

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

<p>In the Matter of the Investigation of PUGET EXPRESS, LLC For Compliance with WAC 480-30-221</p>	<p>DOCKET TE-170951 <i>(Consolidated)</i> ORDER 01</p>
<p>In the Matter of the Penalty Assessment Against PUGET EXPRESS, LLC In the amount of \$8,300</p>	<p>DOCKET TE-170950 <i>(Consolidated)</i> ORDER 01 ORDER OF CONSOLIDATION; ORDER CANCELLING CERTIFICATE; ORDER IMPOSING, DISMISSING, AND SUSPENDING PENALTIES</p>

BACKGROUND

- 1 On September 13, 2017, the Washington Utilities and Transportation Commission (Commission) issued a Notice of Intent to Cancel Certificate as a Charter and Excursion Carrier; Notice of Brief Adjudicative Proceeding; Setting Time for Oral Statements In the Matter of the Investigation of Puget Express, LLC (Puget Express or Company) For Compliance with WAC 480-30-221 in Docket TE-170951 (Notice of Intent to Cancel). The Notice of Intent to Cancel set the Brief Adjudicative Proceeding for October 18, 2017, at 9:30 a.m.
- 2 Also on September 13, 2017, the Commission assessed a penalty of \$8,300 (Penalty Assessment) in Docket TE-170950 against Puget Express for 83 acute and critical violations of Washington Administrative Code (WAC) 480-30-221, which adopts by reference 49 Code of Federal Regulations (C.F.R.) Part 382 related to pre-employment controlled substance and alcohol use testing; 49 C.F.R. Part 383 related to commercial driver licensing requirements; 49 C.F.R. Part 387 related to required minimum levels of financial responsibility; 49 C.F.R. Part 390 related to general motor carrier safety regulations; 49 C.F.R. Part 391 related to driver qualifications; 49 C.F.R. Part 395 related

to driver hours of service; and 49 C.F.R. Part 396 related to vehicle inspection, repair, and maintenance.¹

- 3 On October 18, 2017, the Commission convened a brief adjudicative proceeding before Administrative Law Judge Rayne Pearson. The parties agreed that the Commission should address the Penalty Assessment in Docket TE-170950 concurrently with the Notice of Intent to Cancel in Docket TE-170951. Accordingly, the Commission consolidated Dockets TE-170950 and TE-170951.
- 4 Commission staff (Staff) presented testimony from Jason Sharp, special investigator. Mr. Sharp provided documentation about the acute and critical safety violations that resulted in Staff's proposed unsatisfactory safety rating for Puget Express. Following an August 2017 compliance review, Staff documented one violation of 49 C.F.R. Part 382.115(a), which requires carriers to implement an alcohol and controlled substances testing program on the date the employer begins commercial motor vehicle operations. At the time of the compliance review, the Company did not have an alcohol and drug testing program in place.
- 5 Staff also documented 37 violations of 49 C.F.R. Part 383.37(a), which prohibits carriers from allowing, permitting, or authorizing a driver to operate a commercial motor vehicle during any period during which the driver does not have a current commercial driver's license or proper endorsements. During the six months preceding the compliance review, employee Michael Kidane operated the Company's vehicle on 37 occasions without the required passenger endorsement.
- 6 Next, Staff documented 17 violations of 49 C.F.R. Part 387.31(a), which requires carriers to have in effect minimum levels of insurance coverage. Puget Express operated without the required minimum levels of insurance on 17 occasions between January and April 2017.
- 7 Staff further documented one violation of 49 C.F.R. Part 390.35, which prohibits carriers from making or causing to make fraudulent or intentionally false statements or record entries. Staff alleges that Puget Express provided a falsified insurance document to Staff on June 13, 2017.

¹ WAC 480-30-221 adopts by reference sections of Title 49 C.F.R. Accordingly, Commission safety regulations with parallel federal provisions are hereinafter referenced by the applicable part of 49 C.F.R.

