BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. SHUTTLE EXPRESS, INC., Respondent.	DOCKET TC-120323

POST HEARING BRIEF OF SHUTTLE EXPRESS, INC.

Brooks E. Harlow
Lukas, Nace, Gutierrez & Sachs, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8680

Counsel for Shuttle Express, Inc.

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INTRODUCTION

1 As the President of respondent Shuttle Express, Inc. ("Shuttle Express") noted at the conclusion of the hearing, from the company's outset and for many years, "the Commission didn't know what they wanted to do with us or … how we operate."[1] The regulation of Shuttle Express—an airport shuttle "share ride door-to-door" service under laws and rules originating in the first half of the last century to regulate traditional bus companies is a classic case of trying to fit a square peg in a round hole. Certainly enlightened and reasonably flexible regulation can provide public interest benefits. But unduly rigid regulation has the capacity to regulate an entire line of business completely out of existence. That is what is at stake in this case.

2 Share ride door-to-door service is extremely popular. Shuttle Express is now the largest "bus" company the Commission regulates. Exh. BY-1 at 24. Staff was not aware of a single complaint against Shuttle Express. TR at 31. But it is also extremely difficult to provide on a sustainable basis. The spread between the costs of a door-to-door service and the competing rates of taxis is narrow. *See* TR at 103. And airline passengers have a number of other options

[1] TR (transcript) at 147.

for ground transportation to and from the airport, such as taxi, limousine, or private car. The challenges of operating a complex share ride service are compounded by the time sensitivity of airline passengers. Being late for a pick up means a missed flight. TR at 48. Being late for the return risks the passenger walking across the driveway to take a taxi or rent a car. TR at 103.

3 Shuttle Express cannot maintain the necessary volumes to operate profitably except by keeping its service quality and timeliness at the highest possible levels, and its costs at the lowest possible levels. The Staff's complaint threatens both of these critical requirements. Granting the Staff's complaint in whole or in part would threaten the very existence of share ride door-to-door service to Sea-Tac. TR at 154. Regulating such a valuable service out of existence in this way would not serve the public interest. To the contrary, it would mean, as the ALJ put it, "we are failing as a Commission." TR at 155.

4 For the reasons discussed herein, the Staff did not prove that Shuttle Express has violated any of the Commission's rules or orders and therefore no penalty should be assessed. Nor is there a need to pursue alternative courses of action relating to future compliance. However, should the Commission disagree, the ALJ's request to address options for resolving issues under WAC 480-30-213(2) going forward is discussed beginning at paragraph 52, below. Additionally, as discussed, there should still be no penalty assessment, since the actions at issue were undertaken in good faith and provided a great net benefit to the overall public interest. Issuing a cease and desist or imposing a substantial penalty would harm the public interest by degrading service, raising costs, and threatening the very viability of a very popular share ride service as a sustainable public service business.

DISCUSSION

I. The Staff Failed to Demonstrate That the Shuttle Express "Rescue" Program Violated Any Applicable Law or Commission Rule or Order.

5 As the Complainant, seeking to impose substantial penalties against Shuttle Express, the Staff bears the burden of proof in this case. *See, e.g.*, TR at 18. The Staff failed to meet its burden on all four of its causes of action, as discussed below.

A. Shuttle Express did not violate WAC 480-30-213(2) (drivers).

1. The independent contractors operated their limousines on rescue trips.

6 The Staff alleged in its First Cause of Action that, "Shuttle Express violated WAC 480-30-213(2) by using independent contractor drivers to provide multi-stop service along its regulated routes …." The rule cited states: "The driver of a vehicle operated by a passenger transportation company must be the certificate holder or an employee of the certificate holder." (Emphasis added.) Thus, to prove a violation of this rule, the Staff must show two things: 1) a vehicle was "***operated***" by Shuttle Express; ***and*** 2) the driver of said vehicle was not a Shuttle Express employee. Staff failed to prove that any of the 5,715 operations were **operated by** Shuttle Express. If anything, Staff conclusively proved otherwise.

7 The Staff's case repeatedly ignored the key requirement that the Respondent of their Complaint—that is, Shuttle Express, not the limousine carriers—must have "operated" the vehicles at issue. For example, the Complaint itself fails to allege that Shuttle Express "operated" the vehicles at issue. Instead, the Complaint alleges that Shuttle Express was "using" contractors to "provide" service. These facts do not meet the threshold element of a 213(2) violation, that the certificate holder must have "operated" the vehicles.

8 Staff's failure to prove that the "use" of contractors to "provide" service rose to the level of Shuttle Express being the "operator" of the independent limousines continued in the hearing room. The Staff witness merely concluded that:

> A If the independent contractor driver is providing regulated service, yes [it is a violation]. The independent contractors can provide other service, which is completely fine under their limo license or under their for-hire authority. That's regulated through the Department of Licensing. However, once it switches over into share ride service on Shuttle Express's regulated routes, that's where it violates Commission rules.
>
> Q If you are an independent contractor driving regulated service, it's a violation?
>
> A Correct.

