

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Investigation of LEAVENWORTH SHUTTLE & TAXI, LLC For Compliance with WAC 480-30-221	DOCKET TE-161021 <i>(Consolidated)</i> ORDER 01
In the Matter of the Penalty Assessment Against LEAVENWORTH SHUTTLE & TAXI, LLC In the amount of \$19,800	DOCKET TE-161020 <i>(Consolidated)</i> ORDER 01 ORDER OF CONSOLIDATION; ORDER UPGRADING SAFETY RATING; ORDER IMPOSING AND SUSPENDING PENALTIES

BACKGROUND

- 1 On September 28, 2016, the Washington Utilities and Transportation Commission (Commission) issued a Notice of Intent to Cancel Certificate as an Auto Transportation Carrier and Notice of Brief Adjudicative Proceeding; Setting Time for Oral Statements In the Matter of the Investigation of Leavenworth Shuttle & Taxi, LLC (Leavenworth Shuttle or Company) For Compliance with WAC 480-30-221 in Docket TE-161021 (Notice of Intent to Cancel). The Notice of Intent to Cancel set the Brief Adjudicative Proceeding for October 20, 2016, at 9:30 a.m.
- 2 Also on September 28, 2016, the Commission assessed a penalty of \$19,800 (Penalty Assessment) in Docket TE-161020 against Leavenworth Shuttle for 334 violations of Washington Administrative Code (WAC) 480-30-221, which adopts by reference 49 C.F.R. Part 382 related to pre-employment controlled substance and alcohol use testing; 49 C.F.R. Part 391 related to driver qualifications; and 49 C.F.R. Part 396 related to vehicle inspection, repair, and maintenance.
- 3 The Commission conducted a brief adjudicative proceeding on October 20, 2016, before Administrative Law Judge Rayne Pearson. At the hearing, the Company submitted its proposed safety management plan and a written request for mitigation of the penalty. The

parties agreed that the Commission should address the Penalty Assessment in Docket TE-161020 concurrently with the Notice of Intent to Cancel in Docket TE-161021.

Accordingly, the Commission consolidated Dockets TE-161020 and TE-161021.

- 4 Staff presented testimony from Sandi Yeomans, special investigator, and David Pratt, assistant director, Transportation Safety. Ms. Yeomans provided documentation about the critical safety violations that resulted in Staff's proposed "unsatisfactory" safety rating for Leavenworth Shuttle. Following a July 2016 compliance review, Staff documented two violations of 49 C.F.R. Part 382.301(a), which requires pre-employment controlled substance and alcohol use testing for all drivers. The Company allowed employees Sally Boyce and Hilary Mason to drive its vehicles prior to receiving a negative controlled substance and alcohol use test result. Staff also documented 187 violations of 49 C.F.R. Part 391.45(a), which requires drivers to be medically examined and certified. Company drivers Mike Kaelin, David Witt, and Jeff Miland drove on a total of 187 occasions without a valid medical certificate. Finally, Staff documented 145 violations of 49 C.F.R. Part 396.11(a), which requires drivers to complete a driver vehicle inspection report (DVIR) at the end of their shift each day a vehicle is used. At the time of Staff's investigation, Leavenworth Shuttle did not require its drivers to complete DVIRs.
- 5 Mr. Pratt presented testimony and evidence related to the Commission's enforcement policy. At the conclusion of the hearing, Mr. Pratt requested additional time to review the Company's proposed safety management plan and provide a recommendation with respect to both the penalty amount and the status of the Company's auto transportation certificate. Judge Pearson issued a bench request for Staff to provide its recommendations by 10 a.m. on Monday, October 24, 2016.
- 6 Leavenworth Shuttle presented testimony from David Witt, Company president, who acknowledged the violations but requested the penalty be mitigated. Mr. Witt explained that the violations were unintentional, and the Company has since developed a compliance plan to prevent recurring violations.
- 7 On October 24, 2016, Staff filed its response to the Company's request for mitigation and proposed safety management plan. With respect to the penalty assessed in Docket TE-161020, Staff recommends the Commission assess a reduced penalty of \$14,800. Staff further recommends the Commission suspend a \$10,000 portion of the penalty for a period of two years, and then waive it, subject to the condition that the Company does not incur any repeat violations of WAC 480-30-221 upon re-inspection. Finally, Staff recommends the Commission upgrade the Company's safety rating to "conditional" and allow the Company to maintain its auto transportation certificate because the Company's

proposed safety management plan adequately addresses the violations that led to the proposed “unsatisfactory” safety rating. Staff will conduct a follow-up non-rated compliance investigation in May 2017.

- 8 Brett P. Shearer, Assistant Attorney General, Olympia, represents Commission Staff (Staff). David Witt, President, Leavenworth, represents Leavenworth Shuttle.