- 8 Staff also documented one violation of 49 C.F.R. Part 391.51(a), which requires carriers to maintain driver qualification files for each driver employed. Puget Express did not maintain a driver qualification file for Mr. Kidane.
- 9 Staff next documented 11 violations of 49 C.F.R. Part 395.8(a), which requires drivers to make a record of duty status. Mr. Kidane drove on 11 occasions in May 2017 without making a record of duty status.
- 10 Finally, Staff documented one violation of 49 C.F.R. Part 396.3(b), which requires carriers to keep minimum records of vehicle inspection and maintenance. At the time of the inspection, Puget Express did not maintain a vehicle inspection and maintenance file for its 30-passenger bus.
- 11 Puget Express presented testimony from Isaiah Fikre, Company owner, who acknowledged the violations but requested the penalty be mitigated. Mr. Fikre explained that the violations were unintentional, and the Company has since made changes to its operations to ensure compliance. As of the morning of the hearing, Puget Express had not yet submitted a proposed safety management plan. Judge Pearson issued bench requests requiring the Company to file a proposed safety management plan no later than Friday, October 20, 2017, at 5 p.m., and requiring Staff to file its response and recommendation no later than Wednesday, October 25, 2017, at 12 p.m.
- 12 On October 25, 2017, Staff filed its response to the Company's request for mitigation and proposed safety management plan. Staff concludes that the proposed safety management plan is deficient in five of the six areas in which corrective action is required. Accordingly, Staff recommends the Commission cancel the Company's charter and excursion carrier certificate effective October 27, 2017.
- 13 With respect to the penalty assessed in Docket TE-170950, Staff recommends the Commission assess a reduced penalty of \$6,300. Staff further recommends the Commission suspend a \$3,300 portion of the penalty for a period of two years, and then waive it, subject to the conditions that 1) the Company ceases and desists operating as a charter and excursion carrier, including advertising charter and excursion carrier services, unless and until the Company's certificate is reinstated or the Company obtains a new certificate, and 2) the Company pays the \$3,000 portion of the penalty that is not suspended.
- 14 Jeff Roberson, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Isaiah Fikre, Owner, SeaTac, Washington, represents Puget Express.

DISCUSSION AND DECISION

1. Docket TE-170951 – Charter and Excursion Carrier Certificate

- 15 Washington law requires charter and excursion carriers to comply with federal safety requirements and undergo routine safety inspections. Staff’s August 2017 compliance review of Puget Express found 83 violations of acute and critical regulations, which resulted in a proposed unsatisfactory safety rating. Violations are considered “acute” when non-compliance is so severe that immediate corrective action is required regardless of the overall safety posture of the company. Violations classified as “critical” are indicative of 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.
- 16 Puget Express received notice of its proposed unsatisfactory safety rating on September 12, 2017. Carriers that receive proposed unsatisfactory safety ratings have 45 days to request and receive a change to the proposed rating. Puget Express’s deadline for requesting and receiving an upgrade to its safety rating is October 27, 2017.²
- 17 On October 20, 2017, the Company submitted its proposed safety management plan and requested the Commission upgrade its safety rating. On October 25, 2017, Staff filed its response to the Company’s proposed safety management plan, which provided an evaluation of the Company’s plan and concluded it was deficient in five of the six areas addressed in Staff’s investigation. Specifically, Staff concluded that the Company’s proposed safety management plan:
- Failed to address whether the Company’s drivers have submitted to pre-employment controlled substance tests or enrolled in a random drug and alcohol testing pool. The plan also failed to include an alcohol and controlled substances policy, educational materials for drivers, or require a certificate of policy be maintained for each driver enrolled in the program.
 - Failed to describe systems put in place to address deficiencies in driver qualification files, including driver road tests, entry level driver training certificates, or procedures for an annual review of employee driving records.
 - Failed to designate an employee responsible for reviewing time cards or establish a frequency for review. The plan also failed to address record retention requirements.

² The 45-day deadline is October 28, 2017, which is a Saturday. Accordingly, the Company would have to submit, and Staff would have to approve, a proposed safety management plan no later than close of business on Friday, October 27, 2017.

- Failed to address emergency exit and pushout window testing, as required.
- Failed to include policies and procedures to ensure Driver Vehicle Inspection Reports are completed.

