Meridian Group of Companies
P.O. Box 21646
Seattle, WA 98111-3646
PHONE: 206.621.9301 OR 800.901.9301 FAX: 206.621.9750 OR 800.901.9302
EMAIL: info@meridiangroup.net WEB: www.meridiangroup.net

Friday, June 15, 2007

Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P.O. Box 74250
Olympia, WA 98504-7250

Re: *Penalty Assessment Against Meridian Transportation Resources, LLC*
Docket No. TE-070767

Dear Ms. Washburn:

Enclosed for filing with respect to the above-captioned matter are an original and 12 copies of MTR Western's Motion to Void Violation of WAC 480-30-221 and to Dismiss Penalty in the Amount of $500, together with an original copy of a Certificate of Service.

Respectfully,

MERIDIAN TRANSPORTATION RESOURCES, LLC

By: Darren Berg
Its: Owner, General Counsel and CEO

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Penalty Assessment against **MERIDIAN TRANSPORTATION RESOURCES, LLC**, (doing business as MTR WESTERN) in the Amount of $500	DOCKET NO. TE-070767 MOTION TO VOID VIOLATION OF WAC-480-30-221 AND TO DISMISS PENALTY IN THE AMOUNT OF $500

COMES NOW Meridian Transportation Resources, LLC *("MTR Western")* by and through F. Darren Berg, its Owner, General Counsel and Chief Executive Officer, and moves that the violation issued by the Washington Utilities and Transportation Commission *("WUTC")*, subject of the above-captioned action, be voided and that the penalty arising therefrom in the amount of $500 (five hundred dollars) be dismissed as follows and for the following reasons:

I. FACTS:

1. MTR Western is a Seattle based charter motorcoach company regulated by WUTC.
2. On or about December 15, 2006, MTR Western hired Dustin M. Larsh as a Motorcoach Operator. Mr. Larsh was given a start date of January 2, 2007.
3. Prior to his employment with MTR Western, Mr. Larsh worked as a Motorcoach Operator for Gray Line of Seattle. Mr. Larsh continued his employment with Gray Line of Seattle until immediately prior to his start date with MTR Western.
4. On January 2, 2007, Mr. Larsh reported for duty at MTR Western. Between the approximate hours of 9AM and 11AM, he underwent training on pre-tripping and post-tripping MTR Western motorcoaches using MTR Western's unique, computer contolled, Zonar® pre and post trip inspection system and, further, underwent "differences" training and instruction on the differences between the motorcoaches owned and operated by MTR Western and those owned and operated by Gray Line of

Seattle. This involved a small amount of close quarters maneuvering and driving in the MTR Western yard. Nevertheless, *despite the fact Mr. Larsh never left the MTR Western yard in Kent,* Mr, Larsh dutifully completed a brief log for this day.

5. At approximately 1:30PM on January 2, 2007, Mr Larsh presented himself for a pre-employment drug test.

6. On January 3, 2007, Mr. Larsh reported to work for further training. Once again, much of this training occurred in the MTR Western yard. However, Mr. Larsh did briefly leave the MTR Western yard to perform an "assessment" drive for an MTR Western Safety and Training Supervisor. This assessment drive was performed under the direct supervision of said Supervisor. Once again, Mr. Larsh dutifully completed a log entry for this day.

7. On January 4, 2007, MTR Western received the results of Mr. Larsh's pre-employment drug test. The results of that test were negative. In addition to receiving test results on this day, Mr. Larsh also completed some additional training including a second test drive with an MTR Western Safety and Training Supervisor. Once again, Mr. Larsh dutifully completed a log entry for this day.

8. WUTC Staff, despite the matter at issue, will admit to the fact that MTR Western is arguably the most safety-conscious charter motorcoach company the WUTC inspects in the State of Washington. MTR Western operates with an impeccable safety rating virtually devoid of previous safety violations, despite being one of largest charter motorcoach companies operating in the State of Washington. Further, the inspection that yielded the violation in question also yielded a reported "first" for the WUTC inspector who performed it – it was reported to MTR Western field staff following the inspection that this had been the first time this WUTC inspector, despite having been in the business for "30 years," had failed to find a *single defect* in any of the motorcoaches inspected. Nevertheless, in spite of the foregoing, WUTC proposes to

cite and fine MTR Western the **maximum allowable fine** for having allowed a newly-hired driver to operate an empty motorcoach for two very brief periods of time under the direct supervision of an MTR Western Safety and Training Supervisior.

9. On this matter, and in light of the fact that the purported violation occurred owing primarily due to MTR Western's unique commitment to in depth safety training (a commitment that MTR Western contends WUTC should, per its mission, support), MTR Western objects to the violation and the fine that results therefrom and hereby moves that both be dismissed for the reasons articulated herein.

