

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re the Application of

PENNCO TRANSPORTATION, INC.

for Certificate of Public Convenience
and Necessity in Furnishing Passenger
and Express Service.

DOCKET NO. TC-041340
TC-041593

COMMISSION STAFF'S POST-
HEARING BRIEF

I. Introduction

1 Commission Staff submits the following post-hearing brief on the consolidated hearing of the applications of Pennco Transportation, Inc. (Pennco) and Heckman Motors, Inc. d/b/a Olympic Bus Lines (Heckman) for extension of authority under their respective certificates of public convenience and necessity. Staff's objective is not to advocate a particular outcome, but to analyze the alternatives available to the Commission given the statutory framework and Commission precedent in auto transportation application cases.

II. Standard for Determination

2 The relevant statute, RCW 81.68.040, provides:

No auto transportation company shall operate for the transportation of persons, and baggage, mail and express on the vehicles of auto transportation companies carrying passengers, for compensation between fixed termini or over a regular route in this state, without first having obtained from the commission under the provisions of this chapter a certificate declaring that public convenience and necessity require such operation;

* * *

The commission shall have power, after hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the commission, and in all other cases with or without hearing, to issue said certificate as prayed for; or for good cause shown to refuse to issue same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate to such terms and conditions as, in its judgment, the public convenience and necessity may require.

3 The Commission must address two sets of questions with respect to each application:

1. Public convenience and necessity:

a. Do the public convenience and necessity require the proposed service?

b. Does and existing auto transportation company operating in the territory at issue provide service to the satisfaction of the Commission?

2. Fitness:

a. Is the company financially fit and capable of providing the service?

b. Does the company exhibit regulatory fitness?

In re App. No. D-079116 of CWA, Inc. d/b/a Central Washington Airporter, Docket No. TC-021402, p. 3 (April 2003).

III. Pennco's existing service

4 Pennco currently has authority to provide door-to-door passenger service, by reservation only:

1. Between Port Angeles and points in Clallam and Jefferson Counties.

2. Between Clallam and Jefferson Counties and Seattle and Tacoma hospitals and transportation hubs (named in the certificate). This service is subject to a "closed door restriction" between the Counties and the named destinations in the Seattle/Tacoma area.

3. Between Clallam and Jefferson Counties and Port Townsend, Port Ludlow, and Silverdale, for passengers whose point of origin or destination is in Clallam or Jefferson County.

5 Pennco's certificate contains the further restriction that Pennco may not pick
up passengers at any point served by Heckman without advance reservations made
at least an hour in advance of the pick-up times stated in Heckman's tariff.

IV. Pennco's proposal for expanded service

6 1. Pennco seeks to expand its existing door-to-door, reservation-only, closed
door service between Clallam and Jefferson Counties and Seattle and Tacoma
hospitals and transportation hubs to include Seattle and Tacoma hotels and Seattle
cruise terminals. Heckman does not protest this.

7 2. Pennco seeks new authority for door-to-door service between Clallam and
Jefferson Counties and Kingston and Bainbridge Ferry Terminals. It is not clear
whether Heckman protests this service.

8 3. Pennco seeks new authority for door-to-door service between Kitsap
County and Kingston and Bainbridge Ferry Terminals. There is no protest to this
proposed service.

9 4. Pennco seeks new authority, *without the door-to-door, reservation-only*
restriction, between Clallum and Jefferson counties and Kitsap County Ferry
Terminals (Kingston and Bainbridge). Heckman protests this proposed service.

10 5. Pennco asks that the provision in its certificate prohibiting it from picking
up passengers at points served by Heckman within an hour or less of Heckman's

tariffed pick-up times be removed. Heckman protests this amendment.

11 The thrust of Heckman’s protest is that Pennco’s proposal for scheduled service between Port Townsend and Port Angeles and the Kingston Ferry Terminal (connecting with the new Aqua Express service from Kingston to Seattle) would take customers away from Heckman’s Port Angeles to Seattle service.

V. Heckman Motors existing service

12 Heckman currently has authority to provide passenger service:

1. Between Port Angeles and Seattle, with an intermediate stop in Sequim.
2. Between Port Angeles and Seattle-Tacoma International Airport with an intermediate stop in Sequim.
3. Between Port Townsend and Hood Canal Bridge with connections to Seattle and Seattle-Tacoma International Airport via Hwy. 20 in Port Townsend, southbound to Hwy. 19, southbound to Hwy. 104, eastbound to Hood Canal Bridge. Connecting with buses at Hood Canal Bridge and return to Port Townsend by the same route. No service can be rendered between Seattle and SeaTac airport.

