September 10, 2013, Commission Staff (Staff)¹ filed a motion requesting the Commission to state which version of the Commission’s auto transportation rules

¹ In a formal proceeding, such as this, the Commission’s regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners’ policy and accounting advisors

would apply in this docket because amended auto transportation rules would take effect on September 21, 2013 (Amended Rules).² According to Staff, if the Amended Rules are applied, an existing auto transportation company may object to an application for new authority only if the company holds a certificate that authorizes the same service and the company provides the same service published in the application docket.³

4 Staff argues that under the Amended Rules, neither Seatac Shuttle nor Wickkiser may continue to participate in this case. Seatac Shuttle does not hold a certificate to provide *any* service between Bellingham and SeaTac Airport, and while Wickkiser holds a certificate for the route, it provides only “multi-stop but not direct” service between the two points, which is not the *same* service as will be provided by SeaTac Direct. Staff concludes that neither Seatac Shuttle nor Wickkiser has standing to object to SeaTac Direct’s application. Moreover, Staff observes that if the Commission decides that the auto transportation rules in place before the Amended Rules (Earlier Rules) apply, SeaTac Direct could simply withdraw its application and re-file it under the Amended Rules.⁴

5 On September 12, 2013, the Commission suspended the procedural schedule and issued a notice giving the parties the opportunity to respond to Staff’s motion. Seatac Direct filed a response on September 18, 2013, and Seatac Shuttle and Wickkiser filed responses on September 19, 2013.

6 Seatac Shuttle argues that administrative rules apply only prospectively, and that because the Amended Rules were not yet in effect when SeaTac Direct filed its application or the Commission held the prehearing conference, applying the Amended Rules to this case would amount to retroactive application of the Amended Rules.⁵ Seatac Shuttle argues that the Amended Rules “could not have been taken into account by any party to the docket at any point during the process.”⁶ Seatac Shuttle

do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

² General Order R-572, Order Amending and Adopting Rules Permanently, Docket TC-121328 (2013), *codified at* WAC 480-30.

³ WAC 480-30-116 (2).

⁴ Motion for Clarification at 4, ¶ 6, and 5, ¶ 8.

⁵ Seatac Shuttle Response at 2, ¶ 5 and 4, ¶ 10.

⁶ *Id.* at 2, ¶ 5.

objects to Staff's arguing outside of a hearing that neither Seatac Shuttle nor Wickkiser provides the same service as SeaTac Direct. Seatac Shuttle urges the Commission to apply the Earlier Rules to this case. In a nearly identical brief, Wickkiser presents the same arguments that Seatac Shuttle does in favor of applying the Earlier Rules to SeaTac Direct's application.

- 7 SeaTac Direct urges the Commission to apply the Amended Rules and, based on the facts and arguments set forth in the parties' original filings, find that the Company does not provide the same service as Seatac Shuttle and Wickkiser. SeaTac Direct argues that further adjudication is unnecessary because SeaTac Direct will not provide the same service as Seatac Shuttle and Wickkiser. SeaTac Direct reminds the Commission that Seatac Shuttle and Wickkiser actively participated in the comprehensive rulemaking process that culminated in the Amended Rules, during which the "same service" standard was adopted.⁷ SeaTac Direct avers that the companies' assertions that they did not know the Amended Rules were coming into effect is not credible. Finally, SeaTac Direct makes the same point as Staff, stating that "even if the decision is made to apply the old rules to my case, I could circumvent it by withdrawing and reapplying in order to assure consideration under the current rules."⁸

DISCUSSION

- 8 As a preliminary matter, Staff entitles its pleading a "motion for clarification." A motion for clarification, however, more appropriately seeks an explanation of a provision in a prior Commission order. Staff's motion does not ask the Commission to clarify an order but to determine in advance of a hearing the extent to which certain Commission rules apply in this docket. Accordingly Staff's motion is more in the nature of a motion for summary adjudication of that legal issue, and we will construe it as such.⁹

⁷ Seatac Shuttle and Wickkiser do not dispute their involvement in the rulemaking that led to the Amended Rules. In its response to Staff's motion, Seatac Shuttle states "For no less than two years staff and 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." Seatac Shuttle Response at 2, ¶ 5. Wickkiser adds "On August 21, 2013, the Commission issued Order R-572 (updating the rules of RCW 480-30) after more than two years of work, preparation and participation by the existing Airporter providers." Wickkiser Response at 3, ¶ 4.

⁸ SeaTac Direct September 18, 2013 Letter to the Commission, at 1.

⁹ See WAC 480-07-395(4).

- 9 The parties pose the issue for determination as whether the Commission can and should apply the Amended Rules retroactively. We disagree. The issue is the extent to which those rules apply to the application pending in this docket and the impact of that application. We conclude that the currently effective rules apply, specifically that WAC 480-30-116 limits the issues to be addressed in this adjudication to whether SeaTac Direct proposes to offer the same services that Seatac Shuttle or Wickkiser currently provide.
- 10 The Earlier Rules permitted existing auto transportation certificate holders to file protests to applications for new certificate authority and required those protests to specify the reasons for the protest.¹⁰ The former rule did not identify which reasons would be sufficient to sustain the protest and deny the application, leaving that determination to the Commission when entering its order in individual cases.
- 11 The Amended Rules continue to allow an existing auto transportation company to object to an application for new certificate authority but “only if the company holds a certificate that authorizes the same service and the company provides the same service published in the application docket.” The Commission has determined by rule that in all cases, the only basis on which the Commission will grant an auto transportation company’s objection to—or protest of— an application is if the applicant proposes to provide the same service that the existing company is providing to the satisfaction of the Commission.
- 12 The revisions to WAC 480-30-116 provide greater specificity than the prior rule by identifying the issues the Commission will consider in an adjudicated application for new certificate authority. We see no reason why we should not give effect to this rule by limiting consideration of the issues in this adjudication to those specified in the rule. The Commission could so limit the scope of this docket by order and would do just that if the Amended Rules rule were not in place. Applying that limitation to the application before us thus gives effect to WAC 480-30-116 without depriving the parties of any substantive or procedural rights they had prior to the effective date of the rule.¹¹

