

September 08, 2005

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 Shuttle Express, Inc. Re Draft Rules

Dear Ms. Washburn:

This letter is in response to the Commission notice requesting comments on draft rules issued on August 15, 2005, in the above-referenced docket. We file these comments electronically (only) in Word format on behalf of Shuttle Express Inc.

Shuttle Express recognizes the substantial effort the Commission Staff has put into the draft rules, and appreciates the time Commission Staff and Commissioners have spent discussing Shuttle Express concerns. We would first like to address two WAC's addressing Owner Operators followed by comments on other WAC's.

Our first comment relates to using drivers to provide services who may be characterized as independent contractors, rather than employees of Shuttle Express. However, Shuttle Express cannot support adoption of the proposed rules in their present form, and in particular proposed WAC 480-30-213 which requires that vehicles operated by a passenger transportation company must be owned or leased to the certificate holder and that the driver must be the certificate holder or an employee of the certificate holder. We also object to proposed sections of WAC 480-30-236 Leasing Vehicles, to the extent that they require that the company has complete possession, control and use of the motor vehicle at all times during the time of the lease; and that the driver is on the company's payroll during the lease.

Shuttle Express believes that adoption of these rules would not be in the public interest, and are not required under Chapter 81.68 RCW. Shuttle Express has informally proposed use of independent contractor agreements with drivers to provide services for Shuttle Express, while Shuttle Express maintains full responsibility for operations under its certificate. We believe that our proposal, with further explanation and understanding of the economic and legal issues, is fully consistent with the Commission's current rules and 81.68 RCW. Shuttle Express was considering filing a petition for declaratory ruling to that effect when the proposed draft rules were issued. If adopted, the proposed rules would preempt a declaratory ruling favorable to Shuttle Express.

Therefore, we ask that the Commission suspend consideration of any rules that would preclude use of drivers who are not characterized as direct employees of Shuttle Express, to allow us to file our petition.

We recognize that current rules could be amended to provide more definitive guidance as to how services may be provided by a certificate holder. As an alternative, or in addition to filing a petition, we would welcome the opportunity to work with Staff to amend the proposed rules to further define the circumstances under which independent contractor drivers may be used to provide services, including Commission approval of independent contractor and lease agreements, if necessary.

We appreciate the observation of Commission Staff that the terms owner-operators, independent contractors and subcontracting are sometimes misunderstood. Therefore, we think it useful to further explain Shuttle Express objectives, and why they are consistent with the WUTC statute and rules. In our proposal, we use the term independent contractor to define the contractual relationship. Those independent contractors are also referred to as owner-operators because they lease vehicles. We are not aware of anything in either 81.68 RCW or WAC 480-30 that either prohibits use of independent contractors, or requires drivers to be employees of Shuttle Express, as long as WUTC regulations applicable to their activities are met.

The only reference to the actual operator of a vehicle in the current rules is “driver.” There is no guidance as to how that person is employed to provide services under the company’s certificate. There is no prohibition on “hiring out driving,” anymore than there is for hiring out maintenance, marketing, or other functions necessary to support operations. Shuttle Express remains the operator as to the public.

The notice to file comments includes the statement that “Subcontracts with anyone that does not hold an auto transportation company certificate are not allowed under the provisions of Chapter 81.68 RCW.” We do not believe that the proposed independent contractor agreement is a “subcontract” within the meaning of that statement. Shuttle Express is the owner and operator providing transportation services to the public. The drivers provide equipment and services to Shuttle Express, not to the public. Shuttle Express would maintain the same responsibility under its certificate, and drivers would be subject to the same operational standards, monitored and enforced by Shuttle Express whether they are employees or independent contractors.

We think there are two basic public policy issues at stake. The public’s interest is in: (1) having transportation needs for shuttle services met by having an adequate number of drivers and vehicles; and (2) having assurance that those services are safe and well regulated. The first objective is increasingly difficult to meet within the present structure under which all drivers are employees of Shuttle Express. Shuttle Express financial data and recent experience with an overtime lawsuit show that Shuttle Express has difficulty maintaining desired service levels on a profitable basis if drivers are employees of Shuttle Express. A rate increase is not the answer, and not in the best interests of the traveling public if there is a better alternative. Allowing drivers to operate as independent owner-operators will reduce overall operational expenses, and increase the number of drivers and vehicles available to serve the public. This can be done without reducing either the quality of service, or changing regulations applicable to vehicles, drivers and consumer purchase of their services.

