

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application of)	DOCKET TC-130708
)	
NORTHWEST SMOKING & CURING, INC. d/b/a SEATAC DIRECT)	PETITION OF SEATAC SHUTTLE, LLC
)	
)	FOR RECONSIDERATION OF
)	
For Permanent Auto Transportation Authority)	ORDER NO. 03
)	

I. SUMMARY OF RESPONSE

1 Seatac Shuttle, LLC, submits this Petition in response to Commission Order No. 03, Docket TC-130708. The Order ignores precedent, the Washington Supreme Court, Washington Administrative Code just recently adopted by the Commission under Order R-572, dated August 21, 2013 and the pronouncement of the effective date of those revisions issued by the Executive Director of the Commission under their authority and approval in letters dated August 22, 2013 and October 15, 2013 ⁽¹⁾. Staff, through the office of the Assistant Attorney General representing the Commission, has flip-flopped its written and oral opinions and arguments to establish a position, however illogical, counter to any reasonable interpretation of code, policy, rule, precedent or statute with the specific intent of limiting the rights granted Autotransportation by the Commission through RCW, and its codified and previous actions. Those rights include timely and efficient processing by the agency of applications, and a fair and equal as well as logical and consistent application of Commission rules to all parties.

II. INTRODUCTION

2 On May 7, 2013 Northwest Smoking and Curing, Inc. (Applicant) filed an application in the above referenced matter. A pre-hearing conference was noticed and subsequently held on

(1)Letter from Steve King, Executive Director, UTC August 22, 2013

RE: Rulemaking to consider rate setting flexibility and competition for auto transportation companies in WAC 480-30, Docket TC-121328 Para 1. And Letter from Steve King, Executive Director, UTC October 15, 2013 Flexible fares for Ancillary charges para 1.

August 26, 2013, three days after Executive Director King's initial letter to all certificate holders stating the effective date of the revisions and again reemphasizing this firm date on October 15, 2013. Hearing was subsequently set for October 2, 2013 ⁽²⁾.

3 Staff also argued that Seatac should not be party to the proceeding as no overlapping service existed between the applicant and Seatac ⁽³⁾, yet even a cursory examination of the applicable WAC, at the time of the application and as of the pre-hearing conference, (480-30-116 (2) **Protests. An existing auto transportation company certificate holder may file a protest to an application published in the application docket**), reveals that the rule in no way is a limitation to the ability of a certificate holder to protest an application for new service. To the contrary, any certificate holder that construes that the issuance is not in the best interest of the public, itself or the industry has leave to file a protest.

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) ⁽⁴⁾ days subsequent to the filing of Applicant's application and its effective date was one hundred thirty-five days (135) ⁽⁵⁾ after the filing by Applicant. The Applicant was not a party to the rule making, had no knowledge of the proposed rules and no expectation that they would be applied to its application.

5 Staff filed a Motion for Clarification on September 10, 2013 ⁽⁶⁾ seeking clarification of the applicability of the revised WAC with reference to this subject docket. As the revised rules were not in effect at the time of filing of the application, the date of the pre-hearing conference, or the date of the filing of the motion and the Executive Director had clearly stated the Commission's opinion on the effective date of the revisions, the motion seemed spurious and frivolous. However despite all required application of rule and logic, precedent and the

(2) Order 01 TC-130708 para. 9

(3) Transcript Docket TC-130708 Vol. 1, pg 8,9,10

(4) Order R-572 issued on August 21, 2013 and application filed on May 7, 2013.

