

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application of)	DOCKET TC-130708
)	
NORTHWEST SMOKING & CURING,)	SEATAC SHUTTLE, LLC
INC. d/b/a SEATAC DIRECT)	PETITION FOR
)	ADMINISTRATIVE
)	REVIEW OF
)	ORDER NO. 2
)	DISMISSING
)	ADJUDICATION
)	
For Permanent Auto Transportation)	
Authority)	

I. SUMMARY OF PETITION

1 Seatac Shuttle, LLC (Shuttle), submits this petition for administrative review of **Order No. 2, Docket TC-130708 INITIAL ORDER DISMISSING ADJUDICATION AND REFERRING APPLICATION TO COMMISSION STAFF** (Order). The Order is in error in both law and fact. Order No. 2 was issued as a direct result of a MOTION FOR CLARIFICATION submitted by UTC staff AAG Michael A. Fassio (AAG) on September 10, 2013. That motion as described by Administrative Law Judge Watson (ALJ) in her **NOTICE SUSPENDING PROCEDURAL SCHEDULE AND EVIDENTIARY HEARING** of September 12, 2013 stated “Commission Staff filed a motion *seeking clarification of whether the Commission will apply the rules in WAC 480-30 as they existed when SeaTac Direct filed its Application or the rules that will become effective on September 21* (emphasis added) (Motion).”¹ The question of the motion was one of clarification on one issue and one issue only; which iteration of WAC 480-30 was the prevailing set of rules to be applied to the docket in question. . We find the motion to be frivolous, the Commission’s stance was clearly stated by the Executive Director and Secretary of the Commission, for the Commission, in his letter of August 22, 2013, “The commission filed its Adoption Order with the Code Reviser on August 21, 2013. **It will become effective on September 21, 2013.**” (emphasis added) The question asked had been answered by the Commission prior to the filing of the motion.

2 The Order erroneously answers the question asked by the Declaratory Petition of Mr. Fassio but not in the forum of a Declaratory Petition. It presumes facts not in evidence and draws conclusion not supportable by rule, facts or precedent. A Declaratory Petition/Motion was summarily and unilaterally converted to a Dispositive Motion without the consent of the participating parties, outside of hearing and without proper notice.² This petition involves WAC 480-07-370, 480-07-375, 480-07-380 480-30-116, 31, 086, RCW 34.05.240, RCW 81.68

II. INTRODUCTION

3 On May 7, 2013 Northwest Smoking and Curing, Inc. (Smoking) filed an application in the above referenced matter. Both Wickkiser International Companies, Inc. (Airporter) and Shuttle filed protests to that application in a timely manner. A pre-hearing conference was set for August 5, 2013 and proper notice given. At that conference Airporter and Shuttle requested a hearing date in November of 2013 due to business scheduling concerns. The AAG, 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

4 On July 26, 2013 after more than two years of work, preparation and participation with the affected Auto Transportation Companies, final public comments were heard by the Commission at the UTC in Olympia, Washington. Both UTC staff and private persons provided the Commission with comment. The Commission then took those comments under advisement prior to issuing an Order. From that date forward UTC staff was unable to provide the Autotransportation companies with any indication of when or if the Commission would issue an Adoption Order and if such an Order were issued what form it might take. There was no expectation by any parties as to the content of any revisions that might or might not be accepted, rejected or modified by the Commission. The Commission was under no time constraint in issuing an Order. The Commission did subsequently issue Order R-572 under TC-121328 on August 21, 2013 with an effective date of September 21, 2013 and a real world effective date of October 23, 2013 for current operators. Operators were specifically precluded from amending tariffs under the amendatory section until the effective date of September 21, 2013 with a tarfff effective date no sooner than October 23, 2013. Until such date the effective rules in WAC 480-

30 were those described in Order R-533, TC-020497, which incidentally was issued four years after the date of the opening of the docket.

