SERVICE DATE

JAN - 7 1993

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

EVERETT AIRPORTER SERVICES ENTERPRISES, INC., Complainant, v. SAN JUAN AIRLINES, INC., d/b/a SHUTTLE EXPRESS, Respondent.	DOCKET NO. TC-910789 COMMISSION DECISION AND ORDER GRANTING ADMINISTRATIVE REVIEW; MODIFYING INITIAL ORDER; ASSESSING PENALTIES

NATURE OF PROCEEDING: This is a private complaint filed by one airporter bus service -- an auto transportation company under governing statutes -- against another such service. It alleges violation of rule, violation of a Commission order, and rates that are predatory and discriminatory. It asks application of such penalties as the Commission deems appropriate.

INITIAL ORDER: Administrative Law Judge Elmer Canfield entered an order on July 24, 1992, rejecting the complaint's allegations of discriminatory pricing and violation of rule, but finding violations of Commission order and assessing penalties totalling $2,000.

PETITION FOR REVIEW: Complainant petitions for review of the entire initial order. It alleges that it did prove the elements of the complaint rejected in the initial order, and asks substantial increases in the penalties for the violations that were found to exist.

COMMISSION: The Commission affirms the rejection of allegations regarding discriminatory pricing; the complainant failed to prove its case. The Commission modifies the initial order to increase the penalties for violation of Commission order and reverses the initial order to find a violation and assess a penalty for rebating a portion of the ticket purchase price without prior Commission approval by order.

[1]* The Commission does not grant voluntary dismissal of a proceeding as a matter of right after entry of an

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*Headnotes are provided as a service to the readers and do not constitute an official statement of the Commission. That statement is made in the order itself.

initial order, but will consider whether dismissal is consistent with the public interest.

[2] When a private complaint presents real issues, results from a real controversy, has completed all procedural stages except final order, involves issues of interest to the industry or the public, and when a request for voluntary dismissal is based only on the respondent's purchase of the complainant, the Commission will deny dismissal and will enter an order resolving the issues.

[3] A complainant challenging a carrier's rates for violation of RCW 81.28.190, prohibiting unreasonable preferences, or RCW 81.28.180, prohibiting unequal charges for similar services, has the burden of persuasion to demonstrate that a violation has occurred.

[4] A penalty under RCW 81.04.380 should equate with the seriousness of the offense, offer a disincentive to future violations, and demonstrate the magnitude of the Commission's concern about open and repeated violations.

[5] RCW 81.28.080 forbids a carrier from rebating any portion of a fare except pursuant to a Commission order. Having a commission payment form in the carrier's tariff pursuant to WAC 480-30-050(5) does not substitute for the statutory requirement.

APPEARANCES: Kirk Griffin, attorney, Seattle, represented the Complainant. Jimy Sherrell, Respondent's president, represented it. Robert E. Simpson, Assistant Attorney General, represented the Commission Staff.

MEMORANDUM

This is a private complaint by Everett Airporter Services Enterprises ("EASE") against San Juan Airlines, Inc., d/b/a Shuttle Express ("Shuttle"). Both firms offer service between portions of Snohomish counties and the Seattle-Tacoma International Airport ("Sea-Tac").

EASE' complaint alleges violations of three sorts. First, it contends that Shuttle's rates for customers in the territory also served by Ease are predatory, taking business away from it, and discriminatory, against passengers in Pierce County. Second, it alleges that Shuttle violated a Commission order and the requirements of its permit when it regularly and frequently offered service to and from locations it was forbidden to serve. Third, it alleges violations of rule in Shuttle's practice of rebating $1.00 of the cost of each ticket to bell persons or others delivering the fare to Shuttle for service.

A. Dismissal. EASE now asks that its complaint be dismissed. It explains that it is being purchased by the respondent, and contends that the purchase makes the issues of the complaint moot. It represents that it has agreement from the assistant attorney general, although it provides no written concurrence.

[1] The Commission does not allow withdrawal as a matter of right after entry of an initial order. Instead, because it is charged with regulating in the public interest, it will consider public interest factors to determine whether to grant the dismissal. It believes that the public interest requires us to deny the request for dismissal.

Here, the issues were real issues and the controversy was a real controversy. It has gone through all stages of a proceeding except entry of a final order: hearing, post-hearing memoranda, initial order, petition for administrative review and answer. It is ready for the Commission to decide.

[2] The only closure to the controversy comes from respondent's purchase of the complainant; granting the motion could encourage any respondent to eliminate a challenge by purchasing the complainant. Because the issues are real and ready for decision; because the issues are significant to the public and the regulated industry; and because failing to reach a final order could send an inappropriate signal about respondents' options in a complaint, the Commission denies the motion to dismiss the complaint.