Since according to the Commission every public road and highway in Shuttle Express's service territory constitutes its "regulated routes,"[2] by this simplistic logic any for hire service that makes multiple stops anywhere in Shuttle Express's certificated area would make Shuttle Express liable under the rule, whether Shuttle Express was involved somehow in operating it or not.

9 Clearly some level of involvement greater than mere operation of a Commission-regulated service by ***someone*** over Shuttle Express's "regulated routes" is required to rise to the level of "operated by" Shuttle Express. The issue is where to draw the line. The Staff did not address in any detail how or why the rescue service performed by independent limousine operator was "operated by" Shuttle Express. The rules themselves provide no guidance as nowhere in the rules does the Commission define the terms "operate" or "operated by." *See* WAC Ch. 480-30. The statute, which uses the term "operating," likewise lacks a definition of the term. The Staff apparently concludes—with almost no analysis or explanation—that Shuttle Express is the operator of the limousines because it "dispatches them" and because Shuttle

[2] *In re San Juan Air, dba Shuttle Express*, Order M.V.C. No. 1810 (1989).

Express has additional insurance that protects Shuttle Express, passengers, and the public in the event a limousine has an accident. *See* Exh. BY-1 at 20. But there is much more to the "operation" of vehicles by a passenger transportation company than dispatch and insurance.

10 A longstanding and fundamental precept of construction of statutes and regulations is that they should generally be interpreted according to the "plain meaning rule." *See, e.g., State v. Bolar,* 129 Wash.2d 361, 917 P.2d 125, 126 (1996) ("In the absence of a statutory definition of a word, we employ the plain and ordinary meaning of the word as found in a dictionary."); *see also, First Covenant Church v. City of Seattle,* 120 Wash.2d 203, 220, 840 P.2d 174 (1992). "Where a term used in a statute is not defined therein, it should be given its ordinary meaning." *State v. Brown,* 50 Wash. App. 405, 409, 748 P2d 276 (1988)

11 The term "operate" has numerous dictionary definitions, but the two most salient elements in most dictionaries are either "to perform a function" or "exert power or influence." *E.g., http://www.merriam-webster.com/dictionary/operate.* Under the first definition of "operate," in common usage and understanding, a vehicle is "operated by" the person ***who is the driver.*** Since staff proved the drivers of the rescue services were not Shuttle Express employees, the most telling fact goes against staff. TR at 27.

12 Under the plain meaning of "operate" as a direct operator—a driver—Shuttle Express cannot possibly be considered the operator, since its employees were not the drivers. Accordingly, Staff would have had to prove under common usage and understanding that the independent contractors' activities and businesses were so intertwined with the operations of Shuttle Express that Shuttle Express could be deemed the "operator" of the independent contractors' vehicles on their rescue trips under the second definition of "operate." The most important factor in determining "power or influence" would be to determine ***who was managing***

the business of the independent contractors. Indeed, the statutory definition of "auto transportation company" includes the "managing" of vehicles' transportation passengers. In the 2007 case,[3] the Staff analyzed this question extensively and showed that Shuttle Express was managing the operations of the independent contractors in numerous respects, going well beyond dispatch and insurance. *E.g.*, Exh. BY-2 at 13-14.

13 In the current case, the staff did not even discuss management in its report or at the hearing, let alone draw any conclusion that Shuttle Express was "managing" the operations of the independent contractors. *See* Exh. BY-2 at 14-15. Moreover, even though Staff bore the burden of proof and failed to make a *prima facie* case of management or control, Shuttle Express nevertheless presented overwhelming evidence that it does not manage the independent contractors' businesses either the way it did in 2007 or to the extent that Shuttle Express could be deemed the operator of the rescue rides.

14 The record addressed numerous indicia of "power" or "influence" of Shuttle Express and nearly all of them stand in stark contrast to the findings of the 2007 case. For example, probably the next most important factor in a transportation case is to ask, ***who owns the vehicle***? Again, the record conclusively demonstrated that Shuttle Express did not own the vehicles in question. *E.g.*, Exh. BY-1 at 60, 86, 89. Nor does Shuttle Express maintain or service the limousines. Exh. BY-1 at 65. The limousines are not based at the Shuttle Express facility. *See Id*. Table 1, below, illustrates both in number and character the numerous factors in the record related to the key issue of whether Shuttle Express "operated" the vehicles in the sense of the degree of its power or influence over the independent contractors relative to their overall operations, as well as in comparison to the 2007 program:

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[3] Docket TC-072228.

