MILLER | NASH LLP
ATTORNEYS AT LAW

Miller Nash LLP
www.millernash.com
4400 Two Union Square
601 Union Street
Seattle, WA 98101-1367
(206) 622-8484
(206) 622-7485 fax

3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204-3699
(503) 224-5858
(503) 224-0155 fax

500 E. Broadway, Suite 400
Post Office Box 694
Vancouver, WA 98666-0694
(360) 699-4771
(360) 694-6413 fax

Brooks E. Harlow
brooks.harlow@millernash.com

September 16, 2003

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
Post Office Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, Washington 98504-7250

Subject: Docket No. TC-020497 - Passenger Transportation Company Rulemaking Comments of Washington Airport Operators Association and Evergreen Trails, Inc. Re Draft Rules

Dear Ms. Washburn:

This letter is in response to the Commission notice requesting comments on draft rules issued on August 8, 2003, in the above-referenced docket. We file these comments electronically (only) in both Word and Adobe formats on behalf of the Washington Airporter Operators Association and Evergreen Trails, Inc., d/b/a Grayline (collectively "Airporters").

The Airporters appreciate the substantial amount of effort that the Commission Staff has clearly put into the draft rules. It is evident from the content of those rules that the Staff has not only spent a great deal of time on the rules, but has also made considerable efforts to address the comments of the Airporters filed in 2002. In general, the Airporters believe that the proposed rules strike a reasonable balance between protecting the public interest and ensuring that bus companies can continue to operate efficiently without excessive regulation. This is not to say that the Airporters would support all rules individually but, rather, the package appears to be a reasonable compromise in many areas. Indeed, there are a number of provisions that the Airporters strongly support. Exceptions are noted below in these comments. Additionally, the Airporters suggest clarifications and other improvements to certain sections of the draft rules.

WAC 480-XX-XX61: The Airporters suggest the provision in this section regarding records of traffic delays be discussed and clarified at the workshop. In western Washington traffic delays are so common that this could become a significant burden. Perhaps the intent can be clarified or the requirement can be dropped altogether.

WAC 480-XX-XX86: The Commission has faced budget cuts in recent years. Contested auto transportation company applications can consume significant Commission resources. The Airporters doubt that the recommended application fees in the draft rule even cover Staff review and processing of an application, let alone any hearing cost in the event an application must go to hearing. The fees in the new rules should reflect current costs and economic realities. The Airporters suggest $2,000 for new auto transportation company certificates, and $500 for auto transportation company extension applications.

WAC 480-XX-X126: This section should track the provisions of the statute, RCW 81.04.200. Specifically, applicants that either seek review of an order denying an application or who do not comply with the order (for example by engaging in unlawful operations), should not be permitted to refile the application for a period of two years from the date of the final order denying the application.

WAC 480-XX-X181: The Airporters support the increase in insurance recommended by this draft provision. The recommended insurance minimum limits of $5 million for vehicles having a capacity of more than 16 persons is reasonable. However, the Airporters recommend that vehicles with a capacity of 15 or fewer passengers should have limits of at least $3 million. Serious injury or death to even a single person could easily exceed $1.5 million. A 15 passenger van has the potential to do substantially more harm than that. In order to provide reasonable protection for the public, the minimums for 15 and fewer passenger buses should be at least $3 million.

WAC 480-XX-X196(3): An exception should be added to this subsection (3) regarding refusal of service. The Airporters suggest: "...except to the extent allowed or required by other sections of this chapter or the company's tariff,". Such an exception is necessary to prevent a conflict between this section and, for example, proposed section x366.

Under subsection (7), carriers should not be required to post "No Smoking" signs on their buses. There is, of course, a cost to posting, maintaining, and replacing signs. While the cost is minor, in the experience of the Airporters, it is simply a cost that is unnecessary. Because smoking on public conveyances is already illegal, the public has come to expect that smoking is not permitted. On rare occasions where a passenger attempts to smoke, the problem is simply solved by the driver politely advising the passenger that smoking is not permitted. More important than the cost, additional signage on the bus detracts from the appearance of the bus and may detract from other more important posting requirements, such as any safety signage that the carrier may feel is necessary or any posting requirements the Commission may adopt regarding public notices.

