

**STAFF INVESTIGATION  
OF  
SHUTTLE EXPRESS, INC.**

**DOCKET TC-120323**

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## EXECUTIVE SUMMARY

In December 2011, Shuttle Express, Inc. (Shuttle Express) filed a request for a tariff revision with the Washington Utilities and Transportation Commission (commission) to increase its rates for auto transportation service in Docket TC-112072. In order to determine if the increased rates were reasonable, commission staff reviewed the company's operations, including its revenues and expenses from October 2010 to September 2011. During that review, commission staff discovered revenues and expenses associated with services contracted by Shuttle Express to be provided by non-regulated independent contractor-owners. Commission staff assigned to the rate case reported that Shuttle Express considered the service to be regulated door-to-door service, charged customers the company's published tariff rate for door-to-door service, and contracted to provide the service using non-regulated owner-operator drivers and vehicles such as limousines. At the time of the rate case, commission staff did not have enough information to determine if the independent contractor program was appropriate under the commission's rules. The matter was turned over to the commission's Transportation Safety Enforcement staff for investigation. This report documents commission staff's findings.

This is not the first time the commission has investigated Shuttle Express for using independent contractors. In April 2008, the commission issued a penalty assessment to Shuttle Express for violating WAC 480-30-213(2), which requires the driver of a vehicle operated by a passenger transportation company to be the certificate holder or an employee of the certificate holder. Shuttle Express violated the rule when it used drivers who were not employees to provide auto transportation services authorized under Shuttle Express's commission certificate. The commission approved a settlement agreement between Shuttle Express and commission staff and imposed a \$9,500 penalty on Shuttle Express for using independent contractor drivers. Within the settlement agreement, Shuttle Express admitted the violations and agreed to comply with all applicable rules and statutes enforced by the commission.

In this investigation, based on a review of the information provided by Shuttle Express, commission staff finds that Shuttle Express violated the settlement agreement approved by commission Order 01 in Docket TC-072228, as well as three commission rules, when it used non-regulated independent contractor drivers to provide multi-stop service along its regulated routes between October 2010 and September 2011.

Staff recommends the commission file a complaint on its own motion setting forth any act or omission by Shuttle Express that violates any law, or any order or rule of the commission, as provided by RCW 81.04.110.

The commission could penalize Shuttle Express up to \$1,000 per violation for 22,860 total violations of commission rules, as provided by RCW 81.04.380. Through its enforcement

policy, the commission considers a number of factors when determining the level of penalty to be imposed. A full discussion of each of those factors and how they apply to Shuttle Express in this case is included in the “Staff Findings and Recommendations” section of this report, beginning on page 19.

Based on those factors, commission staff recommends a penalty of \$250,000.

## **PURPOSE, SCOPE, AND AUTHORITY**

### **Purpose**

The purpose of this investigation is to determine if the independent contractor program of Shuttle Express violates commission rules.

### **Scope**

The investigation focuses on information obtained by commission staff relating to Shuttle Express's operations.

### **Authority**

Staff undertakes this investigation under the authority of the Revised Code of Washington (RCW) 81.01.010, which adopts RCW 80.01, directing the commission to regulate passenger transportation providers in the public interest, and to adopt such rules and regulations as may be necessary to do so. In addition, RCW 81.04.510 makes it clear that the commission is authorized to conduct such an investigation. Appendix A includes copies of relevant laws and rules.



## BACKGROUND

Shuttle Express has held a certificate of public convenience and necessity as a passenger transportation company since 1989 and provides auto transportation services in King, Pierce, Snohomish and Island counties. Shuttle Express is located at 800 Southwest 16th Street, Seattle, Washington, 98057. John Rowley is the company's president. Jimmy Sherrell is the company's secretary, chairman and director, and Kaaren Sherrell is the vice president, secretary, treasurer and director.<sup>1</sup> Shuttle Express reported approximately \$13.1 million in gross intrastate operating revenues for 2011.

### **Prior Enforcement – Docket TC-072228**

In April 2008, commission staff completed an investigation into allegations that Shuttle Express was violating one or more commission rules by operating an independent contractor program. Following the investigation, the commission issued a penalty assessment to Shuttle Express for violating WAC 480-30-213(2), which requires the driver of a vehicle operated by a passenger transportation company to be the certificate holder or an employee of the certificate holder. As stated in the penalty assessment, Shuttle Express violated the rule when it used drivers who were not employees to provide auto transportation services authorized under Shuttle Express's commission certificate. In July 2008 the commission approved a settlement agreement between Shuttle Express and commission staff and imposed a \$9,500 penalty on Shuttle Express for using independent contractor drivers. Within the settlement agreement, Shuttle Express admitted the violations and agreed to comply with all applicable rules and statutes enforced by the commission, including those at issue in the current investigation.<sup>2</sup>

### **General Rate Case – Docket TC-112072**

In December 2011, Shuttle Express filed a request for a tariff revision with the commission to increase its rates for auto transportation service in Docket TC-112072. In order to determine if the increased rates were reasonable, commission staff reviewed the company's operations, including its revenues and expenses from October 2010 to September 2011. During that review, commission staff discovered revenues and expenses associated with services contracted by Shuttle Express to be provided by non-regulated independent contractor-owners. Shuttle Express provided staff a copy of its most recent independent contractor contract, dated May 22, 2009.<sup>3</sup> Commission staff assigned to the rate case reported that Shuttle Express considered the service to be regulated door-to-door service, charged customers the company's published tariff rate for door-to-door service, and contracted to provide the service using non-regulated owner-operator drivers and vehicles such as limousines.<sup>4</sup>

<sup>1</sup> Secretary of State Corporation Detail web page print out at Appendix B, page 41.

