BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application of NORTHWEST SMOKING & CURING, INC. d/b/a SEATAC DIRECT For Permanent Auto Transportation Authority.	DOCKET TC-130708 COMMISSION STAFF'S ANSWER TO WICKKISER'S AND SEATAC SHUTTLE'S PETITIONS FOR ADMINISTRATIVE REVIEW

1 Pursuant to WAC 480-07-825(4), Commission Staff (Staff) submits this Answer in response to Wickkiser International Companies, Inc.'s (Wickkiser) and Seatac Shuttle, LLC d/b/a Whidbey-Seatac Shuttle's (Seatac Shuttle) Petitions for Administrative Review (Petitions) of Order 02, Initial Order Dismissing Adjudication and Referring Application to Commission Staff (Initial Order). Staff supports the Initial Order and requests the Petitions be denied. Staff does not challenge the Initial Order in this Answer.

III. ARGUMENT

A. The Initial Order did not Err by Construing Staff's Motion as in the Nature of a Motion for Summary Adjudication on the issue of the extent to which 2013 Rules Should Apply.

2 In their Petitions, Seatac Shuttle and Wickkiser assert that it was an error for the Commission to construe, as a preliminary matter, Staff's "Motion for Clarification," filed on

September 10, 2013, as a motion for summary adjudication, and decide the issue accordingly. Staff disagrees.

3 WAC 480-07-395(4) provides that:

> "The commission will liberally construe pleadings and motions with a view to effect justice among the parties. The commission, at every stage of any proceeding will disregard errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties."

4 Staff takes no issue with the Commission's exercise of discretion to liberally construe its pleading. Although Staff titled its filing a "motion for clarification," it did not seek to clarify an order. The Initial Order accurately summarized the purpose of Staff's motion, which was for the Commission to determine in advance of a hearing the extent to which certain Commission rules, in particular WAC 480-30, which became effective on September 21, 2013, should apply in this docket.[1] The Initial Order framed the issue as such. Staff believes the Commission appropriately framed the issue and exercised the discretion provided under WAC 480-07-395(4) as a preliminary matter.

B. The Initial Order did not Err in Concluding that the Current Effective Rules ("2013 rules") should Apply to SeaTac Direct's Application.

5 The Initial Order concludes that the currently effective WAC 480-30 rules (2013 rules), which became effective September 21, 2013, should apply to this docket.[2] In their Petitions for Administrative Review, Seatac Shuttle and Wickkiser assert that this is in error, and the Commission should apply the prior rules. Staff disagrees.

6 It is appropriate for the Commission to apply the 2013 rules to its consideration of the application in this docket. The Initial Order also properly concluded that WAC 480-30-116 limits the issues to be addressed in an adjudication to whether SeaTac Direct proposes

[1] Initial Order, ¶ 8-9.

to offer the same services that SeaTac Shuttle or Wickkiser currently provides.[3] While the former rule permitted existing auto transportation certificate holders to protest an application, it did not expressly identify the reasons sufficient to sustain the protest and deny the application; in contrast, the 2013 rules continue to allow an existing auto transportation company to object to an application but "only if the company holds a certificate that authorizes the service and the company provides the same service published in the application docket."[4] Even if the 2013 rules were not in place at the time SeaTac Direct filed the application or protests/objections were filed, they became effective prior to adjudication or hearing, and Commission consideration, of the merits of SeaTac Direct's application, and the merits of any existing objection to it. Therefore, it is appropriate for the Commission to apply the current rules to its consideration of the application, and, as the Commission did in its Initial Order, to give effect to WAC 480-30-116 by limiting consideration of the issues in an adjudication to those specified in the rule. In any event, the Commission may limit the scope of adjudication by order.

7 Seatac Shuttle suggests, in the alternative, that the Commission could direct SeaTac Direct to withdraw and refile its application, and current rules would apply.[5] The alternative is not reasonable when the Commission can apply the current rules the same way in this Docket. Not only would requiring SeaTac Direct to refile be at odds with the Commission's stated goals of streamlining the application process, but, at the very least, forcing the company to refile, and restart the application process would place an unnecessary burden on SeaTac Direct and would further delay a decision on the authority it seeks.

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[2] Initial Order, ¶ 9.
[3] Initial Order, ¶ 9.
[4] WAC 480-30-116(2) amended (2013); Initial Order, ¶ 11.
[5] See Seatac Shuttle's Petition for Administrative Review, ¶ 27.

C. The Initial Order Correctly Held that Wickkiser and Seatac Shuttle do not Provide the Same Service as SeaTac Direct Proposes to Provide, and thus there are No Grounds for Further Adjudication.

8 Wickkiser's Petition asserts that the Initial Order improperly concluded it does not provide the same service SeaTac Direct proposes to offer, and asserts a hearing is required to resolve the issue. Seatac Shuttle's Petition essentially supports that position. Staff disagrees.