EASE challenges the initial order's determination on each of the issues.[2]

B. Discriminatory Pricing. Shuttle Express' fares between Sea-Tac and the territory north of Seattle also served by EASE are higher than EASE' fares.[3] They are similar in total, but less per mile, than Shuttle's fares to points in Pierce County, south of Seattle. Shuttle lost a great deal of money during its first years of operation.

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[2]The parties' post-hearing briefs to the presiding officer were not filed with the Commission. The presiding officer specifically directed the respondent to serve other parties and to file a copy with the Commission, but it responded only with certification of service on the parties. The Commission must thus make its decision without the benefit of any argument or citations contained in those briefs.

[3]The statements of fact are drawn from the record and reflect circumstances as of that time.

The initial order rejected the complaint's claim of discrimination, finding that the complainant had not sustained its burden of proof to demonstrate that the pricing operated in an unfair or discriminatory manner. The Commission affirms the initial order's ruling.

The evidence demonstrates that the respondent's north of Seattle rates are less than its average operating cost per mile, and that its Pierce County rates exceed that average. That does not prove, however, that the carrier's rates are discriminatory or predatory.[4]

The Commission does not guarantee profitability nor mandate that a carrier achieve an approved operating ratio when it approves tariff rates. The Commission merely affords a carrier the opportunity to achieve profitability. Operating losses do not prove that the carrier's pricing is predatory.

The Commission requires that rates bear a demonstrable relationship with costs. It allows a carrier the opportunity, when pricing its services, to consider charges for competitive non-regulated services, volumes of service, start-up costs, and other relevant factors. Respondent's Pierce County rates were reviewed by Commission Staff on submission and were not challenged.

Respondent's Pierce County rates were based upon its anticipated and experienced costs and upon lower traffic densities. The per-passenger-mile differential between those rates and its Snohomish county rates is neither discriminatory nor predatory.

A carrier's rates can legitimately consider a number of reasonable factors, such as traffic density, operating efficiencies, and references to unregulated competition. Here, the northern territory had been served longer and respondent's service was established. Passenger traffic density to the north was

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[4]RCW 81.28.190 provides that a carrier may not give any undue or unreasonable preference or advantage to any person or to any locality or to any description of traffic, or subject any person to any undue or reasonable prejudice or disadvantage. RCW 81.28.180 prohibits a carrier from charging or receiving a greater or lesser rate from one person than from another for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances.

substantially greater than to the south of the airport.[5] Service to the southern territory began more recently and involved initial expenses. Differing rate levels based on reasonable, particularly cost-based, factors may be found permissible.

[3] The initial order correctly determines that the financial detail of record does not demonstrate that the system average per-mile costs should apply equally to the different routes for pricing purposes, or that the per-mile price differences are discriminatory, either against Pierce County passengers or against EASE.

The Commission does not take this allegation lightly. Here, however, the Commission agrees with the initial order that the complainant failed to meet its burden to demonstrate that the differences are impermissible under the statute.

C. Penalty assessments for violations. The initial order found that service to forbidden hotels or motels constituted a violation of the Commission order granting Shuttle its authority, and of the resulting permit. It found that at least twenty violations had occurred, and assessed penalties under RCW 81.04.405 at $100 per occurrence, for a total of $2,000.

Complainant contends that the penalty is inappropriate, considering the frequency and the circumstances of the violations. It urges a penalty of $500 per violation. Respondent answers that many of the alleged violations did not occur and that others are excused, but does not cite to evidence of record to support its claims.

The Commission agrees with the complainant. The initial order found that the violations occurred. Although the respondent denies some and makes excuses for others of the incidents, it is abundantly clear from the record that violations occurred and that they occurred regularly.

The Commission order's provisions were clear and were inserted because of a need to maintain diverse, economically viable service for the public. Credible testimony states that similar violations occurred both before and after the itemized violations, and that similar violations occurred regularly in other territory. There is no excuse for the frequent and flagrant violations that occurred. The carrier's management knew or had

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[5]Although the initial order was incorrect in asserting that Shuttle did not have authority to serve points in King County south of the airport, that does not affect the validity of the order.

access to knowledge about the violations, and at the very least tacitly approved improper behavior.

[4] RCW 81.04.380 allows the Commission to assess a penalty of up to $1,000 per occurrence upon a finding of violation. The penalty imposed should demonstrate the level of the Commission's concern about open and repeated violations should equate with the severeness of the violations and should offer a disincentive to future violations. In the Commission's judgment, the $100 penalty does not meet these tests.

Instead, the Commission believes that a $500 per occurrence penalty under RCW 81.04.380, totalling $10,000 for the twenty proved violations, considers the respondent's response while it demonstrates the seriousness of the violations and promotes future compliance by the respondent and others. The Commission perceives no reason why violations could have occurred under management that was firmly committed to lawful operations. This penalty will offer encouragement for management to make or to reaffirm its commitment.