<sup>2</sup> TC-072228 - commission Order and settlement agreement at Appendix C, starting at page 42.

<sup>3</sup> Shuttle Express Independent Contractor Agreement at Appendix D, starting at page 57.

<sup>4</sup> TC-112072 Staff Open Meeting Memo at Appendix E, starting at page 76.

At the time of the rate case, commission staff did not have enough information to determine if the independent contractor program was appropriate under the commission's rules. The matter was turned over to the commission's Transportation Safety Enforcement staff for investigation. This report is the result of that investigation.

## INVESTIGATION

### Independent Contractors

Commission staff requested specific information from Shuttle Express related to the current independent contractor program on March 30, 2012.<sup>5</sup> Commission staff received Shuttle Express's response on May 21, 2012.<sup>6</sup> In its response, Shuttle Express described portions of its operations as follows:

- Shuttle Express uses independent contractors for two functions: luxury transportation and “rescue” service.
- For luxury transportation, Shuttle Express accepts reservations for executive sedans, SUVs, and six- and eight-passenger limousines and refers those services to independent contractors.<sup>7</sup> This type of passenger transportation is regulated by the Department of Licensing as either limousine carrier or for-hire service and is not regulated by the commission.
- Shuttle Express also uses independent contractors as a rescue service when delays may cause a customer to miss a flight.<sup>8</sup> Mr. Sherrell explained that within the company's business model and “flight guarantee,” when a Shuttle Express van encounters heavy or slow traffic or the van is otherwise delayed, Shuttle Express uses all of its resources to transport customers on time for their flight. This includes contracting with an independent driver to pick up the customers and transport them over the regulated auto transportation route that the Shuttle Express van would have used had one been available.
- When Shuttle Express started operations in the late 1980's, the company used taxis to rescue customers when delays occurred. However, in the late 1990's, Shuttle Express's insurance company informed it that use of taxis for rescue services left Shuttle Express fully liable for any service or safety consequences. From that point forward, Shuttle Express has used independent contractors for rescue service.

Commission staff focused on Shuttle Express's rescue service operations in its investigation of the current independent contractor program.

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<sup>5</sup> March 30, 2012, commission staff information request at Appendix F, starting at page 80.

<sup>6</sup> May 14, 2012, Shuttle Express response at Appendix G, starting at page 84.

<sup>7</sup> Id.

<sup>8</sup> Id.



## Rescue Service

On June 8, 2012, commission staff sent a letter that asked Shuttle Express to describe its rescue service in detail.<sup>9</sup> In response, Shuttle Express explained that on occasions when a vehicle assigned to pick up a party breaks down, is delayed due to traffic, has the wrong location information or gets lost, Shuttle Express focuses on using whatever resource is necessary to pick up customers and transport them to their destination. Because the situations are time-critical, Shuttle Express's dispatchers may use another van, a town car, a limousine or even a bus – whichever option provides the best chance of a successful rescue.<sup>10</sup>

In the same letter, commission staff asked Shuttle Express to provide customer service records for all services provided as rescue services by independent contractors over the last two years, including trip records showing:

- The condition that caused the company to utilize the independent contractor for auto transportation services (e.g., traffic back-ups, inclement weather, etc.).
- The type of transportation provided.
- The number of passengers carried.
- The point each passenger boarded and disembarked the vehicle.
- The fare charged to each customer.

Shuttle Express did not provide the information requested. Shuttle Express stated that it does not differentiate between luxury transportation and rescue service in its reservation system and stated that it would be “cumbersome, time-consuming, and impractical to provide the information.” However, Shuttle Express offered to make its records available for commission staff to examine.<sup>11</sup>

Shuttle Express stated that the company had over 420,000 reservations in 2011 and that 96 percent of those were completed within “normal operation guidelines.”<sup>12</sup> When commission staff asked Shuttle Express to define “normal operation guidelines,” Shuttle Express president John Rowley explained that normal operations are those trips completed within the standards the company feels are adequate to maintain customer loyalty. Abnormal operations are when the company is late picking up or dropping off a customer for any reason, including bad traffic, a reservation error, inadequate GPS information, or a flat tire.<sup>13</sup>

In the rate case filed by Shuttle Express in Docket TC-112072, the company reported annual revenue for regulated services, including revenue associated with independent contractors, of \$13,275,796. Shuttle Express also reported annual revenue for regulated services excluding

<sup>9</sup> June 8, 2012, commission staff information request at Appendix H, starting at page 92.