18 Based on the testimony and evidence presented at the hearing and in response to the administrative law judge’s Bench Requests, the Commission finds that the Company failed to take corrective action to address the violations within the 45-day time period provided by federal law. Accordingly, the Commission finds good cause to cancel the Company’s charter and excursion carrier certificate effective October 27, 2017. The Company must cease and desist all operations, including advertising and offering its services, unless and until the Company’s certificate is reinstated or the Company applies for and obtains a new certificate from the Commission.

2. Docket TE-170950 – Penalty Assessment

19 Violations discovered during safety inspections are subject to penalties of \$100 per violation.³ In some cases, Commission requirements are so fundamental to safe operations that the Commission will issue penalties for first-time violations.⁴ Violations classified as “acute” or “critical” meet this standard.⁵

20 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.⁶ The Penalty Assessment cited 83 acute and critical violations in seven categories. We address each category in turn.

49 C.F.R. Part 382.115(a)

21 **Discussion.** The Penalty Assessment includes a \$1,500 penalty for one violation of 49 C.F.R. Part 382.115(a) because Puget Express did not have an alcohol or controlled substances testing program in place at the time of Staff’s inspection. Mr. Fikre testified

³ See RCW 80.04.405.

⁴ Docket A-120061, Enforcement Policy for the Washington Utilities and Transportation Commission ¶12 (Jan. 7, 2013) (Enforcement Policy).

⁵ 49 C.F.R. § 385, Appendix B.

⁶ Enforcement Policy ¶19.

that he has contacted several companies and intends to enroll in a consortium. Staff noted that this is a repeat violation from a previous inspection in 2012.

22 **Decision.** The Commission assessed a \$1,500 penalty for this repeat violation because controlled substance and alcohol use testing 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 is a repeat violation of a requirement that is critical to safe operations, we decline to mitigate this portion of the penalty.

49 C.F.R. Part 383.37(a)

23 **Discussion.** The Penalty Assessment also includes a \$3,700 penalty for 37 violations of 49 C.F.R. Part 383.37(a) because Puget Express allowed Mr. Kidane to operate commercial vehicles with passengers on 37 occasions without a passenger endorsement on his commercial driver's license. Mr. Fikre testified that he was not aware that passenger endorsements were required to transport passengers.

24 **Decision.** We decline to mitigate this portion of the penalty. The Company neither introduced any new information at hearing that would warrant mitigation, nor demonstrated that it has implemented policies or procedures to prevent these violations from reoccurring.

49 C.F.R. Part 387.31(a)

25 **Discussion.** The Penalty Assessment also includes a \$1,700 penalty for 17 violations of 49 C.F.R. Part 387.31(a) because Puget Express operated without the required minimum levels of insurance on 17 occasions between January and April 2017. Mr. Fikre testified that he was unaware the Company did not maintain required minimum levels of coverage until he was informed by his insurance provider, and explained that this violation has since been corrected.

26 **Decision.** We decline to mitigate this portion of the penalty because the Company failed to introduce any new information that would warrant a reduction of the penalty. It is the Company's responsibility to ensure it maintains adequate levels of coverage. Mr. Fikre's explanation that he was unaware of this requirement is not an acceptable basis for mitigation.

49 C.F.R. Part 390.35

27 **Discussion.** The Penalty Assessment also includes a \$100 penalty for one violation of 49 C.F.R. Part 390.35 because Puget Express provided an invalid certificate of insurance to Staff on June 13, 2017. At the hearing, Mr. Fikre explained that he provided an incorrect document during Staff’s review, and has since submitted proof that he was properly insured during the review period.

28 **Decision.** We dismiss this portion of the penalty. The relevant portion of 49 C.F.R. Part 390.35 provides that no motor carrier shall make or cause to make a “fraudulent or intentionally false entry on any application, certificate, report, or record required to be used, completed, or retained to comply with any requirement of this subchapter” By definition, fraudulent actions are intentionally misleading.⁷ Mr. Fikre credibly testified that he unintentionally provided Staff with an invalid certificate, but was, in fact, insured during the review period, albeit at an insufficient level of coverage. Staff acknowledged that Puget Express was insured during the relevant time period and that the Company later provided valid proof of insurance. Accordingly, Staff failed to establish that this violation was intentional.