¹⁰ WAC 480-30-116 (2), amended (2013), see *supra* n.2.

¹¹ Indeed, Seatac Shuttle and Wickkiser were actively involved in the rulemaking that resulted in the Amended Rules and had ample opportunity to comment on them – including the limitation on the issues objecting certificate holders may raise – prior to Commission adoption.

- 13 Having determined that revised WAC 480-30-116 limits the scope of the issues presented in this docket, we must determine the impact of this limitation. We conclude that because neither Seatac Shuttle nor Wickkiser provide the same service that SeaTac Direct seeks to offer, the Commission should not adjudicate the application.
- 14 Seatac Shuttle admits that it does not provide *any* transportation service between Bellingham and SeaTac Airport. Seatac Shuttle thus does not provide the same service between Bellingham and SeaTac Airport that SeaTac Direct proposes to offer.
- 15 Wickkiser states that it provides *multiple-stop* scheduled service between Bellingham and SeaTac Airport. SeaTac Direct proposes to provide *non-stop* scheduled service between Bellingham and SeaTac Airport. The Commission has previously concluded in comparable circumstances that multiple-stop transportation service is not the same service as non-stop service.¹² We reach the same conclusion here. Wickkiser effectively conceded that it does not provide the same service that SeaTac Direct proposes when Wickkiser filed a tariff on September 20, 2013, to provide new “express passenger service” between Bellingham and SeaTac Airport, the very service SeaTac Direct proposes to provide.¹³ Thus neither Seatac Shuttle nor Wickkiser provides the same service SeaTac Direct has applied for authority to offer.
- 16 Seatac Shuttle and Wickkiser argue that even if the Commission decides that the Amended Rules apply, the Commission must hold a hearing to decide if they provide the same service. Seatac Shuttle and Wickkiser are incorrect. An evidentiary hearing would be necessary only if the Commission were required to resolve genuine issues of material fact. No such factual issues exist. As a matter of law and uncontested fact, neither Seatac Shuttle nor Wickkiser provides the same service SeaTac Direct has applied to offer. Accordingly, there are no grounds for conducting an evidentiary hearing or an adjudication, and this case should be dismissed.
- 17 Commission Staff is responsible for reviewing auto transportation applications to determine, among other things, whether the public convenience and necessity require the Commission to grant a certificate. Accordingly, the Commission will refer SeaTac Direct’s application to Staff for further processing under WAC 480-30-126.

¹² See, e.g., *In re Application of McNamara, Sean d/b/a Bellingham Water Taxi*, Dockets TS-121253, et al., Order 04, Final Order Denying Petition for Administrative Review ¶¶ 14-17 (July 17, 2013).

¹³ Docket TC-131809.

FINDINGS AND CONCLUSIONS

- 18 (1) The Commission is an agency of the state of Washington vested by statute with the authority to regulate the rates, rules, regulations, and practices of auto transportation companies.
- 19 (2) On May 7, 2013, SeaTac Direct filed an application with the Commission to operate as an auto transportation company subject to the Commission's jurisdiction.
- 20 (3) Seatac Shuttle does not provide the same service SeaTac Direct proposes to offer.
- 21 (4) Wickkiser does not provide the same service SeaTac Direct proposes to offer.
- 22 (5) Because no party provides the same service that SeaTac Direct proposes to offer, there are no grounds for further adjudication regarding SeaTac Direct's application.

ORDER

THE COMMISSION ORDERS THAT:

- 23 (1) The adjudication in this proceeding is DISMISSED, and
- 24 (2) Northwest Smoking & Curing, Inc. d/b/a Seatac Direct's application is referred to Commission Staff for evaluation of whether SeaTac Direct will provide service in accordance with the Commission's auto transportation rules.

Dated at Olympia, Washington, and effective November 8, 2013.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

STEPHANY A. WATSON
Administrative Law Judge

NOTICE TO THE PARTIES

This is 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 20 days after the entry of this initial order to file a petition for administrative review (Petition). Section (3) of the rule identifies what you must include in any Petition as well as other requirements for a Petition. WAC 480-07-825(4) states that any party may file an answer (Answer) to a Petition within 10 days after service of the petition.

WAC 480-07-830 provides that before the Commission enters 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. The Commission will not accept answers to a petition to reopen unless the Commission requests answers by written notice.

RCW 80.01.060(3), as amended in the 2006 legislative session, 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. You will be notified if this order becomes final either by operation of law or on administrative review.

You must serve on each party of record one copy of any Petition or Answer filed with the Commission, including proof of service as required by WAC 480-07-150(8) and (9). To file a Petition or Answer with the Commission, you must file an original and three copies of your petition or answer by mail delivery to:

Attn: Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250