<sup>10</sup> July 16, 2012, Shuttle Express response at Appendix I, starting at page 95.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> August 7, 2012, email from John Rowley to staff at Appendix J, starting at page 109.

revenue associated with independent contractors of \$12,565,358.<sup>14</sup> This means independent contractor revenue totaled \$710,438 or approximately five percent of total company revenue.

Commission staff assumed that the \$710,438, or five percent of total revenue, that Shuttle Express reported as independent contractor revenues was generated in those cases where Shuttle Express did not complete reservations for regulated services “within normal operation guidelines.” Commission staff asked John Rowley how many trips comprised the \$710,438, or five percent of total revenue, associated with the independent contractors. If that information was not available, commission staff asked the company to explain why it was able to identify the amount of revenue but not how many trips the revenue represents.<sup>15</sup>

Mr. Sherrell responded, through Paul Kajanoff, Shuttle Express’s Chief Financial Officer, stating in part:

This does not mean 4 % were ‘not’ completed within normal guidelines. What it does mean is we are sensitive to the convenience/service to travelers using our services. . . . We feel there is a length of staging time that is acceptable and one that is not. Once we have a staging time in excess, which is . . . 45 minutes or longer, we seek to find these travelers an alternative to get them on their way. . . . Because we have affiliated independent towncar operator[s] who are regulated, licensed and insured, we have a viable, legal alternative. I address the legality due to they are licensed for one stop service. Our UTC license for Auto Transportation is multi stop. Conversely, if we were a single stop operator as the towncar affiliates are, we would not need a UTC license.

Thus, when staging time is starting to get in excess and there a[re] towncars available, we offer travelers . . . the option of upgrading their travel from a multi-stop van to a single stop towncar at no additional cost. . . . These travelers receive a single stop trip, and thus is a viable option to waiting for a multi stop Shuttle Express ride at a later time. It is important to understand there are two distinct services/qualifications for using a towncar. Going to the airport the concern is making a flight and the consequences that this entails. This is what we deem to be a rescue by a towncar, limo or whatever other means we may find available. . . .

As you questioned, last year we had revenues of \$710,438 (12,075 trips), which is approximately 5% of Shuttles regulated revenue. . . . Rescue is a part of the number, as well as upgrades out of the airport. We handle rescues differently than upgrades out of

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<sup>14</sup> Docket TC-112072, commission staff Open Meeting memo at Appendix E, starting at page 76.

<sup>15</sup> August 28, 2012, email from Betty Young to John Rowley at Appendix K, starting at page 126.



the airport with relation to legality. Out of the airport is a single stop, rescues is [sic] getting travelers to the airport as required.<sup>16</sup>

Commission staff remained unclear about how rescue trips are actually provided and, on October 17, 2012, asked the following clarifying questions of Mr. Sherrell by email:<sup>17</sup>

1. Are rescue trips provided as single stops by town cars or limos as well?
2. If one of your multi-stop vans has a flat tire or another condition exists that requires a “rescue service” while picking up or dropping off multiple passengers at different locations, how do you transport the waiting/stranded passengers?
  - a. Do you dispatch another van to pick people up?
  - b. Do you upgrade passengers to limo or town car service? If so,
    - i. Are limos or town cars sent to pick up each individual customer?
    - ii. Do limos or town cars make multiple stops to pick up multiple passengers?

Mr. Sherrell responded that when a rescue is required, the type of vehicle is secondary to the services required. Shuttle Express guarantees people will make their flight.<sup>18</sup>

Because Mr. Sherrell’s response did not fully answer commission staff’s questions, David Danner, then-Commission Executive Director and Secretary, sent Mr. Sherrell a data request on October 31, 2012.<sup>19</sup> Mr. Danner’s data request reiterated staff’s previous questions and informed Mr. Sherrell that if commission staff did not receive specific answers to the questions, it would ask the commission to order Shuttle Express to provide the information.

Mr. Sherrell responded that delays create the need for Shuttle Express to provide rescue service, and the most common source of delays is bad traffic. If traffic or other circumstances cause a delay to a share-ride Shuttle Express van, a dispatcher checks to see if another van is in the area and determines if it will not inconvenience other travelers. If another Shuttle Express van is used, dispatch re-routes and changes assignments to other vans to get back on schedule. Independent contractors are used as a last resort in these cases and are not scheduled ahead of time for regulated service.<sup>20</sup>

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<sup>16</sup>September 21, 2012, email from Jimmy Sherrell (through Paul Kajanoff) to Betty Young at Appendix L, starting at page 129.

<sup>17</sup>October 17, 2012, email from Betty Young to Jimmy Sherrell (through Paul Kajanoff) at Appendix M, starting at page 131.

<sup>18</sup>October 19, 2012, email from Jimmy Sherrell to Betty Young at Appendix N, starting at page 132.

