

**Exhibit No. DP-5  
Dockets TC-143691, TC-160516,  
TC-161257 (consolidated)  
Witness: David Pratt**

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**In re the Application of  
SPEEDISHUTTLE WASHINGTON,  
LLC d/b/a SPEEDISHUTTLE SEATTLE  
For a Certificate of Public Convenience  
and Necessity to Operate Motor Vehicles  
in Furnishing Passenger and Express  
Service as an Auto Transportation  
Company**

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**SHUTTLE EXPRESS, INC.,**

**Complainant,**

**v.**

**SPEEDISHUTTLE WASHINGTON,  
LLC d/b/a SPEEDISHUTTLE  
SEATTLE,**

**Respondent.**

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**SPEEDISHUTTLE WASHINGTON,  
LLC d/b/a SPEEDISHUTTLE  
SEATTLE,**

**Complainant,**

**v.**

**SHUTTLE EXPRESS, INC.,**

**Respondent.**

**DOCKETS TC-143691, TC-160516,  
TC-161257 (consolidated)**

**EXHIBIT TO TESTIMONY OF**

**David Pratt**

**STAFF OF  
WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION**

*Order 04 – Final Order in Docket TC-120323*

**March 17, 2017**

[Service Date March 19, 2014]

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET TC-120323
	)	
Complainant,	)	ORDER 04
	)	
v.	)	FINAL ORDER DENYING, IN PART,
	)	AND GRANTING, IN PART,
	)	PETITION FOR ADMINISTRATIVE
SHUTTLE EXPRESS, INC.,	)	REVIEW AND ASSESSING
	)	PENALTY
Respondent.	)	
.....	)	

**BACKGROUND**

- 1 Shuttle Express, Inc. (Shuttle Express or Company) is an automobile transportation company providing regulated share-ride door-to-door service in multi-passenger vans. Until recently, the Company operated what it calls “rescue service,” pursuant to which Shuttle Express dispatched independent contractors to provide customers with share-ride service to Seattle Tacoma International Airport (Airport) when the Company’s own drivers and equipment were not readily available to timely transport those customers.
- 2 On May 1, 2013, the regulatory staff (Staff)<sup>1</sup> of the Washington Utilities and Transportation Commission (Commission) filed a complaint against Shuttle Express alleging that between October 2010 and September 2011, the Company was operating an unlawful independent contractor program. Specifically, the complaint alleges, *inter alia*, that Shuttle Express violated WAC 480-30-213(2), WAC 480-30-456, and the final order in Docket TC-072228 on 5,715 occasions by relying on independent contractors to transport passengers, rather than using the Company’s own drivers.

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<sup>1</sup> In formal proceedings, such as this, the Commission’s regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners’ policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

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- 3 The Commission conducted an evidentiary hearing on the complaint on August 1, 2013. Staff filed its post-hearing brief on September 19, 2013. Shuttle Express filed its post-hearing brief on September 20, 2013.
- 4 On November 1, 2013, the Commission entered Order 03, Initial Order (Initial Order), concluding that Shuttle Express violated WAC 480-30-213(2), WAC 480-30-456, and the final order in Docket TC-072228 on 5,715 occasions as alleged in the complaint. The Initial Order required Shuttle Express to cease using independent contractors to provide multi-stop service along its regulated routes and assessed a penalty of \$120,000, suspending \$85,000 for three years conditioned on the Company's strict compliance with the rules at issue in this docket, and requiring payment of the remaining \$35,000 in three monthly installments.
- 5 On January 3, 2014, Shuttle Express filed a petition for administrative review of the Initial Order (Petition).<sup>2</sup> The Company claims the following errors:
- The Initial Order failed to conclude that Staff did not carry its burden to prove that Shuttle Express' use of independent contractors violated any applicable law or Commission order because (a) those contractors operated their own limousines, not Shuttle Express vehicles; (b) the contractors were providing lawful limousine services; and (c) door-to-door ride share on an irregular basis has never been classified as Commission-regulated auto transportation service;
  - The Initial Order failed to recognize that WAC 480-30-456 permits a company to use customer information to provide the requested service;
  - The Initial Order failed to recognize significant differences between the independent contractor program at issue in Docket TC-072228 and the use of independent contractors challenged in this proceeding; and
  - Even if the Company violated one or more of the legal requirements at issue in this docket, the Initial Order could or should not assess penalties for those violations because (a) any violations were not knowing or willful; (b) penalizing Shuttle Express for violation of an ambiguous rule would violate due process; (c) the Company should not be penalized for its good

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<sup>2</sup> By Notice dated November 15, 2014, the Commission granted the Company's request for an extension of time to file its petition until January 3, 2014.