II. ISSUES:

A.

WUTC asserts a violation of WAC 480-30-221 occurred, yet WAC 480-30-221 lacks its own unique language and is nothing more than a recital of 49 C.F.R. Part 382. No violation of 49 C.F.R. Part 382 occurred, given the Federal Act limits its purview to operating commercial vehicles "in commerce."

1. This matter arises as a consequence of WUTC's assertion that MTR Western violated WAC 480-30-221. In fact, WAC 480-30-221 is, by itself, entirely devoid of its own unique language relative to the matter at issue in this dispute (the pre-employment testing for controlled substances of newly-hired employees). Instead, WAC 480-30-221 relies fully and completely upon the adoption and incorporation by reference of Code of Federal Regulations Title 49, Part 382 for the purpose of incorporating language relative to such, WAC 480-30-221 stating simply that:

> *"Entire Part 382, including definition of commercial motor vehicle, is adopted and applies to Washington intrastate operations."*[1]

Accordingly, in order to ascertain whether or not a violation of WAC 480-30-221 occurred, one must refer to the language of 49 C.F.R. § 382.

---

[1] See published and subsequently adopted text of WAC 480-30-221

2. In support of the issuance of its violation and the assessment of its penalty, WUTC states as follows:

"During my carrier review, I found the following driver had operated a vehicle, although the company had not yet received a negative controlled substance test result before allowing him to drive:

Dustin M. Larsh

He was hired on January 2, 2007. Trip dates noted on daily logs indicate that he drove on January 2, 3 and 4, 2007. The date of his negative pre-employment controlled substance test result verification is January 4, 2007."[2]

In further support of the issuance of its violation and the assessment of its penalty, WUTC additionally states:

*"**Any type of driving**, whether supervised or unsupervised, is a safety sensitive function. Code of Federal Regulations Title 49, Part 382.301(a), requires that, prior to performing a safety sensitive function for the first time, a driver must undergo testing for controlled substances. The presence of a safety and training manager does not invalidate or excuse the violation (emphasis added)."*[3]

3. MTR Western asserts that WAC 480-30-221 is, in the best case, unreasonably confusing. In the worst case, WAC 480-30-221 is uninterpretable (and, as such, unenforceable). WAC 480-30-221 reads as nothing more than the adoption and incorporation of Code of Federal Regulations Title 49, Part 382. 49 C.F.R. § 382 is therein adopted and incorporated in its entirety without specifying a single interlineation, edit, or amendment. Rather than draft its own legislation targeted toward intrastate operations, Washington State lawmakers instead simply adopted a Federal Act and lazily directed that it shall "apply" to Washington intrastate operations. Problem is, *the adopted Federal Act was*

---

[2] Declaration of Leon Macomber dated June 6, 2007
[3] Declaration of Leon Macomber dated June 6, 2007

written with specific intent to exempt intrastate operations. Lacking the interlineations, edits and amendments that would be necessary to amend the Federal Act so that it can be reasonably interpreted as a State Act directed toward intrastate activity , the result is a circular reference that contradicts itself and that specifically exempts itself from regulating the issues it is supposed to address.

4. Citing an obvious example of such a conflict, Code of Federal Regulations Title 49, Part 382, states in its opening Paragraph as follows:

> *"Sec. 382.103 Applicability. This Part applies to every person and to all employers of such persons who operate a commercial motor vehicle* ***in commerce*** *in any State (emphasis added)."*

5. With respect to the definition of "commerce," the parent Federal legislation goes on to state:

> *"Sec 382.107 Definitions. Commerce means any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place* ***outside of such State****, including a place outside of the United States (emphasis added)."*

6. Did Washington lawmakers intend to correct this conflict? If so, how? Strangely, WAC 480-30-221 specifically states that the definition of commercial motor vehicle "*is adopted and applies to Washington intrastate operations.*" Yet WAC 480-30-221 is otherwise silent with respect to the remaining definitions contained in the parent Federal Act (such as, for example, the definition of "commerce"), definitions which need to be clarified so as to avoid a nonsensical result. Did Washington lawmakers intend to adopt these definitions as written in the Federal Act or did they intend that they be modified in some form? If the intent was to adopt modified definitions (including a modified definition of "commerce"), the manner in which these definitions are supposed to be

modified for the purposes of interpreting the Washington Act is unclear and in no way specified.