<sup>19</sup>October 31, 2012, letter from David Danner to Jimmy Sherrell at Appendix O, starting at page 133.

<sup>20</sup>November 15, 2012, letter from Jimmy Sherrell to staff at Appendix P, starting at page 139.

In response to commission staff’s question of whether Shuttle Express utilizes limousines and for-hire vehicles to provide multi-stop service along its regulated routes when it provides rescue services, Mr. Sherrell stated,

“Yes, when absolutely necessary as a last resort. Our share-ride vans are used whenever possible.”<sup>21</sup>

In the event Shuttle Express dispatches an independent contractor, it notifies the traveler of the change, the estimated time of arrival and the route to the airport.

In response to commission staff’s question about how many of the 12,075 trips represent rescue trips and how many were upgrades out of the airport, Mr. Sherrell responded that Shuttle Express does not have data to differentiate between rescue trips and upgrades out of the airport.

In response to commission staff’s question about how many rescue trips involved multiple stops to pick up or drop off passengers, Mr. Sherrell stated that according to the company’s records in its last rate case, 5,715 trips were multi-stop trips – approximately 15.5 per day.<sup>22</sup> Shuttle Express provided a breakdown of the 5,715 trips showing how many occurred each month:<sup>23</sup>

Month/Year	Trips
Oct 2010	316
Nov 2010	283
Dec 2010	486
Jan 2011	453
Feb 2011	393
Mar 2011	434
Apr 2011	381
May 2011	445
Jun 2011	572
Jul 2011	622
Aug 2011	705
Sep 2011	625
Total	5,715

Mr. Sherrell explained that because Shuttle Express’s vans are now allowed to use the high occupancy vehicle (HOV) lanes, the company is experiencing fewer traffic delays. Because of this, and because the company loses revenue when it uses independent contractors, Shuttle Express changed its policies and procedures in January 2012. A dispatcher is now stationed at

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> January 25, 2013, response from John Rowley at Appendix Q, starting at page 143.



the airport, enabling the company to improve efficiency. According to Mr. Sherrell, the amount of multi-stop rescues using independent contractors has dropped to an average of 0.26 per day. This is a decrease from the average of 15.65 trips per day during the investigation period (5,715 divided by 365 days). However, Mr. Sherrell stated that each day's traffic is unpredictable and rescues will undoubtedly continue to be needed.

## ANALYSIS OF OPERATIONS

### Independent Contractors – General Operations

In commission staff's prior enforcement investigation of Shuttle Express's independent contractor program in 2007, commission staff found that Shuttle Express violated WAC 480-30-213(2) because the vehicles driven by the independent contractors were actually being "operated" by Shuttle Express. To make that determination, commission staff evaluated the independent contractor program in the following categories: management, contracts, operation of vehicles, compensation, reservations and dispatching, fare tickets, and advertising.<sup>24</sup>

In the current investigation, commission staff evaluated Shuttle Express's present independent contractor program in a similar way, focusing on rescue services. Commission staff did not address advertising, as Shuttle Express does not advertise to provide rescue services.

### Management and Contracts

Commission staff asked Shuttle Express to provide a list of all independent contractors Shuttle Express has contracted with since the inception of the independent contractor program. Commission staff asked Shuttle Express to include the following information for each independent contractor:

- Name and contact information for the company.
- Beginning and end (if applicable) dates of the independent contractor relationship.
- Applicable independent contractor agreement(s) if not the May 22, 2009, agreement already provided.
- The number of referrals Shuttle Express made to the independent contractor over the term of each applicable agreement.
- The number of referrals accepted by the independent contractor over the term of each applicable agreement.
- Records of all routes traveled by the independent contractor in providing service subject to the agreement(s).
- Copies of all reservation records referred to the independent contractor for services under the agreement(s).
- Copies of all invoices submitted by the independent contractor for payment for services rendered under the agreement(s).<sup>25</sup>

Shuttle Express provided the first two items only. For the remaining items, Shuttle Express stated that the information was not available without an extensive, highly labor-intensive effort of

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<sup>24</sup> Docket TC-072228 - staff investigation report.

<sup>25</sup> March 30, 2012, letter from commission staff to Shuttle Express at Appendix F, starting at page 80.

combing through archived records. Shuttle Express did, however, state that records could be made available for commission staff to inspect.

According to Shuttle Express, independent contractors must meet specific criteria before entering into an independent contractor contract, including standards and legal requirements for chauffeurs serving at SeaTac airport as well as requirements of RCW 46.72A (Limousines), the Department of Revenue, the Department of Licensing, the Port of Seattle and local cities.<sup>26</sup>

### **Operation of Vehicles**

Under Shuttle Express's independent contractor program, independent contractors own their own vehicles and do not lease vehicles from Shuttle Express or companies owned by Shuttle Express. Independent contractors are required to provide their own liability insurance in the amount of \$1,050,000. Shuttle Express provided a copy of what it refers to as an "umbrella" \$5 million combined single limit insurance policy, which it claims would cover any vehicle under dispatch by Shuttle Express. In the copy of Shuttle Express's insurance policy provided to staff, an endorsement to the policy titled "Hired Autos Specified as Covered Autos You Own" shows coverage for "any hired auto while under dispatch for Shuttle Express, Inc."<sup>27</sup> It appears the rescue vehicles operated by non-Shuttle Express employees are covered under the Shuttle Express insurance policy for the required \$5 million combined single limit amount.