D. Unlawful rebates. The complaint alleged that the respondent's practice of paying $1 for each ticket sold by certain hotel staff constitutes an unlawful rebate. The initial order disagreed; the Commission reverses.

The initial order ruled that the practice is governed by WAC 480-30-050(5),[6] and that the respondent had complied with the regulation by including its form of agreement as an element in a filed tariff. Therefore, it reasoned, the carrier complied with law and its actions were not improper. It argues that once a form is in the carrier's tariff, any payment to anyone in any amount is permissible. We reject that view.

The regulation is designed to facilitate a carrier's contract with agents such as travel agents or institutions. It is not designed to supersede the requirements of RCW 81.28.080, nor to allow payments to individuals whose jobs do not regularly include such duties. Payment is not proper to bellhops or other individuals whose regular vocations do not involve similar agencies

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[6]The regulation reads as follows:

> (5) No auto transportation company shall pay any commission to any individual, firm, association or corporation, their lessees, trustees or receivers, for the sale of any ticket or fare, or for transportation by express unless upon a contract or agreement, the form of which has previously been approved by the commission.

or services, who are not understood by the public to be engaged in such agency roles for compensation, and whose strategic locations afford them the opportunity to refer customers to certain carriers and away from others.

The record contains no proof of the carrier's tariff nor of its contents. Respondent did not submit a copy of the tariff, despite its record commitment to do so, to determine whether the tariff, if followed, would provide proper public protections. The respondent admitted that it paid rebates to bellhops and others, allegedly per the form agreement. The Commission cannot find compliance because there is no order as required by statute.

[5] RCW 81.28.080 forbids a carrier from rebating any portion of a fare except pursuant to a Commission order. The respondent does not contend that its actions were pursuant to a Commission order. Existence of a form in the tariff does not meet this statutory requirement. The carrier's actions are not protected and constitute unlawful rebates.

It is not necessary that every contract be individually approved, but it is necessary that an order be entered clearly identifying the terms of payment, the class of persons who are eligible for payment, and the other terms of the agreement. Although the form of agreement may be contained in a tariff provision, an order can call into play mechanisms for compliance when the arrangement is misused or when its terms are not followed. Neither is there an easy mechanism for enforcement, unless the commission amount is contained in or calculable from an order of approval. The statute's wisdom is clear.

There is possible confusion about the meaning of the regulation and its interface with the statute. The number of violations is not clear from the record. Therefore, the Commission will assess one penalty under RCW 81.04.405, at $100. It will mitigate that penalty to zero. The respondent is now on notice that its practice is impermissible and of steps it must take to bring its actions into compliance.

To allow its commission payments, the respondent must secure a Commission order allowing payment, before making any payments. It may not make such payments indiscriminantly or in a manner outside terms of an order granting Commission approval. The Commission may enter an order allowing payment when terms of the agreement are clear and permissible, and when the class of allowable contractee is clearly identified. Only then is there statutory compliance, and only then can the Commission undertake enforcement.

Conclusion. The Commission affirms the initial order's determination that respondent failed to demonstrate that respondent's rates are predatory or discriminatory. It affirms the initial order's determination that twenty violations occurred of the Commission's order forbidding service to specified hotels or motels. It recalculates the appropriate penalty for those violations, not subject to mitigation, at $500 per violation. It reverses the initial order's determination that a rebate of a portion of the ticket price to bellhops or others was permissible, and assesses a penalty, but mitigates the penalty for past violations to zero.

FINDINGS OF FACT

Having discussed the evidence and having stated findings and conclusions above, the Commission makes the following findings of fact. Those portions of the preceding findings pertaining to the ultimate facts are incorporated by this reference.

1. This is a formal complaint by Orville J. and Diane J. Coombs, d/b/a Everett Airporter Services Enterprises (EASE) against San Juan Airlines, Inc. d/b/a Shuttle Express. The complaint alleges that the respondent engages in predatory and discriminatory pricing in its Snohomish County service territory. The complainant also alleges specific violations of Commission Order M. V. C. No. 1918, and that the respondent improperly rebated fares to bellhops and travel agents.

2. Complainant EASE is engaged in the transportation of passengers for hire between points in north King and Snohomish Counties and the Seattle-Tacoma International (Sea-Tac) Airport. Service is conducted under certificate C-858. The complainants operate a regular route, scheduled service, although door-to-door service is authorized and offered at a higher rate. The complainants pick up and deliver passengers at hotels along the route to and from the airport. The rates in effect at the time of hearing for this service are as follows: $13 between Everett and the airport; $12 between 128th Street in Snohomish County and the airport; $11 between Lynnwood and the airport; $9 between Seattle's University District and the airport.