5 On August 5, 2013 at pre-hearing conference the AAG made an oral Dispositive Motion to deny or restrict the rights of Shuttle to participate in the adjudication.⁴ The ALJ made an immediate ruling, outside of hearing, on that motion and restricted the rights of Shuttle to participate in the adjudicate process.⁵ Airporter asked the ALJ if it could make a motion for Summary Judgment (dispositive motion) at that time and was denied leave to do so by the ALJ.⁶

6 Subsequent to that conference, the AAG submitted a Motion for Clarification on September 10.⁷ Responses to that Motion were provided by Shuttle, Airporter and by a letter from Smoking on September 19, September 19 and September 20, 2013 respectively. On September 12, 2013 the hearing of October 2, 2013 was suspended denying Smoking its and staff's requested hearing date.⁸ On November 8, 2013 the ALJ issued Order No.2 in response to staff's Motion for Clarification which pronounced summary judgment denying both Airporter and Shuttle all rights afforded them under either iteration of WAC 480-30. At no time did any party to the Docket request any such ruling or advisement.

III. DISCUSSION

7 A Motion for Clarification was filed by the AAG on September 10, 2013. It was captioned COMMISSION STAFF MOTION FOR CLARITICATION , it was not captioned Motion for Summary Judgment. At no point in the discussion or arguments presented by the motion was it suggested or inferred that the parties to the action have their rights limited or curtailed. It posed the opinion that *if* the 2013 iteration of 480-30 were applied retro-actively then limitations under the new rules would in effect restrict the rights of the affected parties as background information. The motion also correctly advised that if the 2013 rules are applied prospectively.... "since SeaTac Direct's application was filed before that date [Sept. 21, 2013], the 2006 rules should apply to the Commission's consideration in the matter of this docket".⁹ The information provided does not support either applying the 2013 rules retro-actively or prospectively, rather merely posits the possible future direction(s) of an adjudicative proceeding under this docket in both circumstances. The Order takes no cognizance of *MacKenzie*¹⁰ or *Champagne*¹¹ as referenced by both the motion¹² and the response of Shuttle¹³. Applying the 2013 rules runs contrary to and does not meet the test of either citation. *MacKenzie* requires that

application of administrative code retro-actively not be arbitrary and capricious, or contrary to law and must satisfy the need for public safety in an emergency situation. Applying 480-30 [2013] retroactively does not meet any of these required tests.

9 Furthermore, *Champagne* requires that for rules to be applied retro-actively they must meet any one of three test: (1) the agency intended the amendments to apply retro-actively, (2) the effect of the amendment is remedial or curative, or (3) the amendments serves to clarify the purpose of the existing rule. Again, Order No. 2 does not satisfy even one of these requirements. First, there is no provision in the amendments directing, inferring or implying intent to have them applied retro-actively. Second, the effect of the amendments are neither remedial or curative but rather a compromise worked out between the regulators and the regulated to foster a new procedure for rate setting as the primary issue and a reduction to entry for NEW applicants as the quid pro quo. With no emergency existent and no direction for retro-applicability within the amendments as well as the other requirements provided under law, there is no justification or legal precedent for their retro-active application as ordered.

10 The conclusion of the Order that “The parties pose the issue for determination as [to] 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.”¹⁴ It is unclear how a concise question posed under the rules of a Petition for Determination and stated as such by the determining party (ALJ) can be found not to be the actual question asked but converted to another question altogether and generating a response and order to a Dispositive Motion never posed nor responded to by the affected parties as such. This reinterpretation from the bench of a simple question and the application of rule not in force despite no compelling argument provided can only be characterized as “legislating from the bench”. If rule, precedent and example serve no purpose, what avenue is then open to an aggrieved party in responding to the agency? The piece-meal or cafeteria style selection of “which [of] those rules apply to the application pending in this docket and the impact of that application.” leave any prospective applicant or protestant (objector) without any guidance under rule or confidence in the process.