VI. Heckman Motors proposal for expanded service

13 1. Heckman seeks to expand its existing service between Port Angeles and Seattle to include stops not only in Sequim, but also in Discovery Bay, Kingston, Edmonds, and Silverdale. Pennco made no case in protest of this service.

14 2. Heckman seeks to expand its existing service between Port Angeles and
Seattle-Tacoma International Airport to include stops not only in Sequim, but also
in Discovery Bay, Kingston, Edmonds, and Silverdale. Pennco made no case in
protest of this service.

15 Heckman's proposed new services would be restricted such that no service
would be rendered between Silverdale and Seattle, Edmonds and Seattle, Edmonds
and SeaTac airport or Silverdale and SeaTac.

16 Heckman has provided service to the points named in its application
(Discovery Bay, Kingston, Edmonds, and Silverdale) in accordance with tariffs filed
with the Commission since obtaining the company. The prior owner had also
provided service to the named points. However, the certificate itself never listed
those points. Staff advised Heckman to file an application to amend the company's
certificate to identify the intermediate points.

VII. Background of the relationship between Pennco and Heckman operating authority

17 Pennco first obtained authority from the Commission in 1998. M.V.C. Order
No. 2241, In re Jeffrey Lynn Porter d/b/a Pennco Transportation, Hearing No. 78706
(Dec. 1998). At that time, the company was under different ownership. Olympic
Van Tours, Inc., the predecessor in interest to Heckman Motors, then held the
authority that Heckman now holds.

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In that case, the Commission granted Pennco authority that overlapped that authority held by Olympic because the Commission concluded there was a need for a “direct, premium, around the clock, door-to-door service” that was not being met by Olympic’s “scheduled, central pick-up point service.” The Commission’s conclusion was based on testimony that door-to-door service is convenient to the elderly population who are better served by not being required to arrange local transit to a central departure point from which an airporter then departs and returns; door-to-door service is more simple and useful to this segment of the public. *Id.* at pp. 8-9. The Commission found that Clallam and Jefferson Counties require both scheduled service at fixed termini and on-call, door-to-door service; Olympic Van Lines offers exclusively the former, Pennco exclusively the latter; both services are required to satisfy the public convenience and necessity. The Commission found Olympic’s service satisfactory to the extent provided, but that the public needed door-to-door service. *Id.* at pp. 9, 10. Thus, Pennco’s present operating authority was restricted to door-to-door, reservation only service.

19

The Commission had previously found the distinction between door-to-door service and scheduled, fixed-termini service to be a basis for granting overlapping authority to carriers providing the different types of service in at least one case. *See* Order M.V.C. No. 1809, In re San Juan Airlines, Inc. d/b/a Shuttle Express, Order

No. D-2566, p. 17 (April 1989) (granting Shuttle Express authority to provide door-to-door service to and from the fixed terminus of SeaTac airport into territory already served by carriers that were providing only scheduled airporter service between fixed termini).

20 One of the key issues in the case in which the Commission granted Pennco's certificate was how to prevent potentially destructive competition by Pennco against Olympic's scheduled service if Pennco was not somehow prevented from "pirating" passengers awaiting pickup at Olympic's pick-up points. Pennco Transportation, at 10, 11. The Commission was persuaded that this was a real problem and therefore imposed the condition on Pennco's certificate that Pennco is prohibiting from picking up passengers at points served by Heckman Motors within an hour or less of Heckman's tariffed pick-up times.

21 The Commission has recognized this same problem between other carriers where it has allowed overlapping reservation only door-to-door and scheduled fixed point service. The Commission has imposed conditions designed to prevent this unfair competition against scheduled services. *See* Order M.V.C. No. 1893, Evergreen Trails, Inc. v. San Juan Airlines, Inc., Docket No. TC-900407 (Nov. 1990) (amending San Juan's authority to prohibit door-to-door reservation service to hotels served by Evergreen as part of its scheduled, fixed-termini service because

San Juan was skimming passengers awaiting pickup by Evergreen at SeaTac airport and delivering them by impromptu “reservation” to the hotels served by Evergreen).