WAC 480-XX-X206(1)(b). The subsection should be redrafted to exclude from the destination sign requirement buses and vans with a smaller capacity than 30 persons in

addition to excluding non-regular route service. Smaller buses and vans serving the airport now use the transportation center located on the third floor of the SeaTac parking garage. Due to height restrictions in the garage, there is simply not room to include destination signs on the top of the vehicles. Other sign locations, such as in the windows, would restrict visibility and create a safety hazard.

WAC 480-XX-X221: The Commission should always take appropriate steps to stop unlawful operations first. Education can come later. Unlawful operators likely do not have adequate insurance, training, safety programs, and other important protections for the travelling public. Cessation should be the first priority. Likewise, unlawful operations, even in the first instance, are a gross misdemeanor under RCW 80.04.390. The power to pursue gross misdemeanor charges should be included in subsection (1), the same as it is included in subsections (2) and (3).

WAC 480-XX-X246: As drafted, this rule is needlessly broad and burdensome. The Airporters do not object to having their full tariffs available at offices and passenger facilities. However, the requirement to have tariffs on each vehicle should be eliminated or scaled back to just fare and schedule information. Some carriers have 20 page, more or less, tariffs. Keeping that large a document in place, intact, and up to date on a fleet of vehicles would be very difficult and costly. For example, Shuttle Express has about 100 vehicles. If it takes 5 minutes per vehicle to update pages in a tariff book, it would consume more than an 8 hour shift to comply with this rule every time there is a tariff change. Since the vehicles are on the road most of the day, it could easily take days to update the books every time there is a change.[1] Fares and schedules could be printed onto a card or single piece of paper which could be handed out to drivers, who would discard the outdated card.

WAC 480-XX-X262: Subsection (1) should be modified to read: "To implement decreases in rates or charges, including temporary or promotional fare decreases;".

WAC 480-XX-X271: The notice requirements of this draft section are unduly restrictive and unnecessarily burdensome. The Airporters do not object to the 30 day notice requirement for rate changes. However, the numerous notice requirements go beyond what is required by law and attempt to impose a "one size fits all" approach that does not fit. For example, not all carriers have internet web sites. Smaller carriers would find it technically difficult and/or expensive to establish a web site that would meet the requirements of the proposed rule. Likewise, the lengthy posting requirements set forth in subsection (3) will be difficult to place in a conspicuous place in a seven passenger van that many of the Airporters operate. There is no reason to require such postings with regard to rate decreases, as public

[1] This assumes drivers do not do their own updates. To ensure consistency and accuracy of updating tariff books this task would probably give to a single person with experience and familiarity with tariffs.

comment of protest of decreases are unlikely. The notice requirements should be more flexible. For example, subsection (2) currently requires compliance with up to four notice locations. Adequate notice could be given to carriers choosing two of the four enumerated notice locations, as most appropriate to its operations and capabilities. Likewise, the content provision of subsection (3) requires an extremely lengthy notice. The provisions seem to be drawn from the billing insert requirements for utilities. The feasibility of including a billing insert with such detail and voluminous information is much greater than the feasibility of a posting in a vehicle. If any posting is required at all on vehicles, it should be a simple notice that a fare increase is pending and the driver or web site or passenger facility contains much more detailed information.

WAC 480-XX-X296: The purpose and impact of subsection (2)(e) is unclear. Perhaps this can be explored and explained at the workshop.

WAC 480-XX-X403: The requirement to issue tickets or receipts should be only upon passenger request. This rulemaking is being undertaken pursuant to the governor's directive to state agencies to review, update, and streamline rules. The intent is to make rules more efficient where possible. This rule is counter to that intent, adding requirements and burdens that are not necessary to protect the public nor consistent with efficient provision of service. Even the airlines are rapidly eliminating paper tickets. Shuttle Express, for example, handles all of its reservations by computer and is completely ticketless. Receipts are offered to all guests, but provided only to guests that want them. Requiring paper tickets would increase labor and material costs, create additional solid waste and litter, and would not improve customer satisfaction. Moreover, the length of list of information required by this rule eliminates a great deal of flexibility in the kinds of paper and printers that could be used. It either requires very tiny print or large tickets or receipts, which are not efficient. Handing out that much information to every passenger when it is only relevant to one in a hundred or one in a thousand is wasteful. The information should be made available on request.

WAC 480-XX-X406: The provisions of this section requiring auto transportation companies to meet certain minimum liability amounts for baggage and to allow a declaration of excess value for baggage is not consistent with the statute. RCW 81.29.020 expressly permits passenger carriers to limit their liability for baggage:

> [T]he provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value,. . . shall not apply: First, to baggage carried on passenger trains, boats, motor vehicles, or aircraft, or trains, boats, motor vehicle, or aircraft carrying passengers. . . .