7. We return to the language contained in Paragraph 3 of this Section above. WUTC states, as it argues to justify its claim that MTR Western violated WAC 480-30-221 that *"any type of driving"* is a safety sensitive function covered under the provisions of Code of Federal Regulations Title 49, Part 382. With all due respect to WUTC, this statement is simply not correct. In fact, the referenced Federal Act "*applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce.*" Given "commerce" is defined in the Federal Act as "*any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States,*" a correct read of the Federal Act would be that any type of *interstate* driving is considered a safety sensitive function covered under the provisions of Code of Federal Regulations, Title 49, Part 382. This is a critical distinction: **given the manner in which the Federal Act is written, a motorcarrier such as MTR Western can undertake local, intrastate training of a newly-hired driver prior to the receipt of test result verification absent purview of the Federal Act.** So long as the driver in question does not cross a state line, he is deemed to not be operating *in commerce* per the definition contained in the Federal Act and, thus, is deemed to be exempt from the Federal Act.

8. So what should a motorcarrier be reasonably expected to make of a State Act that is nothing more than the blanket adoption of a Federal Act? To the extent an action is allowed under the parent Federal Act, is it reasonable for a motorcarrier to conclude it is also allowed under the State Act? To the extent the intent of Washington State lawmakers was to specifically *disallow* in the State Act an action that is otherwise allowed in the Federal Act it copied, would it be reasonable to expect the adopting lawmakers to specifically articulate such? These questions cut to the heart of this dispute

and form the good faith basis under which MTR Western reasonably believed non-revenue safety and training drives, undertaken in empty motorcoaches prior to the receipt of test result verification, were exempt so long as the driver in question was not operating ***in commerce.***

9. In Paragraph #14 of the Declaration of Leon Macomber, filed by WUTC in support of the violation and the penalty, the Staff Recommendation reads:

> *"The evidence establishes that the violation of 49 C.F.R. § 382.301(a) occurred and that MTR Western does not meet the requirements of the exception to the rule."*

In fact, the evidence outlined above establishes precisely the contrary – no violation of 49 C.F.R. §382.301(a) occurred given 49 C.F.R. itself, at its core, is applicable only to persons who operate a commercial vehicle ***in commerce***. To the extent WUTC meant to assert, rather, that it believes a violation of WAC 480-30-221 occurred, it fails to articulate such and, further, fails to adequately articulate how and where WAC 480-30-221 differs in its language sufficiently from 49 C.F.R. such as to render it more restrictive than its parent Federal legislation.

B.

WUTC's proposed assessment of the maximum allowable fine for a first time violation incurred by an operator otherwise uniquely committed to the furtherance of safety related issues is bad public policy.

1. By assessing MTR Western the maximum allowable fine, WUTC asserts that all perceived violations of WAC 480-30-221 are equal. A carrier that sends a newly hired driver out over the road on an all night charter with a motorcoach full of school aged children prior to receiving a negative drug test result is treated the same as a carrier who diligently seeks to briefly train a driver in an empty motorcoach with a Safety and Training Manager present and, in the process, innocently runs afoul of WUTC's

interpretation of a flawed act. The first example is an intentional, blatant violation that jeopardizes the lives of countless people by placing an untested driver at the wheel of a motorcoach for an extended period of time absent observation and supervision. The other is an innocent misunderstanding. To treat both of these instances with equal gravity runs contrary to common sense and is, at its core, bad public policy

II. REQUEST FOR RELIEF

WHEREFORE, in view of the foregoing, MTR Western respectfully requests as follows:

1. Void the citation issued by WUTC on April 24, 2007.
2. Set aside the penalty of $500 arising therefrom.
3. Immediately correct any and all reports filed with each and every State and Federal agency or quasi-governmental agency regarding the Safety Record of MTR Western.

Respectfully submitted,

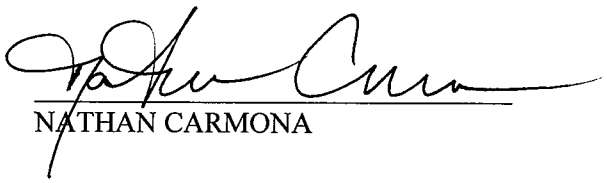
F. Darren Berg
Owner, General Counsel and C.E.O.
Meridian Transportation Resources, LLC
1501 Fourth Avenue, Suite 1900
Seattle, WA 98101
(206) 621-9301
(206) 621-9750 (fax)

Docket No. TE-070767

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached Motion to Void Violation of WAC 480-30-221 and to Dismiss Penalty in the Amount of $500 upon the persons and entities listed on the Service List below by depositing a copy of said document in the United States mail, addressed as shown on the said Service List, with first class postage prepaid.

DATED at Seattle, Washington this 15th day of June, 2007



NATHAN CARMONA

Jennifer Cameron-Rulkowski
Attorney General of Washington
Utilities and Transportation Division
1400 S. Evergreen Park Drive SW
P.O. Box 40128
Olympia, WA 98504-0128