TABLE 1

OPERATING FACTORS:	Prior TC-072228	Current TC-120320
Shuttle Dispatch Non-employee Drivers for Share Ride?	Yes	Yes
Shuttle Own IC Vehicles?	Yes	No
Base IC Vehicles at Shuttle?	Yes	No
Shuttle Maintain IC Vehicles?	Yes	No
Shuttle Procure IC Insurance?	Yes	Partially
Shuttle Regularly Schedule ICs to Drive Share Ride?	Yes	No
Share Ride Comprise Majority of ICs' Work?	Yes	No
Include ICs in Planned Staffing for Share Ride?	Yes	No
Shuttle Usually Have ICs Make Multiple Stops?	Yes	No
Require ICs To Accept Share Ride Work?	Yes	No
ICs a Substantial Percentage of Shuttle's Trips?	Yes	No
ICs Drive Share Rides if Employee Drivers Available?	Yes	No
Use of ICs Financially Beneficial to Shuttle?	Yes	No
ICs Have No Substantial Non-Share Ride Work?	Yes	No
ICs Drove 10 Passenger Share Ride Vans?	Yes	No
IC Vehicles Display Shuttle's Name, Logo & Permit No.?	Yes	No
Shuttle Compensated ICs for Transporation?	Yes	No

15 Of 17 factors in Table 1, 15 of them support a finding that the independent contractors were managing and operating the vehicles and only the two cited by staff briefly in its report could support a finding that Shuttle Express operates the vehicles in rescue situations. And even finding two factors is a stretch, because Shuttle Express only partially provides insurance for the independent contractors. The independent contractors provide their own insurance up to $1.05 million, which is the legal requirement for their limousines. Shuttle Express provides an additional $5.0 million of insurance, for a total of over $6.0 million. TR at 59.

2. The independent contractors' rescues were lawful limousine services.

16 While the legality of the independent contractors' conduct was not addressed in the complaint, Shuttle Express sees no inconsistency between their rescue operations and the scope of their limousine authority. Their lawful operations as limousines further precludes a finding that Shuttle Express was operating unlawfully under its auto transportation permit. Limousines are now regulated by the Department of Licensing ("DOL") under RCW Ch. 42.72A and WAC Ch. 308-83. The definition of a "limousine carrier" is "a person engaged in the transportation of a person or group of persons, who, under a single contract, acquires, on a prearranged basis, the use of a limousine to travel to a specified destination or for a particular itinerary." RCW 46.04.276. Limousines may carry up to 14 passengers in a "stretch" automobile or a van. WAC 308-83-010(12).

17 Rescue service meets the definition of a limousine service because Shuttle Express prearranges the transportation with the passengers and, in some cases, groups them.[4] Then the independent contractors perform the transportation under a "single contract" with Shuttle Express for the "particular itinerary" required to transport the group to or from the airport.

18 The focus of the DOL's regulations is on "pre-arrangement." *See, e.g.*, WAC 308-83-200. The other requirements implied by the definition of "limousine" are never mentioned in DOL's limousine regulations. *See* WAC Ch. 308-83. Even under the extensive prearrangement regulations, the rescue services qualify. Prearrangement does not require days or hours. Rather, it is defined as a minimum of 15 minutes. WAC 308-83-200(c). Moreover, there is an exception from prearrangement for Sea-Tac airport, where immediate transportation from the airport is allowed. *See* RCW 46.72A.020(1).

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[4] Only the groups are at issue, since Staff does not contend that a rescue trip between the airport and a single other location constitutes an operation by Shuttle Express. *See, e.g.*, Exh. BY-1 at 20.

19 In conclusion, the Complaint alleged that Shuttle Express violated WAC 480-30-213(b) because it "operated" a rescue service using non-employees. What Staff instead proved in its report and at the hearing was that the ***independent contractors "operated"*** the rescue service as limousine operators, upon irregular and unpredictable referrals from and arrangement by Shuttle Express. While the legality of the operations of the independent contractors was not directly at issue in this case, the facts developed in the investigation and at the hearing support the conclusion that the independent contractors' rescue operations were within the scope of their limousine authority, regardless of how many stops they made.

3. *Door to door share ride on an irregular basis has never been classified as auto transportation.*

20 Even assuming, for sake of argument, that the independent contractors were not operating as limousines, that does not mean, *a fortiori*, that they were operating as auto transportation companies. Door to door share ride services are inherently difficult to classify because the statute that defines auto transportation companies was written with operations like Greyhound and Trailways in mind. The definition of an "auto transportation company" is a "corporation or person … operating … any motor-propelled vehicle used in the business of transporting persons … between fixed termini or over a regular route." RCW 81.68.010(3). The original classification of Shuttle Express when it commenced operations was uncertain because it seems counterintuitive that a door to door service operates between fixed termini or a regular route.

21 The Commission ultimately classified Shuttle Express as an auto transportation company in 1989, but the key to its decision was the hub and spoke nature of the operations. It was the hub and spoke character of Shuttle Express' operations that the Commission relied on to support both its finding of fixed termini (service to "unlimited points within a named city or town as long as the service operates between that city or town and the named airport.") and of a regular route

("the company funnels its operations into a limited number of major highways to or from the airport."). *In re San Juan Air, dba Shuttle Express*, Order M.V.C. No. 1810 at 5 (1989).

22 Shuttle Express continues to operate its share ride service in this hub and spoke manner today. And when it used independent contractors in 2007, the independent contractors also operated in a hub and spoke manner that the Commission had previously classified as "auto transportation" services, because the independent contractors had little or no work other than the airport shuttle service. In the rescue service, however, the key attributes that led to classification of the business of Shuttle Express as auto transportation are lacking with regard to the businesses of the independent contractors. For the independent contractors, most of their business is ordinary limousine service between and among countless random points in the state. Such geographically diverse operations have never been classified as auto transportation and may never be so classified, as it would be hard to justify under the statute.