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faith efforts to better serve the public interest; (d) the Commission should stay enforcement of the rules at issue here pending consideration of a long-term waiver or exemption petition Shuttle Express would file; and (e) any penalties the Commission assesses should be smaller, and the Company should have additional time to pay them.

6 On January 13, 2014, Staff filed its answer to the Petition (Answer), urging the Commission to uphold the Initial Order on the following grounds:

- For purposes of WAC 480-30-213(2), Shuttle Express “operated” the limousines and town cars it dispatched for share-ride transportation;
- When the Company outsourced share-ride service to independent contractors, those independent contractors provided service the Commission regulates;
- Because Shuttle Express failed to keep its commitment to comply with all Commission rules, the Initial Order correctly held that the Company violated the final order in Docket TC-072228;
- Shuttle Express knew or should have known its latest independent contractor program was unlawful and thus its conduct was willful;
- WAC 480-30-213(2) is not vague and thus penalizing the Company for violation of that rule does not violate due process;
- The Initial Order correctly concluded that Shuttle Express violated WAC 480-30-456 because the Company improperly released customer information to independent contractors for a service the customers did not request; and
- The Company has failed to justify any reduction to, or stay of, the penalties assessed in the Initial Order.

### **DISCUSSION**

7 We agree with the findings and conclusions in the Initial Order that Shuttle Express violated WAC 480-30-213 and Order 01 in Docket TC-072228 on 5,715 occasions by using independent contractors to provide a portion of the Company’s regulated auto transportation service, and we deny the Petition in part as to those claims. We grant

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the Petition in part as to the challenge to the Initial Order's conclusion that Shuttle Express violated WAC 480-30-456, finding that the Company used customer information to provide the service the customers requested. Finally, we reduce the assessed penalty for the Company's violations to \$60,000 but require Shuttle Express to pay the entire amount of that penalty within 30 days of the date of this order.

**Violations of WAC 480-30-213(2)**

- 8 WAC 480-30-213(2) requires that “[t]he driver of a vehicle operated by a passenger transportation company must be the certificate holder or an employee of the certificate holder.” The Initial Order concluded that Shuttle Express violated this rule by using independent contractors, rather than Company employees, for its “rescue service.” Shuttle Express contends this conclusion is erroneous because the Company did not “operate” the limousines or town cars the independent contractors used to provide the service. According to Shuttle Express, the ordinary meaning of “operate” in this context is either “drive” or “manage,” and the Company neither drove the limousines nor managed the business of the independent contractors who did. We disagree with Shuttle Express on both the law and the facts.
- 9 Shuttle Express’ legal interpretation of “operated” in WAC 480-30-213(2) ignores the fundamental tenet of regulation that a company receives a certificate of public convenience and necessity (CPCN) so that the *company* can provide auto transportation service. Commission oversight of a regulated company would be meaningless if that company could unilaterally delegate to another entity part or all of its obligations to serve the public. The language in the Commission’s rules must be interpreted in this context.
- 10 We agree with Staff that “[t]he definition of ‘operate’ as a transitive verb is ‘to control or direct the functioning of.’”<sup>3</sup> The Commission uses the word “operate” throughout the rules in WAC ch. 480-30. For example, “[a]ll motor vehicles *operated* under the provisions of this chapter are at all times subject to inspection by the commission,”<sup>4</sup> and “[a] company must ensure that all motor vehicles *operated* in the transportation of passengers are properly identified.”<sup>5</sup> In each instance, the rule governs vehicles that the certificated entity controls or directs the functioning of for the purpose of providing regulated auto transportation service.

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<sup>3</sup> Staff Answer ¶ 21 (quoting Webster’s II New College Dictionary (1995)).

<sup>4</sup> WAC 480-30-221(5) (emphasis added).

<sup>5</sup> WAC 480-30-231(1) (emphasis added).