DISCUSSION AND DECISION

1. Docket TE-161021 – Auto Transportation Certificate

- 9 Washington law requires auto transportation carriers to comply with federal safety requirements and undergo routine safety inspections. Staff’s July 2016 compliance review of Leavenworth Shuttle found 334 violations of critical regulations, which resulted in a proposed “unsatisfactory” safety rating. Critical regulations relate to management and/or operational issues, and violations of these regulations typically indicate a breakdown in a carrier’s management controls. Patterns of noncompliance with a critical regulation are quantitatively linked to inadequate safety management controls and usually higher-than-average accident rates.

- 10 On October 20, 2016, the Company submitted its proposed safety management plan and requested the Commission upgrade its safety rating. On October 24, Staff submitted its evaluation of the Company’s proposed safety management plan and recommended that the Commission upgrade the Company’s safety rating to “conditional.” Staff found that Leavenworth Shuttle’s safety management plan addresses each violation, identifies how each violation occurred, describes the steps taken to correct each violation, and describes the controls put in place to ensure compliance going forward.

- 11 Based on the evidence in the record, the Commission finds that the Company has achieved compliance by correcting the violations that led to the proposed “unsatisfactory” safety rating. Accordingly, the Commission agrees with Staff’s recommendation and grants the Company’s request to upgrade its safety rating to “conditional.”

2. Docket TE-161020 – Penalty Assessment

- 12 Violations discovered during safety inspections are subject to penalties of \$100 per violation.¹ In some cases, Commission requirements are so fundamental to safe

¹ See RCW 80.04.405.

operations that the Commission will issue penalties for first-time violations.² Critical violations meet this standard.³

- 13 The Commission considers several factors when entertaining a request for mitigation, including whether the company introduces new information that may not have been considered in setting the assessed penalty amount, or explains other circumstances that convince the Commission that a lesser penalty will be equally or more effective in ensuring the company's compliance.⁴ The Penalty Assessment cited 334 critical violations in three categories. We address each category in turn.

WAC 480-30-221, 49 C.F.R. Part 382.301(a)

- 14 **Discussion.** WAC 480-30-221, 49 C.F.R. Part 382.301(a) prohibits auto transportation carriers from using drivers prior to receiving a negative pre-employment controlled substance and alcohol use test result. The Commission assessed a \$1,000 penalty for two violations of 49 C.F.R. Part 382.301(a) because Leavenworth Shuttle allowed employees Sally Boyce and Hilary Mason drive its vehicles prior to receiving a negative controlled substance and alcohol use test result. Mr. Witt explained that he was unaware that drivers who are not required to maintain a commercial driver's license were subject to pre-employment drug and alcohol testing. Mr. Witt testified that he has since corrected the violations by enrolling in a consortium and having all drivers submit to a controlled substance and alcohol use test prior to driving Company vehicles.

- 15 **Decision.** Although these are first-time violations, the Commission assessed a \$1,000 penalty because controlled substance and alcohol use testing prior to employment is essential to safe operations. Drivers who have not been tested for alcohol or controlled substance use may drive while impaired, which poses a serious risk to passengers and other drivers. Because this requirement is fundamental to safe operations, we decline to mitigate this portion of the penalty.

WAC 480-30-221, 49 C.F.R. Part 391.45(a)

- 16 **Discussion.** WAC 480-30-221, 49 C.F.R. Part 391.45(a) requires drivers to be medically examined and certified as physically qualified to operate a commercial motor vehicle. Staff discovered during its review that two drivers drove on 187 occasions without being

² Docket A-120061, Enforcement Policy for the Washington Utilities and Transportation Commission ¶12 (Jan. 7, 2013) (Enforcement Policy).

³ 49 C.F.R. § 385, Appendix B.

⁴ Enforcement Policy ¶19.

medically examined and certified. Mr. Witt testified that, to address this issue, the Company has become familiar with Commission safety requirements and put controls in place to ensure that medical cards are obtained and kept on file for all employees.

- 17 **Decision.** We find that a “per violation” penalty is appropriate here because medical certification is fundamental to safe operations; drivers who are not medically certified may have an undocumented medical condition that puts the traveling public at risk. We will however, assess a reduced penalty of \$13,700 for 187 violations of WAC 480-30-221, 49 C.F.R. Part 391.45(a) because the Company promptly corrected the violations and implemented procedures to ensure future compliance.

WAC 480-30-221, 49 C.F.R. Part 396.11(a)

- 18 **Discussion.** WAC 480-30-221, 49 C.F.R. Part 396.11(a) requires drivers to complete a DVIR at the end of his or her shift each day. The report includes an 11-item checklist that identifies any defects that could affect safe operation of the vehicle. The Penalty Assessment cited 145 violations of WAC 480-30-221 because the Company did not previously require its drivers to prepare DVIRs. Mr. Witt testified that prior to the July 2016 inspection, Company drivers performed inspections but did not record the information in the proper format. The Company now requires all drivers to complete the required DVIR form.