23 The statute that defines "auto transportation" says, "[t]he words "between fixed termini or over a regular route "means "the termini or route between or over which any auto transportation company <u>usually or ordinarily operates</u> any motor-propelled vehicle." RCW 81.68.010(6). Unlike Shuttle Express, the independent contractors have no regular routes because they don't have any "usual or ordinary operations" other than limousine operations, which are not regular route operations and are not exclusively hub and spoke to and from SeaTac Airport. The rescue service is ***irregular and out of the ordinary*** and fits the definition of limousine service, not of auto transportation service.

B. <u>Shuttle Express did not violate WAC 480-30-213(6) (equipment).</u>

24 Staff's proof of the alleged shortage of equipment was equally lacking. The reason rescue service is necessary has nothing to do with the amount of equipment Shuttle Express

maintains. Rather, it is the unpredictable nature of if, where, and when a vehicle may be needed for a rescue. *E.g.*, TR at 71-74, 100-105, 123-24.

25 The rule Shuttle Express is accused of violating does not require an auto transportation company to station vehicles all over its territory—with numerous drivers[5] standing by idly as well—to meet every exigency that may arise at every minute or hour of the day. The rule is much narrower than that: "All auto transportation companies must maintain sufficient reserve equipment to insure the reasonable operation of established routes and fixed time schedules." WAC 480-30-216(6)(emphasis added). Staff did not prove for a single one of the 5,715 alleged violations that at the time of the rescue Shuttle Express lacked spare vehicles in serviceable condition. This is what would have been required to show a violation of WAC 480-30-216(6).

26 The allegations in Staff's Second Cause again reflect the "square peg" problem. An operator of a scheduled service over regular routes can generally add buses or substitute larger buses to service unexpected demand or replace a broken bus. TR at 102-03. Shuttle Express explained this and further noted that it rarely had to use rescue service on its scheduled routes as it occasionally must do for door to door. TR at 102-03.

27 The equipment rule is not so expansive as to require dozens of vehicles to be stationed (and staffed) throughout a carrier's service territory merely to cope with the unexpected. Rather, it requires "sufficient reserve equipment to insure the reasonable operation." Indeed, the rule arguably does not even apply to Shuttle Express' door to door service, since it requires "the reasonable operation of established routes and fixed time schedules." Door to door does not follow established routes, like the Greyhound bus that runs down I-5. Nor does door to door operate on fixed time schedules. Rather, it operates on demand or on reservation.

[5] In fact, the rule does not even mention drivers, which is half of the problem that Shuttle Express faces when rescue service is suddenly needed.

28 As Shuttle Express testified, it has plenty of equipment and is willing to acquire more, as may be needed. TR at 124-25, 130. Its equipment is consistently sufficient to serve the scheduled operations and rescue service is generally not employed in its scheduled operations. TR at 102-03. And it has sufficient equipment to serve the door to door operations as well. It merely lacks a crystal ball to show it where and when the unexpected will occur and is unable to bear the cost of having vehicles and drivers idly waiting around throughout its territory for the unexpected to happen. TR at 101, 123-24.

C. Shuttle Express did not violate WAC 480-30-456 (customer information).

29 Staff's testimony did establish that certain customer information is provided to the independent contractors, but in the context of this case, that action is clearly not a violation of the rule. The Third Cause of Action alleges that WAC 480-30-456 "prohibits the release of customer information" and that Shuttle Express violated the rule when, "it shared customer information, without written customer permission…." The Third Cause of Action is based on misinterpretation and an incomplete reading of the rule.

30 The Complaint paraphrases and focuses solely on subsection 3 of the rule. It ignores subsection 2, which sets forth the purposes for which customer information can be used. Subsection 2 states, in relevant part, "Companies must use customer information only for … [p]roviding and billing for services the customer requests." WAC 480-30-456(2)(emphasis added). Once again, the Staff essentially proved that Shuttle Express did ***not*** violate the rule.

31 The record in this case is clear that all of the 5,715 rescue trips were arranged by Shuttle Express to provide a service that a customer had requested, *i.e.*, timely transportation to or from Sea-Tac Airport. *See, e.g.*, TR at 135-36. WAC 480-30-456(2)(a) expressly states that "providing … services the customer requests" is a permissible use of customer information. This

explicit permissible use of information is not qualified or limited in any way to provision or billing of services only by ***employees*** of the carrier. Thus, not only does the rule permit "sharing" of information to IC drivers to provide the transportation, it would also permit a carrier to use a third party billing service, such as PayPal, a bank, or a credit card company, for example.

32 WAC 480-30-456(3), on which the Complaint relies, serves a different and broader purpose, which is to prohibit release of customer information to third parties for purposes unrelated to the providing or billing of the services requested, such as to airlines to market air travel. But Shuttle Express made it clear that it does not use customer information in that way. TR at 58, 135-36. Occasionally its policies have been violated, but in such rare cases, corrective and disciplinary action was promptly taken. TR at 58. And in the cases of the 5,715 violations alleged by Staff—which bears the burden of proof—not a single one was shown to involve disclosure to a third party for anything other than the provision of a service that each of the customers had requested, which subsection (2)(a) of the rule expressly permits.