VIII. Evidence of public convenience and need for the proposed service

22 An applicant for an auto transportation certificate must establish that the public convenience and necessity require the proposed operations. RCW 81.68.040; In re App. No. D-079116 of CWA, Inc. d/b/a Central Washington Airporter, Docket No. TC-021402, p. 8 (April 2003). In a protested proceeding, an applicant for auto transportation authority must present live witnesses to demonstrate that the public convenience and necessity require the service it proposes. The Commission will not consider written statements of witnesses whom the applicant has not made available for cross-examination at hearing. Order M.V.C. No. 2139, In re Apple Blossom Lines, Inc., App. No. GA-78198 (January 1996). Need for new service ordinarily must be established by members of the public who require the service. The Commission does not accept self-serving statements of an applicant, and requires that an application be supported by independent witnesses knowledgeable about the traffic. *Id.* In transportation applications, the sort of evidence that the Commission has found persuasive on the issue of public convenience and necessity is the testimony of witnesses who have been unable to get service when they

needed it from existing carriers. Order M.V.C. No. 2160, In re Ali, Abdirahman Y. d/b/a Broadway Express, App. No. D-78583 (Sept. 1997).

23 Additionally, the absence of a protest to an application for authority does not relieve the applicant of the need to present evidence of need, though written statements may be sufficient in such a case. An applicant's testimony that he believes service to an unprotested area is needed, without a statement of need from a supporting shipper, will not support a grant of authority. Order M.V. C No. 1443, In re Richard & Helen Asche, Bremerton-Kitsap Airporter, App. No. D-2444 (May 1984).

A. Heckman's evidence on public convenience and necessity

24 Heckman presented two witnesses—Mr. Farmer and Mr. Estes. Neither of them spoke primarily to a need for service to the intermediate stops that the company seeks to add to its certificate at Discovery Bay, Kingston, Edmonds, and Silverdale. Rather, the witnesses spoke to need for the existing service, which they have used, between Port Angeles and Seattle. Mr. Estes did, however, state that he had observed passengers getting on and off the Heckman van at Discovery Bay, Kingston, and Edmonds. Tr. at 70, 71. He did not mention Silverdale. It may be reasonable to infer from Mr. Farmer and Mr. Estes' testimony a need for a

transportation service like Heckman's between the Discovery Bay, on the Olympic Peninsula, (and also, perhaps, Kingston on the Kitsap Peninsula), on the one hand, and Seattle and SeaTac Airport, on the other.

25 Heckman's witnesses did not, however, address the need for transportation *between* the named points in Clallam, Jefferson, and Kitsap counties. (As discussed below, Pennco's witness and Pennco's written statements did address that need and, to the extent they are entitled any weight at all, can be viewed as support for a particular type of scheduled transportation between certain points in Clallam, Jefferson counties and the Kingston foot ferry terminal. But Heckman did not propose to provide the specific type of service spoken to by Pennco's support statements.)

26 The need for Silverdale and Edmonds stops also is not addressed in this record. Heckman is restricted under the terms of its proposed certificate against service between Silverdale and Seattle and between Silverdale and SeaTac airport. The same is true between Edmonds and Seattle and Edmonds and SeaTac. The witnesses' testimony therefore has no apparent relevance to the proposed Silverdale or Edmonds stops.

27 Despite the lack of testimony on public need for Heckman's proposed intermediate stops, it is undisputed that Heckman has, in fact, been providing

service to those points. The stops have been reflected on the company's tariff for many years—even prior to Heckman's acquisition of Olympic Van Lines' authority. In its bench request response, Heckman states that it carried a total of 74 passengers between Port Angeles and Kingston in calendar year 2004. Heckman did not provide data for any of the other intermediate stops. If the parties could stipulate to allow Heckman to supplement the record with data regarding the other proposed stops (perhaps in exchange allowing Pennco to supplement the record with written support for those parts of its request that are not contested), the Commission might have enough evidence, given the unique circumstances of Heckman's situation, to conclude that the public convenience and necessity require service to the intermediate points.

28 Because it bears on what Pennco is seeking in its application, it is important to note that Heckman provided no evidence that it either serves, or has plans to serve commuters or others who would utilize transportation between county transit stops or other transportation hubs in either Port Angeles, Sequim, or Port Townsend and Kingston for the purpose of connecting with the Aqua Express foot ferry to Seattle. It is possible, however, given the description of authority that Heckman seeks (and which it already has provided under its tariff), that Heckman *could* provide such a service. The fact that it has not done so is not necessarily

probative of whether it can or will provide such a service; Aqua Express has been operating between Kingston and Seattle only since January of this year.