### **Customer Charges and Contractor Compensation**

In commission staff's Open Meeting memo in Shuttle Express's general rate case in Docket TC-112072, commission staff stated that Shuttle Express charged customers the company's published tariff rate for door-to-door service for services provided by independent contractors.<sup>28</sup> In response to commission staff in this investigation, Shuttle Express stated that during rescue service, the passengers pay the fare quoted in the reservation, pay a discounted fare or receive a complimentary fare.<sup>29</sup> Commission rules state that no auto transportation company may assess rates that are higher, lower, or different from those contained in the company's filed tariff. No auto transportation company may accept a payment for service provided that is higher, lower, or different from the rates contained in the company's filed tariff.<sup>30</sup> It is unclear how many Shuttle Express passengers paid a discounted fare or received a complimentary fare during rescue service.

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<sup>26</sup> May 14, 2012, response from Shuttle Express at Appendix G, starting at page 84.

<sup>27</sup> Shuttle Express insurance policy page at Appendix G, page 91.

<sup>28</sup> March 8, 2012, Open Meeting memo in Docket TC-112072 at Appendix F, starting at page 80.

<sup>29</sup> July 16, 2012, response from Shuttle Express at Appendix I, starting at page 95.

<sup>30</sup> WAC 480-30-276, Tariffs and time schedules, companies must comply with the provisions of filed tariffs and time schedules.



Shuttle Express charges independent contractors 34 percent of collected fares to cover Shuttle Express's fees. The contractors collect fares from customers, pay Shuttle Express's fees and keep the remainder for themselves. Shuttle Express processes credit card payments on behalf of the contractors, and excess funds from credit card prepayments accumulate at Shuttle Express. Twice a month, Shuttle Express settles accounts with the contractors to return these funds.<sup>31</sup>

During the test year for Docket TC-112072, Shuttle Express reported \$710,438 revenue from independent contractors. The company paid the independent contractors \$468,889, and retained 34 percent, or \$241,549, for services (such as making reservations, dispatching, etc.) that Shuttle Express provided to independent contractors.

Regulated Revenues Shuttle Express Received from Customers	\$710,438
Shuttle Express Payment to Independent Contractors	\$468,889
Amount of Revenue Shuttle Express Retained for Providing Services (reservations, dispatch, etc.) to Independent Contractors	\$241,549

### Reservations and Dispatching

Shuttle Express makes customer referrals to the independent contractors using vMDT (vehicle Multiple Data Terminal) technology. The vMDT data transmitted to independent contractors includes customer names, addresses, phone numbers, airline arrival and departure times, pick-up time, fare information and other information as needed.<sup>32</sup>

When commission staff asked Shuttle Express if the company gets written permission from its rescue service passengers to share their customer information with the independent contractors, Shuttle Express replied, "In a rescue situation, of course not."<sup>33</sup> Commission rules prohibit the release of customer information (i.e., customer's name, address, and telephone number) without the written permission of the customer.<sup>34</sup>

### Fare Tickets

Shuttle Express produces the fare tickets, which are then used by independent contractors to "verify pre-paid reservations and to pass on information regarding clients who are directly billed for services."<sup>35</sup> The copies of fare tickets provided to commission staff show the printed name of Shuttle Express at the top of the ticket. Drivers are identified by driver number or first name.<sup>36</sup> Receipts for services provided by the independent contractors vary. Some contractors use a

<sup>31</sup> May 14, 2012, response from Shuttle Express at Appendix G, starting at page 84.

<sup>32</sup> Id.

<sup>33</sup> July 16, 2012, response from Shuttle Express at Appendix I, starting at page 95.

<sup>34</sup> WAC 480-30-456, Fair use of customer information.

<sup>35</sup> May 14, 2012, response from Shuttle Express at Appendix G, starting at page 84.

<sup>36</sup> July 16, 2012, response from Shuttle Express at Appendix I, starting at page 95.



standard business-card type receipt which is printed by Shuttle Express. If requested, the customer may use the fare ticket as a receipt.<sup>37</sup> It is unclear how fare tickets are handled by Shuttle Express during rescue service.

## Safety

Because the independent contractors are either licensed limousine carriers or for-hire (town car) operators, they are not subject to the same vehicle safety inspections or driver qualifications as auto transportation companies. Limousines must be inspected annually by the Washington State Patrol (WAC 204-95-080). Limousine carriers' business records are subject to inspection by DOL (WAC 308-83-130). Limousine chauffeurs must obtain medical certification every two years, must be drug tested prior to certification and must participate in a random drug testing program (WAC 308-83-140). Town car operators are not subject to vehicle inspections and have no requirements for inspection of books and records.