D. Shuttle Express did not violate Order 01 in Docket TC-072228.

33 The Complaint alleges in the Fourth Cause that "Shuttle Express violated Order 01[6] in Docket TC-072228 by violating the rule that was at issue in that proceeding" in providing rescue service. This allegation is an unwarranted and unsupportable attempt to bootstrap the 5,715 citations in Cause One into 5,715 additional and distinct violations. But merely because the Complaint involves the same rule does not mean it is the same violation as the 2007 case that the Order dealt with. To the contrary, the Settlement Agreement[7] and Order were narrowly drawn

[6] Exh. BY-1 at 43-57 (hereafter, "the Order").
[7] Appendix to the Order, Exh. BY-1 at 52-57.

and expressly limited to the specific facts of the 2007 case. Moreover, the IC driver program in 2007 was vastly different in nature, scope, and purpose from the current rescue program.

34 Staff's testimony reflects that Staff has a much broader and sweeping view of the precedent from the 2007 case than the parties ever intended or agreed, or that the Commission ever adopted. In the 2007 Settlement Agreement, which was adopted by the Order, Shuttle Express only admitted "that its independent contractor driver program" violated WAC 480-030-213(2)." Exh. BY-1 at 53. Not only did Shuttle Express not admit that programs other than the specific "independent contractor driver program" addressed in 2007 would violate WAC 480-30-213, Shuttle Express reserved its rights to as to any future alleged violations: "Nor does this agreement preclude Shuttle from asserting any defenses that it may have as to any unrelated claims." Exh. BY-1 at 54. The Order approved and adopted this reservation of rights. The current claim, coming five years later, and being based on a completely different program is an unrelated claim.

35 The Order also made it clear that it was not prejudging or making policy on any future matters: "The Settlement Agreement … is approved and adopted in full resolution of the issues in this proceeding." Order, ¶ 32 (emphasis added). Thus, under the Order for Shuttle Express to have violated the Order, the rescue service that is the subject of today's complaint would have to be the same as—or at least substantially similar to—the "independent contractor driver program" that the Order dealt with in 2007. It is not.

36 The "independent contractor driver program" was described in 2007 as follows: "Shuttle managed the operations of independent contractor drivers who possess Commission charter carrier authority. These charter carriers worked only for Shuttle and drove vehicles they lease from Shuttle's subsidiary. The vehicles displayed the Shuttle name as did the fare tickets used

by the charter carriers. Reservation and dispatching services for the charter carriers took place at Shuttle. Shuttle compensated the charter carriers for providing transportation service authorized under Shuttle's certificate." Exh. BY-1 at 53.

37 The rescue service today shares almost none of the attributes of the "independent contractor driver program" described in the Order and Settlement Agreement, as the Staff's own report largely demonstrates. Shuttle Express does not manage the operations of the independent contractors, who now have limousine licenses, not Commission charter carrier authority. See TR at 49, 56. The independent contractors have substantial independent work. *See, e.g.*, TR at 124. The independent contractors' vehicles are not owned by Shuttle Express or an affiliate. Exh. BY-1 at 86, 89. The vehicles do not display the Shuttle Express name or permit number. *See, e.g.*, Exh. BY-1 at 90. The Staff did not prove the fare tickets used by the independent contractors in the rescue service showed Shuttle Express. *Id.* At 17 ("It is unclear how fare tickets are handled" for rescue service.). Shuttle Express does not compensate the independent contractors, it charges them a referral fee. *Id.* At 87. The only real similarity to the 2007 program is that Shuttle Express does dispatch the rescue service. But unlike in 2007, the independent contractors have substantial work independent from Shuttle Express. Tr. at 124.

38 The Complaint alleges that the rescue program violates the 2007 order merely because it allegedly triggers the same rule. But even assuming, for the sake of argument, that the rescue program is a violation of WAC 480-30-213(2), that fact alone does not make it a violation of the narrowly drawn Order, which expressly adopted Shuttle Express' reservation of rights to defend against any future unrelated claims.

39 The program at issue today could not be more unrelated to the 2007 program. Table 1, above, illustrates how different the two programs were, both in the number and character of

factors related to the key issue of whether Shuttle Express "operated" the vehicles at issue in each program. Moreover, the differences between the two programs were conclusively established in the Staff's own case. All one has to do is compare the Staff's summary reports in the two cases, which Table 2, below, summarizes:

TABLE 2

CONCLUSIONS OF STAFF REPORTS	Prior TC-072228	Current TC-120320
Management	Shuttle Express "manages" ICs	No conclusion/not part of staff findings
Contracts	ICs have no other contracts for charter service	No conclusion/not part of staff findings
Operation of Vehicles	Vans owned by subsidiary of Shuttle	Limos not owned by Shuttle
Insurance	Not addressed	IC provides $1.05 mil.; Shuttle provides additional $5 mil.
Compensation	ICs receive compensation from Shuttle	Shuttle charges ICs
Reservations and Dispatching	Shuttle Express dispatches ICs	Shuttle Express dispatches ICs
Fare Tickets	All say "Shuttle Express" at the top	"Unclear"
Advertising	ICs have no independent work	No conclusion/not part of staff findings

Compare Exh. BY-1 at 3-25 *with* Exh. BY-2 at 3-17.