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- 11 Consistent with the other rules in this chapter, WAC 480-30-213(2) requires that the driver of a vehicle that a passenger transportation company operates, *i.e.*, controls or directs the functioning of to provide regulated service, must be the certificate holder or an employee of the certificate holder. Similarly, WAC 480-30-213(1) requires that “[t]he vehicles operated by a passenger transportation company must be owned by or leased to the certificate holder” – in other words, a certificated company must own or lease any vehicle the company controls or directs the functioning of to provide regulated service. WAC 480-30-213 thus cannot be interpreted to allow a certificated company to use non-employee drivers of non-company vehicles to transport passengers, as Shuttle Express argues, because neither the statute nor the Commission’s rules authorize an entity without a CPCN to provide auto transportation service, and only a certificated company can own and drive the vehicles used to transport passengers.
- 12 Shuttle Express’ factual argument is equally flawed. The Company claims that it “presented overwhelming evidence that it does not manage the independent contractors’ businesses . . . to the extent that Shuttle Express could be deemed the operator of the rescue rides in this case.”<sup>6</sup> To the contrary, the record evidence demonstrates that Shuttle Express controlled or directed the functioning of the independent contractors in the Company’s provisioning of its “rescue service”:
- Shuttle Express exclusively communicated with the customers in advance, including taking reservations for auto transportation service and informing the customers when an independent contractor would be providing that service;<sup>7</sup>
  - Shuttle Express dispatched the limousines to the customer locations;<sup>8</sup>
  - Shuttle Express set the fares the independent contractors could charge, limiting them to the Company’s tariffed rates and charges;<sup>9</sup>

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<sup>6</sup> Shuttle Express Petition ¶ 20.

<sup>7</sup> *E.g.*, TR 79:11 through 80:7 (Ray).

<sup>8</sup> *E.g.*, TR 48:3-24 & 51:23 through 52:3 (Nelson).

<sup>9</sup> Exh. BY-1 (Staff Investigation Report), Appendix D (Shuttle Express Independent Contractor Agreement) § 11(b).

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- Shuttle Express received 34 percent of the customer fares that the Company or the independent contractors collected for the service;<sup>10</sup>
- Shuttle Express provided insurance over and above the insurance it required the independent contractors to maintain to cover customers while they were being transported by the independent contractors;<sup>11</sup>
- Shuttle Express retained and exercised the right to inspect the independent contractors' vehicles;<sup>12</sup>
- Shuttle Express required the independent contractors to adhere to the Company's behavioral safety standards;<sup>13</sup>
- Shuttle Express required each of the independent contractors' vehicles to be equipped with a camera to enable the Company to monitor their driving while providing "rescue service";<sup>14</sup>
- Shuttle Express required the independent contractors to maintain driver and vehicle licensing, permitting, registration, insurance, and certification requirements;<sup>15</sup>
- Shuttle Express required independent contractors to complete an "orientation" course on Company operations, policies, and procedures;<sup>16</sup> and
- Shuttle Express prohibited the independent contractors from soliciting additional business from "rescue service" customers.<sup>17</sup>

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<sup>10</sup> Exh. BY-1, Appendix D at Appendix C (Fees and Charges Paid to Company).

<sup>11</sup> Exh. SE-7 (Shuttle Express Certificate of Liability Insurance Covering Independent Contractors).

<sup>12</sup> Exh. BY-1, Appendix D § 8(e); TR 54:14 through 55:12 (Deangelo).

<sup>13</sup> *Id.* § 9.

<sup>14</sup> *Id.* § 9(d).

<sup>15</sup> *Id.* §§ 5(a), 6 & 8; TR 55:13 through 56:14 (Deangelo).

<sup>16</sup> *Id.* § 5(c).

<sup>17</sup> *Id.* at 5, § 5(h)(1).

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Shuttle Express, not the independent contractors, controlled or directed the functioning of the vehicles used to transport “rescue service” customers to and from the Airport.<sup>18</sup>

- 13 The Company nevertheless contends that the “rescue service” the independent contractors provided meets the definition of limousine service, which those contractors were authorized to provide. Shuttle Express misses the point. The independent contractors were providing “rescue service” on behalf of Shuttle Express, not independently. Customers contacted Shuttle Express for auto transportation service, and Shuttle Express provided that service, primarily in its own vans but also by using independent contractors. Whether the “rescue service” standing alone would be a limousine service is irrelevant. The record evidence unequivocally demonstrates that the “rescue service” was an integral part of the auto transportation service the Company is certificated to provide, and we consider it as such.
- 14 Shuttle Express operated the limousines and town cars used by independent contractors to provide the Company’s “rescue service” within the plain meaning of WAC 480-30-213(2). Because the drivers of those vehicles were not Shuttle Express employees, the Company violated that rule on 5,715 occasions between October 2010 and September 2011.