11 The Order makes much of “same service” as it would potentially apply under the 2013 rules in 480-30-116. The Order goes so far as to state in note 11 of the Order, ” *Indeed, Seatac*

Shuttle and Wickkiser were actively involved in the rulemaking process 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.”¹⁵ Let us be very clear on this issue; Shuttle vigorously contested and opposed the inclusion of the undefined term “same service” within the amendments. Virtually all other autotransportation operators voiced similar opposition at each workshop held with UTC staff. Shuttle foresaw the necessity for litigating this undefined term at some future date if it was not more specifically defined. Staff declined any further illumination and the Commission adopted rules without a concise definition stating that precedent would be the guide. We are at that juncture now. The Order incorrectly places its own, unsupported by rule or definition within WAC, definition of the service at issue in this docket.

12 The Order states that”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”.¹⁶ The ALJ, like some staff members, confused certificated authority with routes. Wickkiser holds authority, (a Certificate for Public Convenience and Necessity) for a territory; it is permitted uncontested expansion and an unlimited number of routes within that authority. There is no certificate for a route; a route is listed within the tariff of an authorized certificate holder. Shuttle is also unaware of any definition of “multi-stop” as proclaimed by the Order in its stretched logic of trying to define what is and what is not same service. Multi-stop is inferred by the following definitions within WAC. **Direct Service** by definition in WAC 480-30-036 is “an auto transportation company service over a route that goes from the beginning point to the ending point with **limited, if any, stops** along the way, and traveling only to points located on the specific route without requiring a passenger to transfer from one vehicle to another.” Furthermore, **Express Passenger Service** is that service, by definition in WAC, which an auto transportation company provides between fixed points or stations **with few, if any, stops** along the route, and is designed to get passengers from origin to destination more quickly than normally scheduled passenger service.¹⁷ Direct and Express Service is inclusive of limited stops. Therefore “multi-stop” service must by definition be a route that has more than three (few) stops. Airporter provides from its Downtown Bellingham pickup point, approximately one block from the applicants proposed pick-up point, eight (8) daily trips that are both Direct and Express by definition in WAC, to and from Seatac International Airport

contrary to that which the Order states as fact in paragraph four (4). Smoking only proposes four (4) daily direct, express trips. The question of “same service” is not a “matter of law or uncontested fact” rather it is the most contentious and contested issue of the docket and needs to be resolved at hearing. It is not resolved by the unsupported contention of paragraph 13 of the Order. Further the Order goes on to affirm Airporter’s providing same service in paragraph 13 stating “Wickkiser filed a tariff...to provide new “express service” between Bellingham and SeaTac Airport, the very service SeaTac Direct proposes to provide.”¹⁸ By definition, Airporter already provides that very same “express service” eight or more times a day from a location one block away from Smoking’s proposed service.

13 Smoking, as interpreted by the Order, alleges that Shuttle knew that the amended rules would be adopted by the Commission what form they would take and when they would be adopted, “SeaTac Direct avers that the companies’ assertions that they did not know that the Amended Rules were coming into effect is not credible”¹⁹ Such “crystal ball” prognostication in normal circumstances would not be worthy of comment, however since it has been alleged we will examine it here. Smoking has no experience with the processes of the Commission or agency staff. It has no demonstrated experience with the rulemaking process with any state agency. It did not participate in any of the rulemaking process under Docket TC-121328. The Commission has complete leave to accept, accept in part, reject, reject in part or modify any amendatory rules submitted to by staff or any other party without time constraint. Smoking was and is blissfully unaware of these circumstances and makes allegations which the Order does not dispute and even accepts. They are baseless and not supported by any facts. In point of fact Shuttle could have no expectations of any particular outcome at any particular time of Docket TC-121328. Staff too was in the dark as to the final form and possible adoption of the 2013 amended sections of WAC 480-30 until September 21, 2013 when Order R-572 was issued by the Commission. Smoking’s assertion is nothing less than pure unfounded bunk. The Order accepts this absurd fantasy as evidence. By this logic, this company could be operating under the revised RCW 81.68 as submitted to the Governor prior to the adoption of the WAC revision by the agency with the full expectation that it would be the operative law deregulating autotransportation. Does the Commission support this position?