40 Finally, not only were the 2007 managerial and operational facts very different from the rescue service, the whole ***purpose*** of the programs was different. The 2007 program was a planned and regular program to help lower costs by incorporating independent contractors in the daily operations of share ride service. TR at BY-2 at 25. In contrast, the rescue service is a reaction to unplanned exigencies and is implemented on an episodic basis solely to ensure safe, efficient, and timely service to the public, at greater cost to Shuttle Express. TR at 98-99.

41 Given the number and magnitude of the differences between today's program and the narrow proscription of the 2007 Order, staff did not prove that any of the 5,715 alleged violations of WAC 480-30-213(2) violated the prior Order. The prior Order in no way addressed or was intended by the Commission to address the rescue service at issue today.

II. Even Should the Commission Find in Favor of Staff on Any or All of the Alleged Violations, No Penalties Can or Should be Assessed.

42 As discussed above, Shuttle Express firmly believes it did not commit any of the violations alleged in the Complaint. Out of caution, however, and without admitting liability, in this Section Shuttle Express addresses why it should not and cannot be penalized for its actions, even if the Commission disagrees and finds a violation.

A. Penalizing Shuttle Express in this case would violate due process.

43 As is discussed above, the Commission's statutes and rules do not define the term "operated by," yet the Staff proposes a significant penalty on Shuttle Express because it supposedly "operated" vehicles it did not own when it occasionally referred rescue work to independent contractors to operate under their limousine licenses. Due process requires adequate notice before a carrier can be penalized for violation of a regulation. It must have "definite warning" that the acts it is engaged in are proscribed by the regulation or statute:

> Due process requires fair notice of the conduct forbidden by a penal statute. "Statutory language must convey sufficiently definite warning or proscribed conduct when measured by common understanding and practice."

In Re McCrea, 28 Wash.App. 777, 781, 626 P.2d 992 (1981)(citations omitted). As noted, the warning is measured by "common understanding." Moreover, "[a]dequate notice requires describing the prescribed conduct sufficiently that persons of ordinary intelligence are not require to guess at its meaning." *State v. Brown,* 50 Wash. App. 405, 408, 748 P2d 276 (1988).

44 Although no Washington cases have been found invoking due process protections in the regulatory context, a long line of federal cases make it clear that agencies likewise cannot penalize carriers without fair notice of the precise conduct that an agency's rules or orders proscribe. *See, e.g., Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C.Cir.1986). "Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broadcasting v. FCC*, 824 F.2d 1, 3 (D.C. Cir., 1987).

45 Accordingly, it is well established that if an agencies or rule is vague, the imposition of fines or other penalties would be a violation of the carrier's due process rights. As the court explained in *Satellite Broadcasting*:

> The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble "Russian Roulette." The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation.

824 F.2d at 4. *See also, High Plains Wireless v. FCC*, 276 F.3d 599 (D.C. Cir. 2002). These federal cases apply with equal force to state agencies under the Supremacy Clause, because the due process rights flow from the U.S. Constitution. *See* Article VI, Clause 2, U.S. Constitution.

46 The Complaint—challenging conduct that has no precedent in its own right and is very different from the 2007 program—is essentially exactly the kind of regulatory "Russian Roulette" that violates due process. As discussed above, the term "operated by" is not defined and is vague, at least in the context of asserting a violation by a carrier when an independent third party operates its own vehicles. To the knowledge of Shuttle Express, the only guidance the Commission has ever provided on what the term "operated by" in WAC 480-30-213(b) means is the prior *Shuttle Express* case, Docket TC-072228. But, as demonstrated in the

discussions and tables above, the Settlement Agreement and the Order were expressly limited to the facts of that case which were very different from the facts in this case.

47 It is more than reasonable to interpret WAC 480-30-213(2) as permitting the rescue service as defined by the record in this case. The Commission should find the service legal under the rule. But if it does not, enforcement should be prospective only. Assessing fines or penalties would violate due process of law.

B. Shuttle Express should not be penalized for its good faith efforts to better serve the public interest, particularly based on an ambiguous rule.

48 The Staff readily concedes that this case is not really about safety. Exh. BY-1 at 21 (rescue "did not put the public in imminent danger"). The independent contractors' limousines are licensed and inspected by the DOL. TR at 56, 59-60. And each IC has a DriveCam in place to monitor for any safety issues, which goes above and beyond the DOL requirements and even the Commission's requirements. TR at 57. Staff apparently concedes that independent contractors operating rescue on a single stop basis are perfectly compliant with Commission regulations. *See, e.g.,* BY-1 at 20. Of course it is impossible to say that carrying up to 14 people in a limousine to or from two locations is any less safe than carrying 14 people to or from a single location, all other things being equal.[8] Thus, the issue is not safety, but rather a technical regulatory issue relating to the number of stops made when a rescue is required.