9 Giving effect to the current rules, 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. WAC 480-30-116(2) (2013). In reviewing an application, the Commission may, among other things, consider "whether an existing company is providing the same service to the satisfaction of the commission." WAC 480-30-140(1)(b) (2013). In determining whether an existing certificate holder provides the same service in the territory at issue, the Commission may consider several factors, including "the certificate authority granted to the existing companies and whether or not they are providing service to the full extent of that authority" and the nature and type of service. WAC 480-30-140(2)(a). Although now set out in rule, the Commission has long considered these factors when deciding similar transportation application cases.[6]

10 It is uncontested that SeaTac Direct seeks authority to provide nonstop scheduled service between Bellingham and Seattle-Tacoma (Seatac) International Airport.[7] "Nonstop service" is defined in the Commission's auto transportation rules as: "transportation of

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[6] See, for example, *In the Matter of the Application of San Juan Airlines, Inc. d/b/a Shuttle Express*, Order M.V.C. No 1809, Hearing No. D-2566, Commission Decision and Order Granting Application as Amended, page 17 (April 21, 1989).
[7] Initial Order, ¶ 15.

passengers from point of origin to point of destination without stopping at any intermediate points." WAC 480-30-036. Seatac Direct would not be permitted to stop along its route.

11 Wickkiser holds certificate authority to provide airporter[8] passenger and express service between Bellingham and Seatac Airport. "Express passenger service" is defined in WAC 480-30-036 as "service provided 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." The services authorized under Wickkiser's certificate allow the company to stop along its route.

12 First, the Initial Order considered the uncontested fact that Wickkiser provides a multiple stop scheduled service between Bellingham and Seatac Airport (in other words, it is not nonstop). The Commission has previously held that a direct, nonstop transportation service between two points is *a different service* from a multiple-stop service between the same two points.[9] To put it another way, they are *not the same service.* The Initial Order correctly applied the factors above, a prior Commission Order, and the law to the uncontested facts to conclude that Seatac Direct's proposed nonstop scheduled passenger service is not the same service as an airporter service that is intermediate service to named points between Bellingham and Sea-Tac International Airport, like Wickkiser provides, as outlined in Wickkiser's published tariff and time schedule.[10]

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[8] WAC 480-30-036 defines "airporter service" as: "auto transportation service that starts or ends at a station served no by another type of transportation such as, air or rail transportation…Although stops may be made along the way, they are usually limited to picking up or discharging passengers, luggage and/or express freight bound to or from the airport or depot served."

[9] Initial Order, ¶15. See *In re Application of Sean McNamara 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).

[10] WAC 480-30-036 defines "intermediate point" as "a point located on a route between two other points that are specifically named in an auto transportation company's certificate or tariff" and "intermediate service" as "service to an intermediate point."

13 Second, the Initial Order properly considered the tariff filing that Wickkiser made on September, 20, 2013, in Docket TC-131809, to add a "new express passenger service" between Bellingham and Seatac Airport, as supporting its conclusion that Wickkiser does not provide the same service that SeaTac Direct proposes.[11] The fact that Wickkiser added this "new" service to their tariff while SeaTac Direct's application is pending means that this was not previously in their tariff, effectively demonstrating they are not providing a nonstop service that Seatac Direct applied for.[12] A company may not provide a service until it files a tariff and time schedule with the Commission and it becomes effective.[13] Wickkiser's Petition does not appear to take issue with the fact or challenge the Initial Order's conclusions about it.[14] Also, contrary to Seatac Shuttle's assertion in its Petition,[15] a company's addition of a new service to its tariff *after* an application is filed and while it is pending, is <u>not</u> evidence that the applicant is proposing a service that is already provided by an existing company.

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[11] Initial Order, ¶ 15. See Docket TC-131809, Transmittal letter and attached tariff page and time schedule, September, 20, 2013, which became effective by operation of law. [The Transmittal letter states: "This is a filing of a rate table and time schedule for new Express Passenger Service between Bellingham and Seatac International Airport."] The filing was consistent with WAC 480-30-301, which requires at least one business-day notice to the Commission for "tariff and time schedule filings whose only purposes is to add a new service option or a service level which has not been previously included in a company's tariff."

[12] The Initial Order characterizes Wickkiser's filing in TC-131809 as for "the very service SeaTac Direct proposes to provide." ¶ 15. This is accurate insofar as Wickkiser's "new" service is Between Bellingham and Seatac Airport and makes no stops and SeaTac Direct's proposed service is also nonstop between Bellingham and Seatac Airport. However, technically SeaTac Direct did not apply for "express service."

[13] See WAC 480-30-271.

[14] The Petition, inappropriately, raises factual assertions that were not cited in the Initial Order, have no evidentiary support in the record and Wickkisser did not raise in response to Staff's Motion for Clarification and the Commission's September 12, 2013, Notice of Opportunity to Respond and Notice Suspending Procedural Schedule and Hearing.

[15] See Seatac Shuttle's Petition, ¶ 12.

14 Neither Wickkiser nor Seatac Shuttle challenge the Initial Order's finding and conclusion that Seatac Shuttle does not provide the same service as SeaTac Direct proposes to offer, which Staff believes is also correct.[16]

15 Because the Initial Order concluded as a matter of law that neither protestant Wickkiser nor intervenor Seatac Shuttle provides the same service as the applicant proposes, the adjudication may be dismissed, no hearing scheduled, and the matter may be referred to Commission Staff for further processing.

IV. CONCLUSION

16 In summary, as set forth above, the Initial Order was proper, and the Commission should deny Wickkiser's and Seatac Shuttle's respective Petitions for Administrative Review.

DATED this 12th day of December, 2013.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General

MICHAEL A. FASSIO
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff

[16] Initial Order, ¶¶14, 20.