14 Shuttle stipulates and acknowledges that it does not provide “same service” as either Airporter or Smoking, it does however aver that its rights and those of the industry as a whole are brought into question by this application and therefore it has full standing as a protestant as permitted under 480-30-116 (2006) and 480-07-370.

IV. SUMMARY OF DISCUSSION

15 Commission Staff For Motion to Clarification was filed after the Commission’s determination of the prospective applicability of the amendatory sections of WAC 480-30 as evidenced by Director King’s letter of August 22, 2013.²⁰

16 The Order incorrectly converts a Declaratory Petition for Clarification to a Dispositive Motion for Summary Judgment. No arguments were solicited from any participating party regarding the conversion and as a Dispositive Motion it was not filed in a timely manner in accordance with WAC 480-07-380 (2) (b) nor was it presented or heard at hearing.

17 An Oral Dispositive Motion was accepted and ruled on at pre-hearing conference limiting and restricting the participation of Seatac Shuttle without regard to the requirements of WAC 480-07-375 (1).²¹

18 The Order incorrectly applies the amendatory sections of WAC 480-30, (2013), to an application filed and processed prior to the effective date of those amendatory sections. The Application was filed under 480-30 (rev. 2006) with the clear expectation of all parties that it would be so processed. No required tests were met to warrant or permit the retro-active application of rules intended to be applied prospectively. No argument was provided to lay a foundation, rule was ignored and precedent not considered in the retro-active application.

19 The determination of “same service” is pronounced without hearing or argument and ignores the definitions provided in WAC 480-30-036. This hotly contested issue is averred to be uncontested and a material fact within the Order.

20 The Order confers upon Shuttle a foreknowledge of Commission decisions which it did not and could not possibly have known then or now or in the future.

21 Contrary to paragraph 12 of the Order, “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 right they had prior to the effective date of the rule.”²², this Order and the assumption made within, severely limit both the substantive and procedural rights of Shuttle as provided under both 480-07-370 (f) and 480-30-116 (2006).

22 Airporter does hold a certificate that authorizes the same service and the company provides the same service and at a greater frequency level than proposed by the applicant.

23 Airporter held at the time of the application and processing and the pre-hearing conference a valid Certificate of Public Convenience and Necessity for the territory in which Smoking made application to provide service. That certificate grants territory *not* specific routes. Airporter is assured freedom from incursion by other proposed operators under that certificate within the authorized territory. If and when any such incursion is proposed it has a right under rule to a hearing. Under the rules effective at the time of application, the burden of proof is upon Smoking to provide evidence at hearing that the certificate holder is not providing service to the satisfaction of the Commission. This opportunity for hearing has been denied abrogating the rights of Shuttle, Airporters and Smoking..

24 The Order prejudices’ both Airporter and Shuttle by its reference to their corporate names rather than their descriptive d/b/a operating names, while referring to Northwest Smoking & Curing, Inc. by its presumed d/b/a which would tend to mask its experience as a purveyor of meat and substitute a name leading one to believe wrongly that it is an experienced provider of public transportation.

V. CONCLUSION

25 The Order incorporates incorrect filings; ignores filing time and notice requirements; denies the rights of the parties to the actions without cause, rule or precedent; denies a hearing to all parties assured them under rule and most egregiously supplants the rules effective under this docket. A retro-active application of amendatory rules was never the intent of staff, the Commission or the parties to the docket as directly evidenced by a total lack of any direction within the amendatory sections or Director King’s letter permitting such retro-active application.