49 The public interest in safety was not affected either way by the use of limousines for rescue service. What about other relevant aspects of the public interest? A number of them were benefitted. First, a number of passengers received more timely transportation to or from the airport than they would have had without the rescue. *See, e.g.,* TR at 48, 116-17. This is critically important going to the airport, as passengers are typically going on a flight, often with

[8] Limousine regulations allow up to 14 passengers in a single vehicle. WAC 308-83-010(12).

non-refundable tickets. *See, e.g.,* TR at 129. Airline change fees or buying new same-day tickets can be very expensive. In some cases a family's vacation may be ruined if they miss their initial flight, as later flights may be full or they may miss cruise or international connections. Or a business person may miss the meeting to which they were traveling. Regardless, it is inherently stressful to miss a flight and have to re-book. Second, the rescue service is viewed by passengers as an upgrade of service at no additional charge. TR at 104-05. Instead of a van with 3 or more stops, they ride in a limousine, in most cases with no other stops. TR at 61-62.

50 Finally, and probably most importantly, rescue service is the "safety valve" that makes share ride door to door service possible at a viable cost and price to airport passengers. *See, e.g. TR 115-19, 147-48.* Without a multi-stop rescue capability, Shuttle Express cannot offer a service that is reliable enough and inexpensive enough to be an attractive option for ground transportation by airline passengers. *See* TR at 94, 104, 117. Rescue has always been essential to successful operation of Shuttle Express's share ride service and always will be. TR at 147. If the Commission penalizes and/or bars rescue service, Shuttle Express may well cease to be viable. TR at 101, 154. Hundreds of thousands of passengers annually will have to find alternative door-to-door services, almost certainly at higher cost and most likely not on a share ride basis. *See* TR at 104. This would directly harm the traveling public and also increase traffic, pollution, and congestion at the airport.

51 The Commission should deny the Staff's complaint entirely based on lack of a *prima facie* case. But even if it finds a violation, it should work more proactively with Shuttle Express to adapt its regulations to real world realities. Instead, on October 19, 2012, midway through the investigation, Mr. Sherrell noted that, "I do not know where these questions are going." Exh. BY-1 at 133. The record does not reflect there was any response from the Commission until it

issued the complaint against Shuttle Express on May 1, 2013. *See* Exh. BY-1. The public has voted Shuttle Express—with its patronage—the most valuable "bus" service in the state. The Commission should be working to preserve that valuable public service, not trying to cripple it. A cease and desist and/or penalties here would severely damage the public interest, not serve it.

C. <u>If the Commission Clarifies That Going Forward Rescue Service Will Be Considered as "Operated By" Shuttle Express, Then the Commission Should Stay Enforcement Pending Consideration of a Waiver Petition By Shuttle Express.</u>

52 The ALJ directed the parties at the close of the hearing and in a Notice Requiring Post-Hearing Briefing (Aug. 5,2013) to file "thorough" briefs addressing the necessity of and options for resolving issues under WAC 480-30-213(2) going forward. Specifically:

> [T]he presiding officer required the parties to file post-hearing briefing, individually or jointly, on the options and prospects for resolving the apparent conflict[9] between WAC 480-30-213(2) and the operational demands of providing door-to-door airport shuttle service. The parties' briefing should include a summary explanation of the issue (*i.e.*, why Shuttle Express believes it necessary to rely in part on independent contractors to provide its "rescue" service) and then address potential means by which Shuttle Express can satisfactorily serve its customers, including but not necessarily limited to:
>
> - Alternate methods, if any, for Shuttle Express to continue offering a "rescue" service in compliance with WAC 480-30-213(2);
>
> - Shuttle Express petitioning the Commission for a declaratory ruling on the legality of its independent contractor program;
>
> - The Commission sponsoring a workshop to discuss differences in operations between "door-to-door" and "scheduled" automobile transportation service in the context of a potential rulemaking to consider revisions to WAC 480-30-213(2);

[9] Despite this statement, Shuttle Express presumes the ALJ has not prejudged the ultimate legal issue of whether rescue service violates Rule 213(2). This ultimate legal question was never expressly addressed at the hearing, although Mr. Sherrell was asked if he could reconcile the rule and the use of independent contractors. *See* TR at 135. As a non-lawyer, he could not. But Shuttle Express was never asked if it admitted that its actions violated WAC 480-30-213(2). Thus, its denial of the First Cause of Action stands. *See* Response from Shuttle Express, at 2 (May 24, 2013)("Shuttle Express denies the allegations….").

- Shuttle Express petitioning the Commission for an exception to rule; and

- The Commission and/or Shuttle Express seeking changes to the applicable statute or Commission rules.

The briefing should also include each party's preferred course of action to ensure future compliance with WAC 480-30-213(2) and all other associated Commission rules and regulations.

Shuttle Express addresses each of the above bullet points herein below.

53 Shuttle Express does not believe that any alternate methods are needed to comply with WAC 480-30-213(2) because the rescue service already complies with the rule. Even if the Commission disagrees, Shuttle Express does not feel alternative methods are feasible. It tried limiting rescue service to a single stop by the limousines, but service quality declined to an unacceptable level. TR at 118-19.