- 19 **Decision.** Here, the Commission assessed a \$100 penalty for 145 violations of WAC 480-30-221. The Commission could have assessed penalties of \$100 per violation, but, because these are first-time violations, assessed a “per category” rather than “per violation” penalty. Accordingly, we find that no further penalty reduction is warranted, and decline to mitigate this portion of the penalty.

- 20 Because the Company submitted a satisfactory proposed safety management plan that details the controls it has put in place to prevent repeat violations of Commission safety rules, we agree with Staff’s recommendation and assess a reduced penalty of \$14,800. We also suspend a \$10,000 portion of the penalty for a period of two years, and then waive it, subject to the following conditions: 1) Leavenworth Shuttle must maintain a “conditional” safety rating, 2) Leavenworth Shuttle may not incur any repeat violations of WAC 480-30-221, and 3) Leavenworth Shuttle must pay the remaining \$4,800 portion of the penalty within 10 days of the effective date of this order. The Company may work with Staff to establish mutually agreeable payment arrangements to pay the \$4,800 portion of the penalty that is not suspended. If Leavenworth Shuttle fails to comply with

any of these conditions, the entire \$10,000 suspended penalty will become immediately due and payable without further Commission order.

FINDINGS AND CONCLUSIONS

- 21 (1) The Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, and practices of public service companies, including auto transportation companies, and has jurisdiction over the parties and subject matter of this proceeding.
- 22 (2) Leavenworth Shuttle is an auto transportation company subject to Commission regulation.
- 23 (3) Leavenworth Shuttle cured the deficiencies that led to its “unsatisfactory” safety rating within 45 days, as required. Accordingly, Leavenworth Shuttle’s safety rating should be upgraded to “conditional,” and the Company should be allowed to maintain its auto transportation certificate.
- 24 (4) Leavenworth Shuttle violated WAC 480-30-221, which adopts by reference 49 C.F.R. Part 382.301(a), by using drivers prior to receiving a negative pre-employment controlled substance abuse and alcohol use test result.
- 25 (5) Leavenworth Shuttle should be penalized \$1,000 for two violations of WAC 480-30-221, which adopts by reference 49 C.F.R. Part 382.301(a).
- 26 (6) Leavenworth Shuttle violated WAC 480-30-221, which adopts by reference 49 C.F.R. 391.45(a) by using two drivers on 187 occasions who were not medically certified.
- 27 (7) Leavenworth Shuttle should be penalized \$13,700 for 187 violations of WAC 480-30-221, which adopts by reference 49 C.F.R. 391.45(a).
- 28 (8) Leavenworth Shuttle violated WAC 480-30-221, which adopts by reference C.F.R. Part 396.11(1) by failing to require its drivers to prepare DVIRs.
- 29 (9) Leavenworth Shuttle should be penalized \$100 for 145 violations of WAC 480-30-221, which adopts by reference C.F.R. Part 396.11(1).
- 30 (10) The Commission should assess a penalty of \$14,800 for 334 violations of WAC 480-30-221. A \$10,000 portion of the penalty should be suspended for a period of two years, and then waived, subject to the following conditions: 1) Leavenworth

Shuttle must maintain a “conditional” safety rating, 2) Leavenworth Shuttle may not incur any repeat violations of WAC 480-30-221, and 3) Leavenworth Shuttle must pay the remaining \$4,800 penalty within 10 days of the effective date of this Order. The Company may work with Staff to establish mutually agreeable payment arrangements to pay the \$4,800 portion of the penalty that is not suspended. If Leavenworth Shuttle fails to comply with any of these conditions, the entire \$10,000 suspended penalty will become immediately due and payable without further Commission order.

ORDER

THE COMMISSION ORDERS That

- 31 (1) The Commission upgrades Leavenworth Shuttle & Taxi, LLC’s safety rating to “conditional.”
- 32 (2) The Commission assesses a \$14,800 penalty against Leavenworth Shuttle & Taxi, LLC. The Commission suspends a \$10,000 portion of the penalty for a period of two years, and then waives it, subject to the following conditions: 1) Leavenworth Shuttle & Taxi, LLC must maintain a “conditional” safety rating, 2) Leavenworth Shuttle & Taxi, LLC may not incur any repeat violations of WAC 480-30-221, and 3) Leavenworth Shuttle & Taxi, LLC must either pay the \$4,800 portion of the penalty that is not suspended or file jointly with Staff a proposed payment plan within 10 days of the effective date of this Order.
- 33 (3) If Leavenworth Shuttle & Taxi, LLC fails to comply with any condition of this Order, the entire \$10,000 suspended penalty will become immediately due and payable without further Commission order.

DATED at Olympia, Washington, and effective October 24, 2016.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RAYNE PEARSON
Administrative Law Judge

NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and **five (5)** copies of any Petition or Answer must be filed by mail delivery to:

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