(5) Order R-572 issued on August 21, 2013 with an effective date of September 21, 2013

(6) Staff Motion for Clarification Docket TC-130708 Sept. 10, 2013

order of the State Supreme Court ⁽⁷⁾ the ALJ issued Order No. 2 ⁽⁸⁾ applying the “not in effect” rules retro-actively to the application and dismissed the protests. The ALJ converted a Motion for Clarification to a Declaratory Motion denying the rights of the Protestants without following procedure and without proper notice to the affected parties. Order No. 2 effected this conversion. Order No. 03 reaffirms this conversion stating “Wickkiser and Seatac Shuttle have no basis for their claims that Order 02 expanded Staff’s motion and denied them proper notice or due process. ⁽⁹⁾ WAC 480-30-07 (2) (b) requires that:

(b) *Time for filing motion for summary determination.* A party must file any motion for summary determination **at least thirty days before the next applicable hearing session**, unless the commission establishes by order a different specific date for any such motion to be filed.

Order 01 set the next hearing date for October 2, 2013. ⁽¹⁰⁾ The motion was filed less than the required number of days for it to be considered as Motion for Summary Adjudication. The motion in its entirety should be stricken and not be part of this proceeding. There can be no excuse for untimely filings by the agency or acceptance of such filing by the Commission.

6. Seatac and Airporter vigorously opposed this misguided ruling in individual Petitions for Administrative Review. Seatac, in reviewing the complete confusion created by Order No.2 and the inconsistencies of staff, offered within its Petition to withdraw if, as the Applicant suggested it could, withdraw its application and refile properly under the new revision of 480-30. The Applicant did not object to or voice any negative opinion of following its own suggestion despite a solicitation by the ALJ to respond to the Petitions. The Applicant applied under the only rules in force at the time of his application. The Regulatory Analyst assigned to this docket never raised the issue with the Applicant; staff presented no concerns during the application process, the pre-hearing conference or during the development of the revisions. On the contrary, the only objection came once again from the AAG well after the fact. It is incredulous to this petitioner that the AAG can on one hand argue for application of the revised WAC in this docket and then argue against the applicant properly filing for its use, despite suggesting just such a course of action in concert with the applicant. ⁽¹¹⁾

(7) 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

(8) Order 02 Docket TC-130708, Initial Order Dismissing Adjudication, November 8, 2013

(9) Order 03 Docket TC-1307-8 para. 7

(10) Order 01 TC-130708 para. 9

(11) Order 02 Docket TC-130708 para. 4 Staff Motion for Clarification at 4, ¶ 6, and 5, ¶ 8.

Three of the four parties to this application have suggested this course of action. Now the AAG raises spurious arguments to the contrary of his stated position. One must question motives here.

III. DISCUSSION

Staff did not respond or present any argument to support its contention that the “revised rules” should be applicable in regards to the processing of this application

7. Staff, through the assigned staff AAG, filed an answer to Seatac’s Petition for Administrative Review. In point of fact the document filed was not an answer as it did not respond to the issues raised by the Petition other than to argue against the refiling of the application of the Applicant under the new revision of 480-30 on the false pretense that doing so would extend the application process ⁽¹²⁾. This Petitioner points out that this application is now more than ten months old and every delay has been a result of the staff objecting to each and every reasonable course of action suggested by any of the parties. Staff’s argument for continuing a faulty course of action in lieu of a clear cut one which would have resulted in swift resolution is but the latest example of another delay. And again, this is a course of action suggested by the Applicant, the Petitioner and the AAG. Both the AAG and the Commission state concern for the burden of the Applicant in refiling and thereby being compliant with the revised code. ⁽¹³⁾ The actual and real effect of not refiling of the application when first suggested by the AAG and the Applicant has been to prolong these proceedings and create an extraordinary burden on the Applicant, the Protestants and the Commission. The only redundancy here ⁽¹³⁾ is the repetition of the ignoring case law by staff and the Orders. Refiling would only require the applicant to xerox his original application and resubmit it on a date subsequent to the effective date of the revisions that the AAG and the Order seek now to apply to his application. Not really an overwhelming burden.