49 C.F.R. Part 391.51(a)

29 **Discussion.** The Penalty Assessment also includes a \$100 penalty for one repeat violation of 49 C.F.R. Part 391.51(a) because Puget Express did not maintain a driver qualification file for Mr. Kidane at the time of Staff’s review. Mr. Fikre testified that this violation occurred because he was “not doing a good job of record keeping.”

30 **Decision.** We decline to mitigate this portion of the penalty. The Penalty Assessment assessed the minimum penalty for this violation, and the Company’s explanation – that it simply failed to comply – is neither compelling nor persuasive. In addition, this is a repeat violation for which the Company previously received technical assistance.

49 C.F.R. Part 395.8(a)

31 **Discussion.** The Penalty Assessment also includes a \$1,100 penalty for 11 violations of 49 C.F.R. Part 395.8(a) because Mr. Kidane drove on 11 occasions during May 2017 without making a record of duty status as required. Mr. Fikre testified that he was

⁷ See Black’s Law Dictionary 660 (6th ed. 1990), which defines “fraud” as an “intentional perversion of truth”

unaware of this requirement, but now ensures that the Company's driver logs his start, stop, and total hours on his time card.

32 **Decision.** We decline to mitigate this portion of the penalty. The Company's proposed safety management plan failed to address retention procedures for records of duty status, and Mr. Fikre's explanation that the violation occurred due to "poor record keeping" is an unacceptable basis for mitigation.

49 C.F.R. Part 396.3(b)

33 **Discussion.** The Penalty Assessment also includes a \$100 penalty for one repeat violation of 49 C.F.R. Part 396.3(b) because Puget Express did not maintain a vehicle inspection and maintenance file for its 30-passenger bus. Mr. Fikre testified that "the vehicle doesn't move much," so he did not believe "it was that big of a deal" to keep inspection and maintenance records for his 30-passenger bus. Mr. Fikre further testified that the violation has since been corrected.

34 **Decision.** We decline to mitigate this portion of the penalty. Although the Company claims it has corrected the violation, its proposed safety management plan failed to demonstrate that it has put controls in place to prevent this violation from reoccurring. Moreover, this is a repeat violation for which the Company previously received technical assistance.

35 **Penalty.** The Company neither introduced any new information at hearing that would warrant a penalty reduction, nor submitted a satisfactory proposed safety management plan prior to the deadline. Moreover, Staff based its recommendation for a reduced penalty solely on the Company's insufficient efforts to achieve compliance. Accordingly, we decline to adopt Staff's recommendation to assess a reduced penalty.

36 We nevertheless recognize the financial hardship the \$8,200 penalty associated with these violations would likely impose on a small business. According to the Company's annual report, Puget Express operated only one vehicle and traveled less than 2,000 miles in 2016. The Company also noted in its request for mitigation and again at hearing that imposition of the entire penalty may force it to close its business. Although Puget Express has not yet successfully achieved compliance, the Company has the option to request reinstatement of its certificate within 30 days of the date of this Order if it is able to correct the deficiencies in its safety management plan. In the event the Company is able to satisfactorily revise its proposed plan within the required timeframe, the Commission does not wish to create an insurmountable financial burden that would prevent the Company from being reinstated.

37 Accordingly, we will exercise our discretion to suspend a \$5,200 portion of the \$8,200
penalty for a period of two years, and then waive it, subject to the following conditions:
1) Puget Express must either maintain a conditional safety rating or cease and desist all
charter and excursion carrier operations, 2) Puget Express may not incur any repeat
violations of WAC 480-30-221, and 3) Puget Express must pay the remaining \$3,000
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
\$3,000 portion of the penalty that is not suspended.