**Violations of WAC 480-30-456**

- 15 WAC 480-30-456 prohibits “[a]ny sale or release of customer information without the written permission of the customer” and defines “customer information” to include “the customer’s name, address, and telephone number.” The Initial Order concluded that by releasing customer information to the independent contractors to enable them to provide “rescue service,” Shuttle Express violated this rule. Shuttle Express disputes that conclusion because the rule also states that companies may use customer information for “[p]roviding and billing for services the customer requests,” and the Company provided customer information to the independent contractors to enable them to provide the service to the Airport the customers requested. We agree.

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<sup>18</sup> Shuttle Express identifies 17 “operating factors” it alleges are “related to the key issue of whether Shuttle Express ‘operated’ the vehicles,” only two of which, the Company claims, indicate any exercise of its “power or influence over the independent contractors relative to their overall operations.” Shuttle Express Petition ¶ 22. The appropriate inquiry, however, is whether Shuttle Express controlled or directed the functioning of the independent contractors’ vehicles *to provide auto transportation service*, not the extent to which the Company managed the independent contractors’ business as a whole.



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- 16 Having found that Shuttle Express provided its regulated auto transportation service by using independent contractors in addition to its own employee-driven vans, we conclude that the Company was using customer information to provide that service. Shuttle Express dispatched the independent contractors to the customer locations, which required the Company to provide those independent contractors with the name, address, and telephone number of the customer to be picked up, just as Shuttle Express provides customer information to its employee drivers. Such use of customer information is precisely what the rule authorizes.
- 17 Staff argues that Shuttle Express “released” customer information without written consent under WAC 480-30-456(3), rather than “using” it to provide service pursuant to WAC 480-30-456(2). That would be correct if Shuttle Express had provided the information to a third party for a purpose other than providing the regulated service the customer requested. Those are not the circumstances presented here.<sup>19</sup>
- 18 Staff also contends that Shuttle Express did not use the customer information consistent with the rule’s requirement because the service provided was not the service the customers requested. Again, this argument conflicts with the basis for our conclusion that the Company violated WAC 480-30-213(2). Shuttle Express used independent contractors to provide the Company’s “rescue service,” which was part of the auto transportation services the Commission has authorized Shuttle Express to provide. It is irrelevant for purposes of WAC 480-30-456 that some customers were taken to the Airport in limousines owned and driven by independent contractors, rather than in Shuttle Express vans. In either circumstance, Shuttle Express provided the service. The customers requested share-ride service from Shuttle Express, and that is the service they received.
- 19 We conclude that Shuttle Express did not violate WAC 480-30-456 by providing customer information to the independent contractors that the Company arranged to provide its “rescue service.”

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<sup>19</sup> We note that if we accepted the Company’s position that the independent contractors were operating independently of Shuttle Express when providing “rescue service” – which we do not – we would agree with Staff that Shuttle Express violated WAC 480-30-456 by releasing customer information to a third party for purposes other than providing the regulated service those customers requested.

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**Violation of Order 01 in Docket TC-072228**

- 20 Docket TC-072228 was another complaint proceeding that Staff brought against Shuttle Express for using independent contractors in violation of WAC 480-30-213. Order 01 in that docket approved a settlement agreement between the Company and Staff in which Shuttle Express committed to “comply with all applicable rules and statutes enforced by the Commission, including those at issue in this proceeding.”<sup>20</sup> The Initial Order concluded that “Shuttle Express knowingly returned to using independent contractors in violation of Commission rule and in violation of the terms of the July 2008 settlement agreement” and thus violated Order 01 in Docket TC-072228 on 5,715 occasions.<sup>21</sup> Shuttle Express claims this conclusion was erroneous because “the independent contractor driver program in 2007 was vastly different in nature, scope, and purpose from the current rescue program.”<sup>22</sup> Those differences are irrelevant.
- 21 The settlement agreement approved in Order 01 does not state that Shuttle Express only agreed not to engage in the same independent contractor program it conceded was a violation of WAC 480-30-213. Rather, that agreement requires Shuttle Express to comply with *all* applicable Commission rules. In the context of finding the settlement agreement to be in the public interest, the Order characterized this obligation more specifically as a “pledge[] to comply with WAC 480-30-213 on a prospective basis.”<sup>23</sup> Our conclusion that Shuttle Express once again violated that rule necessarily results in violations of the Company’s commitment to comply with the rule. The independent contractor program that resulted in the 2007 violation was different than the independent contractor program at issue in this proceeding, but the rule is the same. *Any* subsequent violation of WAC 480-30-213 by Shuttle Express after Order 01 became final is a violation of that order.
- 22 Shuttle Express contests the plain language of the settlement agreement and the Commission order approving that agreement by asserting that Order 01 was “narrowly drawn” and “expressly adopted Shuttle Express’ reservation of rights to defend against any future claims based on different facts.” Order 01, however, was no more narrowly drawn than the settlement agreement itself, and the “reservation of