VI. RELIEF SOUGHT

26 We call upon the Commission for the above causes to rescind Order No. 2, TC-130708 and the matter be set for hearing.

27 In the alternative, Smoking asserts that “SeaTac Direct could simply withdraw its application and re-file under the amended rules”.²³ Virtually all of the assertions of Shuttle relative to this Order would become moot as the Order would be null and void should Smoking do as it suggests. Acting on this simple matter to re-file its application under the “new” rules would conform to the procedures provided under rule without contention. Shuttle for years has been seeking consistency in the commission’s application of rule. This is but one more unfortunate example of creating a fog in lieu of clarity. Rather than attempt to apply rules clearly not in effect for this proceeding, creating an excessive amount of work for the Commission, staff and parties to the docket, we would support a re-filing of the application at a date subsequent to the effective date of the amendatory sections of WAC 480-30 (2013). This would satisfy the rules, provide for a clear and concise procedure for processing, and provide the “efficient and expedited” processing sought by the amendatory sections. Under this process Shuttle will have no standing and will not seek to intervene. This will provide for a reduced timeframe for the applicant over that which can be expected if the current process is to run its full course. By its own statement Smoking sees this as a simple alternative to the current adjudication.²³

28 We the regulated certificate holders must follow the Commission’s rules and policies; so should staff and any prospective new entrants.

Respectfully submitted this second day of December, 2013,

By,

Michael Lauver, Member

Seatac Shuttle, LLC d/b/a Whidbey Seatac Shuttle, C-1077

Notes to Petition for Administrative Review:

1. Notice of Opportunity to Respond / Notice Suspending Procedural Schedule and Evidentiary Hearing RE: *In re Application of Northwest Smoking & Curing, Inc. d/b/a SeaTac Direct*, Docket TC-130708 para. 3
2. WAC 480-07-380 (2) (b)
3. Transcript – Prehearing Conference, Vol. 1, pg 0020 para. 1 TC-130708
4. Transcript – Prehearing Conference, Vol. 1 pg 0010 para. 2 TC-130708
5. Transcript – Prehearing Conference, Vol. 1 pg 0015 para. 1 TC-130708 & WAC 480-07-380
6. Transcript – Prehearing Conference, Vol. 1 pg 0018 line 21-22 TC-130708
7. Commission Staff Motion for Clarification TC-130708 September 10, 2013
8. Notice of Opportunity to Respond / Notice Suspending Procedural Schedule and Evidentiary Hearing RE: *In re Application of Northwest Smoking & Curing, Inc. d/b/a SeaTac Direct*, Docket TC-130708
9. Commission Staff Motion for Clarification para. 8, TC-130708 September 10, 2013
10. *State v. MacKenzie* 114 Wash.
11. *Champagne v. Thurston County* 163sh. 2d
12. Commission Staff Motion for Clarification, para 8 TC-130708 September 10, 2013
13. Response of Seatac Shuttle, LLC to Staff Motion for Clarification para. 10 TC-130708 September 19, 2013
14. Order No. 2, Initial Order Dismissing Adjudication and Referring Application to Commission Staff, pg. 4, para. 9, TC-130708 November 8, 2013
15. Foot note 11 on pg. 4 of Order No. 2, Initial Order Dismissing Adjudication and Referring Application to Commission Staff, TC-130708 November 8, 2013
16. Order No. 2, Initial Order Dismissing Adjudication and Referring Application to Commission Staff, para. 4, TC-130708 November 8, 2013
17. WAC 480-30-036
18. Order No. 2, Initial Order Dismissing Adjudication and Referring Application to Commission Staff, para. 15, TC-130708 November 8, 2013
19. Order No. 2, Initial Order Dismissing Adjudication and Referring Application to Commission Staff, note 7 page 3, TC-130708 November 8, 2013 & para 7 pg 3 Order
20. Letter from Exc. Dir. King Re: Rulemaking to consider rate setting flexibility and competition for autotransportation companies in WAC 480-30, Docket TC-121328, August 22, 2013
21. Transcript – Prehearing Conference, Vol. 1, pg 0015 para. 1 , TC-130708
22. Order No. 2, Initial Order Dismissing Adjudication and Referring Application to Commission Staff, para. 12, TC-130708 November 8, 2013
23. Order No. 2, Initial Order Dismissing Adjudication and Referring Application to Commission Staff, para. 7, TC-130708 November 8, 2013 and Letter in Response of Northwest Curing & Smoking to Staff Motion for Clarification para. 3 TC-130708 September 18, 2013