54 Shuttle Express does not see any point at this stage of the proceeding in petitioning for a declaratory ruling on the legality of rescue service. The issue is already teed up in this docket and an extensive record was developed. The Commission must decide legality one way or the other in order to rule on the Complaint.

55 Shuttle Express does not favor a workshop to explore WAC 480-30-213(2). If the rescue service is ruled legal, there is no need. Even if it is ruled illegal, Shuttle Express' operations are so unique that the best way to deal with the issue is through a waiver petition (termed an "exception" or "exemption"), not a generic proceeding.

56 If the Commission rules that rescue service as described in the record in this case violates WAC 480-30-213(2), even on a prospective basis only, then absolutely Shuttle Express would want to file a petition for an exemption pursuant to WAC 480-07-110. "The standard for consideration" of an exemption petition "is the public interest standard." WAC 480-07-

110(2)(c). Shuttle Express is confident it can demonstrate that the public interest is well-served by its rescue service. Other interested parties, if any, could intervene in the docket, and the Commission could establish any necessary or desirable conditions on the rescue service. Shuttle Express does not plan to file a petition immediately, as the Commission can and should rule in this docket that the rescue service is legal and therefore no exemption is needed. If the Commission does not, however, Shuttle Express would promptly file for an exemption.

57 Shuttle Express does not favor pursuing statutory changes or a rulemaking. Both consume great time and resources and Shuttle Express does not believe any other carrier operates or would operate a rescue service like that described in the record in this case. Strict application of the rule may well be appropriate for other carriers. If not, they can certainly petition for a rulemaking or exemption, or intervene in the Shuttle Express exemption docket, if there is need for one.

58 If the Commission should rule that WAC 480-30-213(2) applies prospectively to Shuttle Express' rescue service, enforcement should be stayed and no cease and desist should be issued, provided that Shuttle Express promptly files an exemption petition under WAC 480-07-110.

III. If the Commission Should Find That Penalties Should be Assessed, the Amounts Should be a Small Fraction of What Staff Recommends and No Cease and Desist Should be Issued.

59 To the knowledge of counsel, no fine of this magnitude has ever been levied against a transportation company for alleged violations that did not endanger public safety, did not adversely impact the public interest, and did not result in customer complaints. There appears to be no precedent for a fine anywhere near this size under these circumstances, particularly when the violation (if any) is a technical one based on good faith efforts of a company—at significant

cost to itself—to promote the public interest by providing safe, timely, and efficient service to the traveling public.

60 The only recent case found in which Staff sought a six-figure or greater fine was the complaint in *WUTC v. Waste Management of Washington*, Docket TG-121265 (Apr. 23, 2013)("*Waste Management*"). There, the Staff recommended a $2.14 million fine, for an estimated 208,567 violations but settled for just $20,000, despite the significant harm to the public. *Waste Management*, Complaint, ¶ 15; and Order 03, ¶ 24; In contrast to this case—where the public was benefitted, not harmed—in *Waste Management*, approximately 130,000 customers were harmed. *Waste Management*, Complaint ¶ 30. The Commission received 136 complaints from Waste Management customers.[10] Here there was no harm, nor a single complaint from a Shuttle Express customer. TR at 31.

61 Not only is the recommended $250,000 fine unprecedented, it is out of proportion. The Staff justifies the penalty in part by finding 22,860 violations. Exh. BY-1 at 25. But the only violation that is really even debatable is the First Cause of Action, and it is a weak claim at best. The other three causes are completely untenable. So if any violation were to be found at all, it would likely be a fourth of the number of violations Staff alleged, proportionately reducing the penalty recommendation to $62,500.

62 Next, looking to the recent precedent in *Waste Management*, there the fine was reduced by over 99% from the amount sought in the complaint, to $0.096 per violation. Considering the acknowledged harm to the public in Waste Management and the benefit to the public in this case from the actions cited, the fine in this case should be less on a proportionate basis, not more.

[10] *See* http://www.utc.wa.gov/aboutUs/Lists/News/DispForm.aspx?ID=214.

Shuttle Express recommends no fine at all, but if one should be assessed, $500—about 9 cents per violation—would be more appropriate than a quarter of a million dollars.

CONCLUSION

63 Staff's desire to impose penalties of unprecedented proportion seems driven by the view that Shuttle Express intentionally and repeatedly committed the same violation for which it was previously cited. But, as demonstrated at the hearing and herein, that is simply untrue. Shuttle Express has done nothing more than attempt in good faith to fit its "square" business into the "round" regulatory hole. Shuttle Express believes it has a lawful fit in its current rescue program. If the Commission disagrees, it is nevertheless clear that the fit, while not perfect, is serving the public well and without complaint. The Commission should not penalize or prohibit a program that serves the broader public interest. Rather, it should work proactively to make the regulatory hole a little less round, until a proper fit is obtained. Allowing rescue service to continue pending an exemption petition would best serve the overall public interest.

Respectfully submitted this 20th day of September, 2013.

LUKAS, NACE, GUTIERREZ & SACHS, LLP

Brooks E. Harlow

Brooks E. Harlow
Counsel for Shuttle Express, Inc.