(12) Staff Answer to Seatac Shuttle’s Motion for Reconsideration, para.7, December 12, 2013

(13) note13 pg 4 Order 03; Staff Answer to Seatac Shuttle’s Motion for Reconsideration, para.7, December 12, 2013

Loose Interpretation of WAC 480-30-395

8. Petitioner reasserts its argument in paragraph 5 of this petition and refutes staff's claim under WAC 480-30-395. Staff attempts to defend the conversion of its Motion for Clarification to a Declarative Motion, denying the rights of the protestants, by claiming license under WAC 480-07-395 (4), the provision of the code designed to offer some measure of leeway to non-professionals filing documents with the Commission. The intent of the rule is to excuse to some degree, filing errors particularly related to format, structure and citations, in documents filed by laymen or applicants rather than attorneys in order to provide for the best interests of the public. It was never intended that it be used by members of the Bar, licensed attorneys and certainly not members of the Attorney General's office as a method for redefining the nature, character, intent and title of a motion presented to the Commission. It is not a refuge for ambiguity, reinterpretation or restatement after the fact for a practicing attorney. At some point credibility must enter the picture. Order 02 in converting the Motion and then making an argument based on supposition and not code, rule or precedent, then dismissed the adjudication. The filing requirements of a Declaratory Motion were ignored by Order 02 and it was summarily converted without regard to code. No one's rights were curtailed?

The AAG, the ALJ, the Applicant and the Commission have ignored the existence and application of *Mackenzie and Champagne*.

9. Orders 02 and 03, as well as the Answer by staff to Seatac Shuttle's Motion for Administrative Review, and Applicant's arguments, conspicuously ignore and make no mention of the rulings under *Mackenzie* or *Champagne* (7). No arguments or support what-so-ever are made to contradict these rulings and their application to this docket. Ignoring them does not make them go away. Staff has failed to present any argument or rationale for the retro-active application of the 2013 revisions of WAC 480-30 neither has Applicant. There is an overriding bent toward forced and preliminary application of rules to the application regardless of the consequences. This Petitioner participated and contributed to the process of revision WAC 480-30 in good faith. That participation was with the expectation that the rules would be applied as

the effective date and that all providers of Autotransportation would be subject to them in equal application. This entire application process under this docket has been a corruption of that process. As interpreted in Order No. 03, staff in its motions has had no burden to prove or defend its disjointed application of the code selectively. The burden has been on the petitioners to prove that it is not an allowable position that the Commission rules may be applied retro-actively. There is no WAC, RCW or case law that permits retro-active application just because staff thinks it most expeditious or that in its sole opinion doesn't limit the rights of the petitioners. Either it is allowed or it isn't. If it is, then there is no form for petitioners or Autotransportation operators to follow in attempting to be compliant and the rules would lack credibility. There are very specific and limiting guides for any retro-active application and not one of those guidelines/requirements has been met in this docket. The State Supreme Court has spoken on the issue ⁽⁷⁾ and under their ruling retro-active application of rules may only be applied in **emergency** situations. This petitioner has cited this ruling and many other examples of precedent in previous filings that support the inability of WAC to be applied retro-actively; they have never been addressed by the Commission in either Order. Staff and Order No. 2 both state categorically that the rules [rev 2013]" **would take effect on September 21, 2013**" ⁽¹⁴⁾ making any further argument moot. Would, like the word will, refers to future events not past events. Staff has presented no counter argument or support for such retro-application; to the contrary it remains silent on the matter.

Certificates of public Convenience and necessity

Order 03 in paragraph 13 refers to the granting of these certificates and the rules regarding their issuance in this Docket. Certificates of public convenience and necessity may only be granted under the unrevised rules in effect prior to September 22, 2013. After that date Operating Certificates are to be issued to any new entrants. The Order in itself seems confused as to which rules apply in this docket as it applies both sets to the same situation in its rational.