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<sup>20</sup> *UTC v. Shuttle Express*, Docket TC-072228, Order 01, Appendix ¶ 9.

<sup>21</sup> Initial Order ¶ 33.

<sup>22</sup> Shuttle Express Petition ¶ 39.

<sup>23</sup> Docket TC-072228, Order 01 ¶ 16.

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rights” on which Shuttle Express relies bears no relationship whatsoever to the Company’s commitment not to violate WAC 480-30-213.

- 23 Quoted in context, the settlement agreement language to which Shuttle Express refers provides as follows:

This Agreement does not preclude the Commission from pursuing penalties for violations of Commission rules and statutes unrelated to the subject matter of this Agreement at any time or for violations of any rules or statutes at issue in this proceeding with respect to independent contractor drivers not identified in Staff’s investigation, or that occurred before June 16, 2007, the date Shuttle began operating the program, or after December 31, 2007, the date Shuttle terminated the program (“Unrelated Claims”). *Nor does this agreement preclude Shuttle from asserting any defenses that it may have as to any unrelated claims.*<sup>24</sup>

- 24 Shuttle Express’ “reservation of rights” to assert defenses is a corollary to Staff’s reservation of its ability to pursue claims other than those addressed in the settlement. Staff exercised that ability in bringing this complaint making allegations other than the claims resolved in Docket TC-072228. Also consistent with paragraph 10 of the settlement agreement, neither Staff nor the Commission precluded Shuttle Express from asserting its defenses to the complaint. Shuttle Express’ “reservation of rights” has no other applicability to this proceeding.

- 25 In its settlement agreement with Staff resolving the disputed issues in Docket TC-072228, Shuttle Express committed not to violate WAC 480-30-213. Order 01 adopted that commitment. Because Shuttle Express violated WAC 480-30-213(2) by operating the “rescue service” at issue in this proceeding, the Company violated Order 01 on 5,715 occasions between October 2010 and September 2011.

### **Penalties**

- 26 The Initial Order examined the Company’s violations using the factors in the Commission’s enforcement policy statement and assessed a penalty of \$120,000, suspending all but \$35,000 of that amount conditioned on Shuttle Express not using independent contractors to provide regulated service for three years.<sup>25</sup> The Company

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<sup>24</sup> Docket TC-072228, Order 01, Appendix ¶ 10 (emphasis added).

<sup>25</sup> Initial Order ¶¶ 34-59.

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argues that even if the Commission upholds some or all of the Initial Order, the Commission cannot and should not assess any penalties. We disagree, although we revise the penalty assessed in the Initial Order.

*Willfulness*

- 27 Shuttle Express first contends that it was operating its “rescue service” in good faith and that any violations were not blatant, willful, or knowing as the Initial Order characterizes them. The record evidence supports the Initial Order’s findings.
- 28 Shuttle Express has been discussing independent contract programs with Staff since 2004. The Company’s president sent letters to the Commission in August 2004 and February 2005 proposing to hire independent contractors as drivers of the vehicles used to provide auto transportation service, to which Staff responded that such a program would be unlawful.<sup>26</sup> In 2006, Shuttle Express proposed a rule that would have allowed the Company to use a sub-carrier to perform the Company’s regulated auto transportation services, which the Commission rejected as inconsistent with RCW ch. 81.68.<sup>27</sup> One year later, Staff discovered that Shuttle Express had expanded its operations by contracting with independent contractors to provide regulated auto transportation services, which resulted in Order 01 in Docket TC-072228.<sup>28</sup>
- 29 Shuttle Express knew Staff’s views on the use of independent contractors to provide regulated auto transportation service. The Company agreed in Docket TC-072228 that such use is a violation of WAC 480-30-213 and pledged not to violate that rule again. The only substantial operational difference between the independent contractor program addressed in that proceeding and the “rescue service” at issue here is that the Company provided “rescue service” on an *ad hoc* basis, rather than a regular schedule.<sup>29</sup> The contention that Shuttle Express did not know its “rescue service” violated WAC 480-30-213 is not credible.