When Shuttle Express utilized non-regulated independent contractors to provide multi-stop trips on its regulated routes, those independent contractors became subject to the auto transportation rules. Commission rules define "commercial motor vehicle" as any motor vehicle used by an auto transportation company to provide passenger transportation services over the public highways of Washington state.<sup>38</sup> For auto transportation companies, all commercial motor vehicle drivers must meet the same safety requirements as limousine carriers, plus other, more stringent safety standards. For example, auto transportation company drivers must follow strict requirements about hours of service to ensure drivers are not fatigued. Auto transportation company drivers must also conduct specific pre- and post-trip inspections of their vehicles and document any maintenance or safety issues.

Commission staff routinely inspects auto transportation companies' vehicles, books and records to ensure the company is meeting its safety responsibilities. The commission has specific safety regulations for auto transportation companies, including parts of Title 49 Code of Federal Regulations (CFR), adopted by reference, related to vehicle and driver safety requirements (WAC 480-30-999). Auto transportation companies must follow all the requirements adopted by the commission, including<sup>39</sup>:

- Part 40 – Procedures For Transportation Workplace Drug and Alcohol Testing Programs
- Part 382 – Controlled Substance and Alcohol Use and Testing
- Part 383 – Commercial Driver's License Standards; Requirements and Penalties
- Part 379 – Preservation of Records
- Part 380 – Special Training Requirements

<sup>37</sup> May 14, 2012, response from Shuttle Express at Appendix G, starting at page 84.

<sup>38</sup> WAC 480-30-211, Commercial vehicle, defined.

<sup>39</sup> WAC 480-30-221, Vehicle and driver safety requirements.

- Part 385 – Safety Fitness Procedures
- Part 390 – Safety Regulations, General
- Part 391 – Qualification of Drivers
- Part 392 – Driving of Motor Vehicles
- Part 393 – Parts and Accessories Necessary for Safe Operation
- Part 395 – Hours of Service of Drivers
- Part 396 – Inspection, Repair, and Maintenance
- Part 397 – Transportation of Hazardous Materials, Driving and Parking Rules

The vehicles and records of the non-regulated independent contractors Shuttle Express used to provide multi-stop trips on Shuttle Express's regulated routes were not inspected by commission staff. This means that commission staff has no way to determine if the independent contractors' vehicles, books and records meet the commission's safety requirements that auto transportation companies must follow. It also means Shuttle Express's customers, who were transported by non-regulated independent contractors during multi-stop trips on Shuttle Express's regulated routes, may not have had the same safety protections as those customers transported by Shuttle Express's drivers in Shuttle Express's vehicles.

## STAFF FINDINGS AND RECOMMENDATION

Commission staff has determined that Shuttle Express violated the settlement agreement approved by commission Order 01 in Docket TC-072228. Within the settlement agreement, Shuttle Express admitted violating WAC 480-30-213 and agreed to comply with all applicable rules and statutes enforced by the commission.<sup>40</sup>

RCW 81.04.010(11) states that a common carrier “... includes ... auto transportation companies...”

RCW 81.04.010(16) states that a public service company “... includes every common carrier.”

RCW 81.04.380 Penalties – Violations by public service companies states, in part:

“Every public service company ... shall obey, observe and comply with every order, rule, direction or requirement made by the commission under authority of this title .... Any public service company which shall violate or fail to comply with any provision of this title, or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission, shall be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense ...”

Between October 2010 and September 2011, Shuttle Express violated the settlement agreement approved by commission Order in Docket TC-072228 when it utilized independent contractor drivers, in violation of WAC 480-30-213(2), to provide multi-stop service along its regulated routes to provide rescue services at least 5,715 times.

Commission staff has determined that Shuttle Express’s current independent contractor program also violates these commission rules:

- **WAC 480-30-213(2), Vehicles and Drivers**, which requires the driver of a vehicle operated by a passenger transportation company to be the certificate holder or an employee of the certificate holder.

In its current independent contractor program, Shuttle Express admits that it uses independent contractor drivers to provide multi-stop service along its regulated routes to provide rescue services. The independent contractors do not have auto transportation certificates and they are not employed by Shuttle Express, yet the independent contractors’ vehicles appear covered under the liability insurance policy of Shuttle Express.

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<sup>40</sup> TC-072228 commission Order and settlement agreement at Appendix C, starting at page 42.



Commission staff finds that Shuttle Express operates the passenger transportation of these independent contractors because it dispatches them to pick up passengers and transport them along Shuttle Express's regulated routes and because Shuttle Express provides liability insurance coverage for the independent contractors' vehicles.

Between October 2010 and September 2011, Shuttle Express violated WAC 480-30-213(2) when it utilized independent contractor drivers to provide multi-stop service along its regulated routes to provide rescue services at least 5,715 times.