Wickkiser will not provide same service

10. Order No. 03 states that Airporter “**will** not provide same service” as proposed by the applicant. Order 03 further proposes that in as much as Airporter does in fact now provide the same service that it is evidence that it not willing to provide same service. ⁽¹⁵⁾ “Will” is a future tense; it does not imply or in any way refer to the present or past tense. Order No. 3 refers to the “long standing precedent of the commission “with reference to this misapplied term. Yet that same Order ignores the precedent set by the Supreme Court which is also clear and unequivocal. This petitioner is again confused by the application. The agency has taken license to interpret common, customary and usual usage of a verb different from that custom. Misunderstanding a common and accepted usage for years is no justification for continuing to do so. How are we the regulated, supposed to be compliant when there is no logic and staff only acknowledges precedent when it suits them?

11. **SAME SERVICE** is defined by WAC 480-30-140. That section of the code provides protection from just the kind of incursion that the Applicant is seeking. The Order (03) avers that this section, specifically 480-3-0-140(2) ⁽¹⁶⁾ permits the applicant’s provision of service but it ignores the key elements of this section, 480-30-140(2):

(2) **Same service.** When determining whether one or more existing certificate holders provide the same service in the territory at issue, the commission may, among other things, consider:

(a) The certificate authority granted to the existing companies and whether or not they are providing service to the full extent of that authority;

(b) The type, means, and methods of service provided;

(c) Whether the type of service provided reasonably serves the market;

(d) Whether the population density warrants additional facilities or transportation;

(e) The topography, character, and condition of the territory in which the objecting company provides service and in which the proposed service would operate;

(f) For scheduled service, the proposed route’s relation to the nearest route served by an existing certificate holder. The commission views routes narrowly for the purpose of determining whether service is the same. Alternative routes that may run parallel to an objecting company’s route, but which have a convenience benefit to customers, may be considered a separate and different service;

(15) Order 03 para. 12 TC-130708

(16) Order 03 para. 14 TC-130708

A: Airporter provides full service within its territory along the route proposed by the Applicant.

B: Airporter provides service in modern motor coaches and shuttle buses along the same route; the Applicant proposes to use small vans and owns no vehicles at this time.

C: Airporter has provided more than 10 round trips per day for more than twenty years between Bellingham and Seatac International Airport.

D: Population density and customer need does not tax the capacity of Airporter between Bellingham and Seatac.

E: The topography and character of the route is identical. The Applicant proposes to travel via I-5 between Bellingham and Seatac exactly as Airporter does.

F: The Applicant's proposed route does not run parallel to Airporter's Bellingham to Seatac route, it runs over it. Other than picking up at a stop a very short distance from Airporter's established stop, its route is exactly the same as Airporter's. Even the narrowest of reviews of the existing service with that which is proposed must conclude that Airporter's service and the Applicant's proposal are in fact, the same service.

Commission affirms rules now in effect

12. Order No. 03 in Paragraph 10 states *"The Commission rules now better reflect this competitive environment, providing companies with pricing flexibility in the fares they charge, minimizing reporting, tariff, and time schedule requirements and clarifying and streamlining the process for new entrants and existing companies to apply for authority to serve new routes."*

We agree, **now they do**, after September 21, 2013, they did not when this application was filed, noticed, at pre-hearing conference or scheduled for hearing.

Staff has managed to "streamline" a 60-90 day process into a 10 month process that is not yet resolved. This paragraph goes on to state *"Seatac Shuttle and Wickkiser have already benefited from these reduced regulations, and these companies have no legitimate argument to deny SeaTac Direct the same opportunity to take advantage of the revised rules"*. If, in fact, either of

these companies has seen benefit ⁽¹⁷⁾ from the revised rules, any such benefit was specifically denied them until the effective date of the revision plus an additional thirty days, in the case of rate flexibility. We had to adhere to the rules as standing prior to that date and were specifically reminded of that by Director King in his letters of August 22, 2013 and October 15, 2013. We have every legitimate right to deny SeaTac Direct access to those provisions of the code provided those operators who accessed them after the effective date. New entrants need to follow the rules too. The Commission now wants existing companies to follow the rules in effect but new entrants may pick and choose.