FINDINGS AND CONCLUSIONS

- 38 (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 charter and excursion service carriers, and has jurisdiction
over the parties and subject matter of this proceeding.
- 39 (2) Puget Express is a charter and excursion service carrier subject to Commission
regulation.
- 40 (3) Puget Express failed to cure the deficiencies that led to its unsatisfactory safety
rating within 45 days, as required. Accordingly, Puget Express's charter and
excursion carrier certificate should be cancelled.
- 41 (4) Puget Express violated 49 C.F.R. Part 382.115(a) by failing to implement an
alcohol and controlled substances testing program prior to commencing
operations.
- 42 (5) Puget Express should be penalized \$1,500 for one violation of 49 C.F.R. Part
382.115(a).
- 43 (6) Puget Express violated 49 C.F.R. 383.37(a) by using a driver who did not have a
valid passenger endorsement on his commercial driver's license on 37 occasions.
- 44 (7) Puget Express should be penalized \$3,700 for 37 violations of 49 C.F.R.
383.37(a).
- 45 (8) Puget Express violated 49 C.F.R. Part 387.31(a) by operating a motor vehicle
without required minimum levels of insurance on 17 occasions.
- 46 (9) Puget Express should be penalized \$1,700 for 17 violations of 49 C.F.R. Part
387.31(a).

- 47 (10) Puget Express did not violate 49 C.F.R. Part 390.35 when it unintentionally provided an invalid insurance policy to Staff on June 13, 2017.
- 48 (11) The \$100 assessed for one violation of 49 C.F.R. Part 390.35 should be dismissed.
- 49 (12) Puget Express violated 49 C.F.R. Part 391.51(a) by failing to maintain a driver qualification file for its employee.
- 50 (13) Puget Express should be penalized \$100 for one violation of 49 C.F.R. Part 391.51(a).
- 51 (14) Puget Express violated 49 C.F.R. Part 395.8(a) by failing to require its driver to make a record of duty status on 11 occasions.
- 52 (15) Puget Express should be penalized \$1,100 for 11 violations of 49 C.F.R. Part 395.8(a).
- 53 (16) Puget Express violated 49 C.F.R. Part 396.3(b) by failing to keep minimum records of vehicle inspection and maintenance.
- 54 (17) Puget Express should be penalized \$100 for one violation of 49 C.F.R. Part 396.3(b).
- 55 (18) The Commission should assess a penalty of \$8,200 for 82 violations of WAC 480-30-221. A \$5,200 portion of the penalty should be suspended for a period of two years, and then waived, subject to the following conditions: 1) Puget Express must either maintain a conditional safety rating or cease and desist all charter and excursion carrier operations, 2) Puget Express may not incur any repeat violations of WAC 480-30-221, and 3) Puget Express must pay the remaining \$3,000 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 \$3,000 portion of the penalty that is not suspended. If Puget Express fails to comply with any of these conditions, the entire \$5,200 suspended penalty will become immediately due and payable without further Commission order.

ORDER

THE COMMISSION ORDERS That

- 56 (1) Puget Express, LLC's charter and excursion carrier certificate CH-64310 is cancelled. Puget Express, LLC must cease and desist all operations unless and

until its certificate is reinstated or it applies for and obtains a new certificate from the Commission.

- 57 (2) The Commission assesses an \$8,200 penalty against Puget Express, LLC. The Commission suspends a \$5,200 portion of the penalty for a period of two years, and then waives it, subject to the following conditions: 1) Puget Express, LLC must either maintain a conditional safety rating or cease and desist all charter and excursion carrier operations, 2) Puget Express, LLC may not incur any repeat violations of WAC 480-30-221, and 3) Puget Express, LLC must either pay the \$3,000 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.
- 58 (3) If Puget Express, LLC fails to comply with any condition of this Order, the entire \$5,200 suspended penalty will become immediately due and payable without further Commission order.

DATED at Olympia, Washington, and effective October 27, 2017.

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 480-07-610(7) provides that any party to this proceeding has twenty-one (21) days after the entry of this Initial Order to file a *Petition for Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-610(7)(b). WAC 480-07-610(7)(c) states that any party may file a *Response* to a Petition for review within seven (7) 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.

Any Petition or Response must be electronically filed through the Commission's web portal as required by WAC 480-07-140(5). Any Petition or Response filed must also be electronically served on each party of record as required by WAC 480-07-140(1)(b).