- **WAC 480-30-216(6), Reserve Equipment**, requires all auto transportation companies to maintain sufficient reserve equipment to insure the reasonable operation of established routes and fixed time schedules. Shuttle states that it does not overbook and has sufficient vans and drivers to handle each day.<sup>41</sup>

In Pacific Northwest Transportation Services, Inc. d/b/a Capital Aeroporter's (Capital Aeroporter) application for an extension of its certificate in Docket TC-111619, Capital Aeroporter sought to extend its certificate to provide service within Shuttle Express's existing service territory. Shuttle Express protested the application stating, in part:

“Shuttle Express operates a fleet of approximately 100 vans and 15 buses. ... There is no public need for the Applicant's proposed, duplicative service, as *Shuttle Express's existing equipment is not fully utilized and is available to provide additional service should the need and opportunity arise*”<sup>42</sup> (emphasis added).

Commission staff finds Shuttle Express does not maintain sufficient equipment because the company did not have its own equipment to provide “rescue service” and, instead, contracted out its auto transportation service to independent contractors.

Shuttle Express violated WAC 480-30-216(6) when it utilized non-regulated independent contractors at least 5,715 times to provide multi-stop trips on Shuttle Express's regulated routes between October 2010 and September 2011.

- **WAC 480-30-456, Fair Use of Customer Information**, prohibits the release of customer information (i.e., customer's name, address, and telephone number) without the written permission of the customer.

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<sup>41</sup> November 15, 2012, letter from Jimmy Sherrell to commission staff at Appendix P, starting at page 139.

<sup>42</sup> Relevant excerpt of Shuttle Express protest in Docket TC-111619 at Appendix R, starting at page 145.



Shuttle Express shares the customer's name, address, and telephone number with independent contractors when making referrals to the contractors for rescue transportation services.<sup>43</sup>

Commission staff finds Shuttle Express does not obtain written permission from the customer to share personal customer information.

Shuttle Express violated WAC 480-30-456 when it shared customer information, without written customer permission, with independent contractors through referrals for rescue transportation services at least 5,715 times between October 2010 and September 2011.

### **Recommendation**

Staff recommends the commission file a complaint on its own motion setting forth any act or omission by Shuttle Express that violates any law, or any order or rule of the commission, as provided by RCW 81.04.110.

The commission could penalize Shuttle Express up to \$1,000 per violation for 22,860 total violations of commission rules, as provided by RCW 81.04.380. Through its enforcement policy, the commission considers the following factors when determining the level of penalty to be imposed:

#### **1. How serious or harmful the violation is to the public.**

Commission staff believes that Shuttle Express's use of independent contractors to provide auto transportation service did not put the public in imminent danger. However, staff has no way to determine if the independent contractors' operations, vehicles, books and records meet the safety requirements that auto transportation companies must follow. Shuttle Express's customers, who were transported by non-regulated independent contractors during multi-stop trips on Shuttle Express's regulated routes, did not have the same safety protections as those customers transported by Shuttle Express's drivers in Shuttle Express's vehicles.

Shuttle Express's use of independent contractors may have been harmful to other auto transportation providers. In Pacific Northwest Transportation Services, Inc. d/b/a Capital Aeroporter's (Capital Aeroporter) application for an extension of its certificate in Docket TC-111619, Capital Aeroporter sought to extend its certificate to provide service within Shuttle Express's existing service territory. Shuttle Express protested the application on the basis that its existing equipment was not fully utilized and available to provide additional service should the need and opportunity arise. However, Shuttle Express did

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<sup>43</sup> May 14, 2012, Shuttle Express response to commission staff's information request at #4 at Appendix G, starting at page 84.

not use its existing equipment to provide rescue service on 5,715 occasions during the investigation period.

**2. Whether the violation is intentional.** Factors include:

- Whether the company ignored staff's previous technical assistance.
- Whether the company committed previous violations of the same statute or regulation.
- Whether there is clear evidence through documentation or other means that show the company knew of and failed to correct the violation.

Commission staff believes Shuttle Express willfully and intentionally violated commission rules. We offer the following in support of this statement:

- Shuttle Express has deliberately ignored commission staff's previous technical assistance regarding independent contractors. As outlined in commission staff's investigation in Docket TC-072228, the commission and its staff have provided technical assistance to Shuttle Express about the use of independent contractors many times, beginning in 2004. When Shuttle Express first proposed its independent contractor program, commission staff advised the company that such a financial, legal and operational arrangement between Shuttle Express and its independent contractor drivers would constitute a lease of Shuttle Express's certificate, requiring commission approval and requiring the independent contractor drivers to obtain auto transportation certificates. Commission staff also advised Shuttle Express that it would be in violation of state law if it conducted business with independent contractors in the manner proposed.

Commission staff repeatedly advised Shuttle Express to either petition the commission for a declaratory ruling about the legality of the company's independent contractor program or to file an application to lease the company's certificate. Instead, the Commission found in TC-072228 that Shuttle Express chose to operate an independent contractor program in violation of commission rules, heedless of commission staff's technical assistance and advice.

In the current investigation, commission staff found that Shuttle Express intentionally chose to continue operating an independent contractor program despite previous technical assistance.