29 In summary, the Commission could grant Heckman authority between Discovery Bay (and perhaps Kingston), on the one hand, and Seattle and SeaTac airport on the other. However, it appears it would be necessary for Heckman to supplement the record in some way with shipper support or at least more data on actual customer use of the other points it requests to meet the public convenience and necessity standard.

B. Pennco’s evidence on public convenience and necessity

30 Pennco presented only one live witness—Mr. Caldwell of the Jefferson County Economic Development Council. Mr. Caldwell spoke to the need for a scheduled commuter bus service connecting Jefferson Transit bus route termini with the new Aqua Express foot ferry service between Kingston and Seattle.

31 Pennco also submitted unsworn, written statements from a number of individuals and organizations speaking to a similar need for scheduled service between the Victoria (Black Ball Transport, Inc.) ferry terminal in Port Angeles and the Aqua Express foot ferry terminal in Kingston, and in one case between Port Ludlow and Kingston. Heckman did not specifically object to the use of unsworn,

written statements as evidence of need, though Staff noted that the Commission has regarded such evidence as insufficient in the past.

32 For much of the authority that Pennco seeks, including its expanded door-to-door service to Seattle and Tacoma hotels and Seattle cruise terminals and to ferry terminals at Kingston and Bainbridge, it presented no evidence of need whatsoever. (Please refer to the attached matrices, Attachments A and B, addressing particular aspects of Pennco and Heckman’s applications in greater detail.)

33 If the Commission finds that Pennco has at least met its burden of demonstrating that the public convenience and necessity requires a service designed to connect with the Aqua Express foot ferry and Kingston, the Commission could grant Pennco such authority—even while granting the authority that Heckman seeks—on the grounds that Kingston is not a “territory already served by a certificate holder.” This approach would depend on a legal conclusion that Heckman (and its predecessor Olympic) never lawfully expanded its certificated authority to include Kingston and therefore is not entitled to the protection of the statute for that stop. Indeed, the Commission has previously held that filing a tariff that includes rates for territories outside a carrier’s authority does not lawfully expand the filing carrier’s certificated authority and the Commission will not recognize a protest to an application that for authority that exceeds the

protestant's identified authority. Order M.V.C. No. 1444, In re Pacific Northwest Transportation Services, Inc., App. No. D-2445 (May 1984).

34 Another basis for granting both parties authority to serve Kingston would be a finding that, although Heckman is already serving the territory, it is not serving to the satisfaction of the Commission. Such a finding could be based on evidence that Heckman has never provided service that is intended to connect with the arrivals and departures of the Aqua Express ferry. As such, what Pennco proposes is really a service that targets a previously unserved market—people wanting to use the new foot ferry at Kingston. In deciding whether the territory at issue is “already served” within the meaning of the statute, the Commission has considered the extent of that authority, and whether the type of service provided reasonably serves the market. Order M.V.C. No. 1809, In re San Juan Airlines, Inc., d/b/a Shuttle Express, App. No. D-2566 (April 1989).

35 To summarize, the Commission might have enough evidence of public convenience and necessity—depending on the weight and admissibility issues surrounding Pennco's evidence—to grant authority for a scheduled service between transit hubs in Port Townsend (and perhaps Port Angeles and Port Ludlow) to connect with the Aqua Express ferry in Kingston. Other aspects of Pennco's request are wholly unsupported.

IX. Financial Fitness

36 The Commission's examination of an applicant's financial fitness must be commensurate with the responsibilities of the public service that the firm seeks to provide, the risks to the public of failure, and the firm's financial history. RCW 81.68.040. In re App. No. D-079116 of CWA, Inc. d/b/a Central Washington Airporter, Docket No. TC-021402, p. 3 (April 2003), p.10, *citing* Order M. V. C. No. 1899, *In re San Juan Airlines, Inc., d/b/a Shuttle Express*, App. No.D-2589 (March 1991); *modified*, Order M. V. C. No. 1909 (May 1991). However, the Commission does not consider an applicant's financial condition to be a critical element in a grant of authority, so long as there is credible evidence that the applicant has sufficient financing to begin operations and continue them for a reasonable period while its business is building. *Id.*, *citing* Commission Decision and Order, *In re Application of Valentinetti*, App. No. D-78932, Docket No. TC-001566 (2002).