The statute contains no minimums on the carrier's right to limit liability. Likewise, the statute contains no provision for the Commission to modify its provision by rule. In the interest of public service and the public interest, the Airporters would not object to the provisions of subsection (1)(a) regarding minimum liabilities of $250 for adults and $100 for children; ***provided*** that the rule eliminate the mandatory provision of subsection (1)(b) that requires carriers to permit declaration of a higher value. The Airporters anticipate substantial difficulty in determining appropriate tariffs for declaring such excess value and justifying such tariffs to the Commission. Minimal surcharges for excess value might not recover the cost of preparing and procuring approval of a tariff, let alone the cost of a substantial loss. Higher tariffs would be difficult to justify, given the extremely low frequency of loss of baggage.

In essence, the carriers are being asked to establish something akin to an insurance policy. The carriers do not have sufficient experience or expertise to accurately establish such insurance "premiums."

Assuming the liability minimums of $250 and $100 are retained in the rule, the rule should be clarified to reflect that the minimums are the lesser of actual fair market value or loss due to damage or the stated amounts. As drafted, the rule could be misinterpreted by a passenger to require payment of the minimums, even if the actual value of the lost baggage were substantially less.

WAC 480-XX-X347: The Airporters applaud the Commission's commitment to promotional fares and tariffs. However, they see certain practical problems with implementation of the requirement for a "cost of service study." Rather than file extensive comments on this issue, the Airporters believe that the stakeholders' workshop would be a good opportunity to gain a better understanding of the intent of this requirement and to resolve their issues and concerns. The Airporters find it difficult to conceive of any incremental costs involved with promotional fares, at least in the short term. The only incremental cost could be commissions to drivers, which would apply only if the promotion were at a rate above zero. Since commissions are usually a percentage of the fare, cost coverage would not be an issue. The Airporters certainly do not believe a **long** run incremental cost study should be required for a promotional fare. By their nature, promotional fares are temporary. Therefore, carriers will not incur the cost of such promotional fare in the long run. Fares are geared to filling empty seats and are offered at a time when the carrier is operating under its capacity.

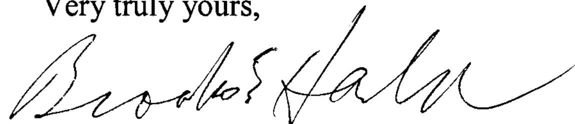
Finally, the Airporters do object to a requirement that fares "provide a contribution to fix costs." This requirement would appear to preclude free transportation on a promotional basis, which can be a very valuable way for carriers to attract new riders to the service. The contribution to fix costs need not be provided not by the promotional carriage, but rather will be covered by the increased traffic that is carried at the regular fares.

WAC 480-XX-[NONE]: The Airporters biggest disappointment in the draft rules is regarding regulation of rates. While the Airporters appreciate that some of there suggestions, like promotional fares, were addressed, the draft rules fall far short of what is needed to restore and maintain the financial health of the industry. Greater flexibility and at least the potential for higher earnings is what is needed.

Additionally, the Commission has missed the opportunity to finally put into writing the unwritten rules it has applied to rates for many years to bring those rules into compliance with the Administrative Procedure Act ("APA"). RCW 34.05.010(16) states that, a "'Rule' means any agency order, directive, or regulation of general applicability . . . (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law...." The Commission has long applied as a regulation a 93% operating ratio for all transportation companies in establishing rates. The Commission also has a generally applicable policy regarding rates relating to "fuel surcharges." These unwritten rules are of general applicability and establish a requirement relating to the enjoyment of the privileges conferred by law, i.e. operating as certificated auto transportation companies. Accordingly, the regulations are "rules" within the meaning of the APA. As such, they must be formally adopted and justified in accordance with the requirements of the APA, RCW 34.05.320, et seq.

In the interest of expediency, the Airporters have abided by the unwritten rules. However, this opportunity when rules are being substantially revised and extended should not be missed to formally and carefully consider how rates are set. In particular, the Airporters believe that the general rule regarding rates needs to be updated and a lower operating ratio is necessary to maintain the health of the industry and ensure public safety. Additionally, rule regarding fuel surcharge rates could be improved if subjected to the rigors and protections of the rulemaking process.

Very truly yours,



Brooks E. Harlow