(2) This second objective, protection of the public, can be effectively accommodated by requiring that all drivers are contractually bound by the same regulatory, insurance and other requirements that apply if they are directly employed by Shuttle Express. As a legal or contractual matter, it makes no difference whether the relationship is one under an employment contract or an independent contractor agreement, if the performance requirements are the same and Shuttle Express is the company operating under the certificate. The same standards with respect to maintenance and repair will apply to vehicles used in Shuttle Express operations. Instead of the current relationship where Shuttle Express employees use vehicles owned by Shuttle Express; the same drivers, as independent contractors, will lease vehicles from Express Leasing, Shuttle Express's wholly owned leasing subsidiary. Further, neither the proposed independent contractor agreement nor vehicle lease agreement will do anything to relieve Shuttle Express of any aspect of its responsibility to the public under all applicable WUTC, Port of Seattle and insurance requirements.

From an operational perspective, operations, and control of performance, will remain essentially the same under the proposed contract arrangement with drivers. Scheduling, dispatch and Shuttle Express responsibility to consumers will remain the same whether drivers are employees or independent contractors. Shuttle Express will continue to receive reservations, develop routes and assign available drivers to trip lines to determine the number to provide services needed. There will be no difference from the present practice of calling employees and asking if they are available to cover a route, and asking owner-operators if they are available to meet the service requirements.

We understand that the Commission Staff will want to consider the overall economic relationship between drivers and Shuttle Express in determining whether a permit is required and who has the permit. We are working with our drivers' committee on the details of revenue sharing and allocation of expenses, which will be further defined in attachments to the owner-operator agreement. The financial arrangements will not result in the shift of substantial economic risk from Shuttle Express to the drivers. For example, owner-operators will be charged a fixed rate per mile for maintenance and repairs, which is covered by revenue from miles driven. Lease payments are also on a per mile basis, with a 30 day or less cancellation provision, resulting in no significant financial exposure for non-use of the vehicle. Fuel is charged at actual cost, with approved fuel surcharges passed through to the drivers. These and other factors, along with Shuttle Express's retention of operational responsibility to the public, are intended to avoid any legal or policy reason to require individual drivers to have certificates.

We look forward to the Commission's response to our request that WAC 480-30-213 and 480-30-236 not be adopted as proposed. We would appreciate the opportunity to work with the Commission and Staff to resolve these issues, either through rule making or a declaratory ruling proceeding, in a manner which allows Shuttle Express to continue its long tradition of serving the public in a manner that is consistent with WUTC policy.

WAC 480-30-081 (1) (b) "Twenty cents for each.....,natural gas...." Carriers are charged fifteen cents, five cents more for using natural gas for each 100 vehicle miles. This flies in the face of promoting the Clean Air Act. Our recommendation is to give an incentive for clean air of five cents. Thus, the mileage fee would be "Ten cents per 100 vehicle miles...."

WAC 480-30-216 (7) (b) While we are in favor of Non-Smoking, the requirement of “must post signs” is not necessary. Signs are signs, and are mostly not read nor heeded. It is the drivers responsibility to ensure compliance with no smoking. It has been our experience that a sign is not needed, and only clutters the vehicle interior and reduces the impact of more important informational signage. We suggest changing “must post” to “may post”.

Part 7 Tariffs, Time Schedules..... We commend the staff in addressing tariff allowances and flexibility. This proposed change will definitely be to the benefit of the public.

WAC 480-30-356 (3) (d) (iii) “not eligible for refund” There are times when customers are entitled to a refund depending upon the circumstances. It must be at the discretion of a company to evaluate these circumstances and act in the best judgment of the public. A hard and fast rule will not allow the public to get a fair shake. Thus, we suggest language “may be eligible for a refund”.

Rates and Rate Methodology. We would like to be involved in the process when the Commission proceeds with a separate proceeding on this issue.

Thank you for this opportunity to comment.

Sincerely,

Jimmy M. Sherrell
President