BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

|  |  |
| --- | --- |
| In the Matter of Penalty Assessment Against AGATE PASS tRANSPORTATION, llc D/B/A AGATE PASS TRANSPORTATION in the Amount of $600 | DOCKET TE-110698COMMISSION STAFF’S RESPONSE TO AGATE PASS tRANSPORTATION, llc D/B/A AGATE PASS TRANSPORTATION’S APPLICATION FOR MITIGATION |

1. Pursuant to WAC 480-07-370(1)(c), Staff of the Washington Utilities and Transportation Commission (Staff) submits this response to Agate Pass Transportation, LLC d/b/a Agate Pass Transportation’s (Agate Pass) Application for Mitigation and Request for Hearing.
2. On May 2, 2011, the Washington Utilities and Transportation Commission (Commission) issued Penalty Assessment TE-110698 against Agate Pass in the amount of $600 for six violations of Washington Administrative Code (WAC) 480-30-221, Vehicle and driver safety requirements, which requires passenger charter carriers to comply with Title 49, Code of Federal Regulations (CFR).
3. The Commission assessed penalties for one violation of CFR Part 382.305(b)(1)[[1]](#footnote-1), failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. For 2010, Agate Pass had to ensure that two drivers were randomly tested; however, only one driver was tested. The Commission also assessed penalties for five violations of CFR Part 382.305(b)(2), failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. For 2010, Agate Pass had to ensure that nine drivers were randomly tested; however, only four drivers were tested.
4. On May 16, 2011, Agate Pass filed with the Commission a Mitigation Request, which included the Company’s reasons in support of its request, and asked for a mitigation hearing. Agate Pass did not dispute the alleged violations, but asked that the penalty amount be reduced by an unspecified amount. In its Mitigation Request, the Company states that that the amount of the penalty would cause a substantial hardship for the business. Agate Pass also claims to have difficulty meeting the “intent of the law” related to random alcohol and substance abuse testing because the Company utilizes part-time drivers. For the reasons set forth below, Staff recommends that the Mitigation Request, seeking an unspecified reduction in the penalty amount, be denied.
5. The Federal Motor Carrier Safety Administration (FMCSA) has provided specific guidance on CFR Part 382 as it relates to seasonal drivers[[2]](#footnote-2) as well as employees off work due to temporary lay-off, illness, injury or vacation.[[3]](#footnote-3)
6. The FMCSA states that employers who use a consortium or other testing program remain responsible at all times for ensuring compliance with all of the rules, including random testing for all drivers that they use, regardless of any utilization of third parties to administer parts of the program.[[4]](#footnote-4) Because Agate Pass contracts with a third-party drug and alcohol testing consortium to conduct its testing, Agate Pass is responsible for letting the consortium know which drivers should be in the testing pool at any given time.
7. Alcohol testing may only be conducted just before, during, or just after the performance of safety-sensitive functions.[[5]](#footnote-5) Agate Pass must wait until just before, during or after the next time an employee is performing a safety-sensitive function to send the employee for random alcohol testing.
8. For controlled substances testing, Agate Pass may notify a driver of his selection for a random test while the driver is in an off-duty status, but must ensure that the driver then immediately proceeds to a collection site. If Agate Pass does not want to notify the driver that he has been selected for a random controlled substances test while the driver is in an off-duty status, the Company could set aside the driver’s name for notification until the driver returns to work, as long as the driver returns to work before the next selection for random testing is made.[[6]](#footnote-6)
9. Agate Pass’s last two compliance reviews, conducted in September 2010 and April 2011, resulted in conditional safety ratings. A conditional safety rating means a motor carrier does not have adequate safety management controls in place to ensure compliance with safety fitness standards.[[7]](#footnote-7) In addition, the violations of C.F.R. Parts 382.305(b)(1) and 382.305(b)(2) found in the April 2011 review were repeats of violations found in the September 2010 review.[[8]](#footnote-8)
10. The Commission’s rules governing safety requirements for passenger transportation, which adopt certain federal safety regulations, are designed to protect the health and safety of the traveling public. It is the policy of the Transportation Safety section to recommend penalties for any violations related to keeping the public safe from unqualified drivers, such as Agate Pass’s six drivers who drove without being randomly tested for alcohol or controlled substances as required.
11. Commission Staff is very concerned about Agate Pass’s compliance history and believes Agate Pass has received more than adequate information and assistance on how to comply with Commission rules. Staff sent the Company a letter on April 25, 2011, outlining its concerns with Agate Pass’s compliance history. Staff will re-inspect Agate Pass’s operations in the near future. If Staff finds repeat critical violations or if Agate Pass receives a conditional or unsatisfactory safety rating at the re-check inspection, Staff will recommend the Commission take additional enforcement action against Agate Pass, up to and including additional penalties and possible suspension of the Company’s operating authority.[[9]](#footnote-9)
12. For the reasons set forth above, Staff recommends that Agate Pass’s mitigation request, seeking an unspecified reduction in the penalty amount, be denied.

DATED this 26th day of May, 2011.

Respectfully submitted,

ROBERT M. MCKENNA

Attorney General

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

GREGory j. TRAUTMAN

Assistant Attorney General

Counsel for Washington Utilities

and Transportation Commission

1. §382.305 at Attachment A. [↑](#footnote-ref-1)
2. Interpretation for §382.305, Random Testing Question 3 and Guidance, included at Attachment B. [↑](#footnote-ref-2)
3. Interpretation for §382.305, Random Testing, Question 10 and Guidance. [↑](#footnote-ref-3)
4. Interpretation for §382.305, Random Testing, Question 5 and Guidance. [↑](#footnote-ref-4)
5. 49 C.F.R. Part §382.305(2)(m). [↑](#footnote-ref-5)
6. Interpretation of §382.305, Random Testing, Question 17 and Guidance. [↑](#footnote-ref-6)
7. §385—Safety Fitness Procedures – 385.3 – Definitions and acronyms. [↑](#footnote-ref-7)
8. A list of violations documented during each compliance review is included at Attachment C. [↑](#footnote-ref-8)
9. Staff’s April 25, 2011, compliance letter at Attachment D. [↑](#footnote-ref-9)