3. The respondent holds authority from the Commission under certificates C-975 and CH-171. Shuttle Express has authority under its charter party certificate CH-171 to provide charter party service in King, Pierce and Snohomish Counties. Under certificate C-975, Shuttle Express provides on call, door-to-door service between points in King and Snohomish Counties and the airport. Its rates for service at the time the complaint was filed were are as follows: $22 from Everett to the airport and $18 from Lynnwood to the airport. These rates were increased on March 1, 1992 to $24 and $21. In addition, the respondent recently acquired authority

to expand its service into Pierce County. Shuttle Express rates for some Pierce County territory are $21 and $24. It also has a $28 fare for service between the airport and Steilacoom, Spanaway and other territory in Pierce County south of Highway 410.

4. Shuttle Express provided financial information which shows that it has been losing money for the past several years. Its average operating cost per mile for all miles driven was $1.05 for the calendar year 1991.

5. Everett is approximately 45 miles from the airport and respondent's fare is $24. That same fare to areas in Pierce County covers a territory which is only 20 to 25 miles from the airport.

6. Commission Order M.V.C. No. 1918 restricted Shuttle Express against serving various hotels, some of which the complainant is authorized to serve. The effective date of that order is August 8, 1991 and the restriction applies to service provided under C-975.

7. On at least twenty separate occasions between August 9, 1991 and November 30, 1991, Shuttle Express either picked up or dropped off an airport passenger at a hotel named in Order M.V.C. No. 1918 as one which Shuttle Express is not allowed to provide airporter service.

8. Shuttle Express routinely pays a rebate of one dollar per fare to persons, including travel agents and bellhops who arrange to have a customer use Shuttle's service. The practice is not authorized by Commission order.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this complaint.

2. RCW 81.28.190 provides that a carrier may not give any undue or unreasonable preference or advantage to any person or to any locality or to any description of traffic, or subject any person to any undue or reasonable prejudice or disadvantage. In this case, the evidence does not establish an undue preference or prejudice. The complainant has not established that the fares are or should be based exclusively on the company's average operating lost per mile. Although an Everett passenger may travel a greater distance than a Tacoma passenger, for the same fare, the respondent may consider other elements of cost in designing its rates. Complainant has not proved a violation of RCW 81.28.190.

3. RCW 81.28.180 prohibits a carrier from charging or receiving a greater or lesser rate from one person than from another for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances. Respondent's transportation between the airport and Tacoma and between the airport and Snohomish County is performed under sufficiently differing circumstances and conditions because traffic densities and costs of operation vary substantially. The complainant did not demonstrate that respondent's rates violate RCW 81.28.100.

4. The respondent did serve hotels from which it was restricted by Order M.V.C. No. 1918 and the terms of its permit, and did so openly and repeatedly after the order was entered and served. The complainant established no fewer than 20 violations between August and November, 1991. The respondent should be assessed a penalty, pursuant to RCW 81.04.380, of $500 per violation, $10,000 total, for those violations. That penalty level recognizes the willful and repeated nature of the violations and provides a sufficient disincentive against repeat violations.

5. RCW 81.28.080 prohibits rebates except upon order of the Commission. WAC 480-30-050(3), provides that a commission may be paid on ticket sales if done pursuant to a contract or agreement, the form of which has been approved by the Commission. Although the respondent's tariff may contain a form for an agency agreement providing for compensation to a person who arranges the fare, implemented agreements including all relevant terms have not been approved by order of the Commission. Therefore, the $1 commission paid on ticket sales is not permissible. Because specific instances are not proved with sufficient precision to support individual penalties, the Commission assesses one penalty under RCW 81.04.405, totalling $100. Because the proper action may have been unclear at the time of violation, the Commission mitigates the penalty to zero for purposes of this order.

ORDER

THE COMMISSION ORDERS That the complaint is sustained, in part. The Commission finds violations in the service to establishments forbidden by Commission order, and by paying rebates without a prior Commission order approving such payments.

THE COMMISSION FURTHER ORDERS That the respondent shall pay a penalty in the amount of $10,000 for twenty violations of Commission order M.V.C. No. 1918.

THE COMMISSION ORDERS That penalty is assessed in the amount of $100 under RCW 81.04.405 for violation of RCW 81.28.080,

the payment of rebates without a prior order of the Commission. The Commission mitigates that penalty to zero.

THE COMMISSION ALSO ORDERS That the balance of the complaint is denied.

DATED at Olympia, Washington and effective this 6th day of January 1993.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHARON L. NELSON, Chairman

RICHARD D. CASAD, Commissioner

A. J. PARDINI, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).