37 There is no issue as to Heckman's financial fitness. Although Heckman did not provide a profit and loss statement, it is apparent from the company's balance sheet that the company has substantial equity of \$519,563 on \$1,244,384 in assets. It is clear that the company would not have to incur any additional expense to provide the service it proposes because it is already providing it. An applicant whose existing business operation shows it is able to meet its obligations, and

whose proposed service would require no additional purchase of equipment or hiring of personnel, has established its financial fitness. Order M.V.C. No. 2041, In re Sharyn Pearson & Linda Zepp, d/b/a Centralia Sea-Tac Airport Express, App. No. D-76533 (March 1994).

38 There is, on the other hand, an issue as to Pennco's financial fitness. Pennco submitted as part of its application a profit and loss statement for April 2003 through March 2004. It shows that Pennco Transportation, Inc., which includes both regulated and unregulated operations, lost \$342,981.16 over twelve month period. The company's total income for the period was \$919,392. Mr. Harris testified that he personally subsidized this loss. Mr. Harris also testified that Pennco has made a decision not to exercise the full rate authority that Commission Staff believed was necessary given the company's revenue requirements. In other words, for regulated operations, Pennco is charging customers rates that are lower than those that Staff found the company needed to meet its revenue requirement for unregulated services.

39 Pennco did not submit a balance sheet as required by question number 15 on the Commission's application for a bus certificate. Therefore, it is difficult to put the loss of \$342,981 in perspective relative to the company's assets and liabilities. In testimony, Mr. Harris gave only general assurance of his personal ability to finance

continued losses. Mr. Harris asserted that the company could provide the additional service for which it seeks authority without any additional expense to Pennco Transportation, Inc. Mr. Harris claims, for example, that the company already has possession of the necessary vehicles, although those vehicles were not among those listed in Pennco's application. Mr. Harris provided descriptions of those vehicles in response to a bench request.

40 Mr. Harris's personal financial difficulties, and those of other business ventures he owns are outlined in a pair of articles from the Nov. 17, 2004, Port Townsend Leader newspaper. Ex. 8.

41 The Commission has held in transportation cases that when an applicant refuses to define clearly its assets and liabilities or present a balance sheet or other relevant financial information demonstrating its ability to conduct operations, there is insufficient information upon which the Commission can base a finding of fitness to conduct operations. Order M.V. No. 146379, In re Brian C. McCulloch, d/b/a Parallax Moving Systems, App. No. P-76085 (April 1993).

42 The Commission has also held that when the applicant is a corporation, but the financial information the applicant provides is a mixture of corporate and shareholder finances, when the operating witnesses cannot clearly define the corporation's assets and liabilities, and when the information presented is

incomplete, inconsistent, and unclear, there is insufficient information upon which the Commission can base a finding of fitness. Order M.V. No. 145701, In re Safco Safe Transport, Inc., App. No. P-73623 (Oct. 1992).

43 Finally, the Commission found in Order M.V.C. No. 1824, In re Evergreen Trails, Inc. d/b/a Evergreen Trailways and E.M. Wickkiser, d/b/a Bellingham Sea-Tac Airporter, App. No. D-2559 (July 1989) that, when an applicant has significant, unexplained operating losses, past operations have not been shown to be profitable, and there is no evidence of a plan to correct the carrier's financial situation and no evidence of another source of financial support for the business, the applicant has not made a *prima facie* showing of financial fitness.

44 The record evidence casts some doubt on Pennco's financial fitness to provide expanded service. The Commission may choose to deny Pennco's application on this basis. This would not preclude Pennco filing again and seeking to rebut the negative implications raised on this record regarding the company's financial soundness. Alternatively, the Commission could accept Mr. Harris' representations that the company will not face any additional expense to provide the new service and that he is able to personally finance further losses the company may face.

X. Regulatory Fitness

45 There is no issue as to either company's regulatory fitness because there is no
evidence that either company has any propensity to disobey Washington's
regulations.

46 Although Heckman has been serving points that are not authorized on the
company's certificate, the points are listed on the company's tariff on file with the
Commission. Heckman bought Olympic's authority and the Commission's rules
require a purchaser to adopt the tariff of the transferring company. Staff asked
Heckman to make this filing in order to clear up the actual extent of its authority.
Staff is not concerned about any lack of good faith on Heckman's part.

DATED this 18th day of April, 2005.

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