Order 03 redefines protests to intervention

Paragraph 16 of Order 03 states that in evaluating a new service “the Commission will consider whether increased competition will benefit the traveling public, including its possible impact on sustainability of service “, but the Commission won’t do so in an evidentiary hearing in this docket. The Order cites WAC 480-30-140-(1) (b) (1) Public convenience and necessity.

WAC 480-30-140(1)(b) : In reviewing applications under this chapter, the commission may, among other things, consider differences in operation, price, market features, and other essential characteristics of a proposed auto transportation service, tailoring its review to the individual circumstances of the application in evaluating whether the public convenience and necessity requires the commission to grant the request for the proposed service and whether an existing company is providing the same service to the satisfaction of the commission. **The commission will also consider whether increased competition will benefit the traveling public, including its possible impact on sustainability of service.**

Though clearly charged with this responsibility, the Commission is avoiding it here stating in footnote 22 on page 6 of the Order that since Wickkiser did not specifically name this issue in its initial protest and present its evidentiary case at that time, it will not be reviewed by the Commission at hearing. The point of a protest is to raise pertinent issues to the possible

(17) As noted in foot note 12 on page 4 of Order 03, Seatac Shuttle did indeed file for rate flexibility under Docket 131793 as specifically permitted under Order R-572. However, no benefit was shown in the Order. The mere filing under the rule does not automatically provide a material benefit. Docket 131793 was entered into only **AFTER** the effective date of the revised rules, not in anticipation of or before the fact. Wickkiser, as well as any other Autotransportation provider, may establish new service within its territory upon one days notice. This ability was not affected in any way by the revised rules and to suggest that it is a benefit of those revisions is disingenuous.

issuance of a certificate to be examined at an evidentiary hearing, not try the case on paper before hearing. Nor does it relieve the Commission of responsibility to consider those factors that may affect the satisfactory provision of service of the incumbent or the viability of the applicant.

Application process not timely

13. This entire process would not be taking place with regard to this question if the agency had processed the application in a timely manner. As it stands the Applicant submitted his application on May 7, 2013. The revised rules did not become effective until September 21, 2013, a time period spanning five months and comprised of 138 days. This is not timely and efficient processing by this agency. It denies the public what it should reasonably expect from their government and regulators. Had this application been processed within this five month time frame there would have been no question of application of rules. Failure by the agency has created this artificial issue. Creating this issue after the fact does not shield the inefficiency demonstrated here, it is not a mitigating factor.

Credibility at issue

14. Nothing less than the credibility of the agency is at stake here. Either it means what it says or it doesn't. Either the efforts of the past two years present us with a clear path toward the future or it was a complete waste of time and we are to operate under the same arbitrary, inconsistent and punitive actions of staff that we have come to know and love for the past decade. Either the rules apply equally and constantly in a readily understandable fashion with rational support or they aren't worth the paper they're written on. This docket goes far beyond this application; Autotransportation operators need to know where the Commission stands on its own rules and procedures. Ethics must be considered, is the Agency trying at this juncture just "to win"? No matter how one tries to create an interpretation of the rules, what message does this send, how does it help Autotransportation and the public? Clarity and transparency are questions here. The issue of application of the revision would never have

risen in a timely processed application. Order No. 03 should be voided for this reason alone if for no other.

IV. PRAYER

15. For the reasons stated above in Seatac Shuttle, LLC. requests that the Commission vacate Orders 03, 02 and 01. In conjunction (another disputed term) with that vacation that it either:

A) Reassign the docket to the Administrative Law Division for the purpose of convening a second pre-hearing conference to establish a date for hearing of the application for permanent service filed by Northwest Smoking and Curing under the rules applicable at the time of the original filing; or

B) In the alternative, direct Northwest Smoking and Curing, should it desire at this juncture to proceed with its application under the revised rules, to file a new application with a date subsequent to the effective date of the 2013 revision of WAC 480-30.

Dated this 28th day of February, 2014

Submitted by,

Michael Lauver

Member, Seatac Shuttle, LLC. C-1077