- Shuttle Express committed previous violations of the same rule. In April 2008, the commission penalized Shuttle Express \$9,500 for violations of WAC 480-30-213(2). In the current investigation, commission staff identified at least 5,715 violations of the same rule.



- Between October 2010 and September 2011, Shuttle Express knew or should have known that it violated the settlement agreement approved by commission Order in Docket TC-072228, and that it violated WAC 480-30-213(2), when it utilized independent contractor drivers to provide multi-stop auto transportation service along its regulated routes to provide rescue service.

**3. Whether the company self-reported the violation.**

Shuttle Express did not self-report the violations outlined in this investigation report.

**4. Whether the company was cooperative and responsive.**

Shuttle Express did not display full cooperation or responsiveness during staff's investigation. Rather, Shuttle Express delayed and obstructed the investigation by providing nonresponsive answers to staff's information requests. Further, the company refused to provide specific information requested by staff on several occasions, stating it would be "cumbersome, time-consuming and impractical to provide the information." However, Shuttle Express offered to make its records available for commission staff to review. At one point during the investigation, the commission's Executive Director sent Shuttle Express a data request on behalf of commission staff because of the company's failure to provide specific information. This ultimately prompted the company to provide some, but not all, of the requested information.

**5. Whether the company promptly corrected the violations and remedied the impacts.**

Shuttle Express has told commission staff that it adjusted its business practices in January 2012 to reduce the use of independent contractors to provide multi-stop rescue services on its regulated routes.

**6. The number of violations.**

Commission staff considers the number of violations in this investigation to be significantly high (22,860 violations over a 23-month time period). Commission staff's previous investigation of Shuttle Express's independent contractor program identified 95 violations during a one-month investigation period.

**7. The likelihood of recurrence.**

While Shuttle Express has adjusted its business practices to reduce the use of independent contractors to provide multi-stop rescue services on its regulated routes, the company also stated that each day's traffic is unpredictable and rescues will undoubtedly continue to be needed. This means the violations likely continue today and will recur.

**8. The company's past performance regarding compliance, violations, and penalties.**

Commission staff reviewed Shuttle Express's penalty and compliance history for the past ten years. The company has consistently demonstrated compliance with commission rules and regulations in the following areas:

- Annual reports and regulatory fees
- Regulatory filings (tariff, rate case, etc.)
- Safety compliance reviews

The only penalty assessment the commission issued to Shuttle Express during this time period was \$9,500 in Docket TC-072228 for violations of WAC 480-30-213(2). Pursuant to a settlement in this proceeding between commission staff and Shuttle Express, which the commission adopted, Shuttle Express committed not to violate WAC 480-30-213(2) or any other applicable laws and rules enforced by the commission.

**9. The company's existing compliance program.**

Shuttle Express complies with commission rules, with the notable exception of those rules that the company has violated in order to continue to use independent contractor drivers. Continuing to operate an independent contractor driver program, in direct violation of the settlement agreement adopted by the commission in Docket UT-072228 and with full knowledge that the practice violates commission rule, reveals an ongoing, willful and deliberate disregard for compliance with commission regulation.

**10. The size of the company.**

Based on the number of annual intrastate miles traveled, Shuttle Express is the largest auto transportation company regulated by the commission. The company reported just over 7.1 million miles traveled and approximately \$13.1 million in gross intrastate operating revenues for 2011.

**Summary**

In 2005, commission staff clearly explained to Shuttle Express that its independent contractor program was contrary to statute and would constitute a lease of the company's certificate. In 2006, the commission advised Shuttle Express in a rulemaking that the law does not allow auto transportation companies to use independent contractors as the company had proposed. In 2008, the commission assessed a penalty of \$9,500 against Shuttle Express for using independent contractor drivers in 95 violations of commission rule, or \$100 per violation. Shuttle Express entered into a settlement agreement with commission staff, agreeing to the penalty and agreeing, in the future, to comply with all applicable rules and statutes enforced by the commission, including those at issue in the current investigation.

Despite prior technical assistance and enforcement action, Shuttle Express crafted a revised independent contractor program to provide regulated services that was even broader in scale,



providing illegal service in 5,715 instances, violating commission statutes, rules, and the settlement agreement.

Commission staff considers each of the 22,860 total violations found in this case to be more serious than the 95 violations in the 2008 case because the company had full knowledge that the practice violated commission rule, and it reveals an ongoing, willful and deliberate disregard for compliance with commission regulation. In addition, the company knowingly violated the terms of the settlement agreement and commission order.

Shuttle Express should have never entered into the independent contractor agreements, should have never provided the illegal service in 5,715 instances, and should have never retained \$241,549 revenue generated by the illegal services.

Considering all of the factors and information outlined above, commission staff recommends a penalty of \$250,000, which represents the approximate amount of revenues retained by Shuttle Express from the company's independent contractor program. This penalty, staff believes, strikes a balance between the number of the violations and the company's willful and deliberate disregard of commission regulation.