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<sup>26</sup> Exh. BY-2 (Staff Investigation Report in Docket TC-072228) at 5-6.

<sup>27</sup> *Id.* at 6 & Appendix H.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> Paragraph 22 of the Shuttle Express Petition includes a chart alleging multiple differences between the two programs, but even to the extent the chart accurately reflects the record, those differences are insignificant. Both programs used independent contractors to provide the Company’s regulated auto transportation service.

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- 30 A prudent company would have consulted with Staff, and if necessary sought a ruling from the Commission, on the permissibility of the “rescue service” before initiating it, or at least when the Company became aware of Staff and the Commission’s concerns. Shuttle Express chose not to do so, despite the long history of the Commission and Staff rejecting the Company’s attempts to use independent contractors to provide regulated service. The clear implication is that, not having received the answer it wanted in the past, Shuttle Express decided to continue the program without asking, believing that seeking forgiveness would be preferable to requesting permission. Indeed, that was precisely the Company’s calculus when it began operating the program at issue in Docket TC-072228. Jimmy Sherrell, the Company’s president, testified that “I chose to put it in place, hoping that it would be ignored, and it wasn’t, so I paid a fine and I discontinued the service.”<sup>30</sup>
- 31 Shuttle Express obviously took the same approach with its “rescue service.” Mr. Sherrell conceded during the hearing that the “rescue service” violates WAC 480-30-213, but argued that the Company was “forced” to commit that violation to serve a public need.<sup>31</sup> “So because we are forced to violate part of the Commission rules, which we’ve been doing for 25 years, I think it’s an oversight of the Commission, of not knowing how to regulate us.”<sup>32</sup> This attitude demonstrates a fundamental misconception of Shuttle Express’ obligations as a regulated company.
- 32 The legislature has charged the Commission in RCW ch. 81.68 with regulating auto transportation service providers in the public interest. With the participation of the industry, the Commission has promulgated rules to implement the statute. Auto transportation companies must comply with that statute and those rules. If Shuttle Express believes legal regulations are unnecessarily constraining, it is incumbent on the Company to ask the Commission or the legislature to change those regulations. Ignoring and violating the law is not acceptable.

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<sup>30</sup> TR 130:2-4.

<sup>31</sup> TR 43:8-12 & 135:6-13. The Company now disputes this concession, contending that its Answer denied the allegations in the complaint and that the cited passage refers to the 2007 independent contractor program, not the program at issue in this proceeding. Shuttle Express Petition at 5 n.7. This argument lacks merit. A denial in an answer does not preclude a party from subsequently conceding a point, and Mr. Sherrell twice stated that the Company’s “rescue service” violates or is inconsistent with Commission rules. The transcript speaks for itself and does not support the Company’s interpretation. We nevertheless rely on this concession only in the context of assessing the Company’s willfulness, not to determine liability for the violations.

<sup>32</sup> TR 43:10-19.

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- 33 No one “forced” Shuttle Express to violate WAC 80-30-213 and Order 01 in Docket TC-072228. The Company chose to do so. The record evidence supports our finding that Shuttle Express deliberately disregarded the rule because the Company believed that compliance would have hampered its ability to provide regulated service the way Shuttle Express wanted to provide it. The problem is not, as Mr. Sherrell stated, that the Commission does not know how to regulate auto transportation services – it does. The Commission has been regulating transportation companies and services for over 100 years. And where the Commission’s regulations can be improved, the law establishes processes by which companies can petition for changes in those regulations.<sup>33</sup> The problem is Shuttle Express’ refusal to be regulated like every other public service company and to comply with the law in its entirety, not just the provisions the Company chooses to follow.
- 34 Shuttle Express did not demonstrate good faith in operating its “rescue service.” The Company’s violation of WAC 480-30-213 was deliberate, knowing, and willful and should be penalized accordingly.

*Due Process*

- 35 Shuttle Express contends that “the Commission’s statutes, rules, and order do not define the term ‘operated by,’ in the context of rescue service” and thus are too vague to provide the Company with sufficient notice that using independent contractors in these circumstances is unlawful.<sup>34</sup> Accordingly, Shuttle Express asserts, penalizing the Company for its reasonable interpretation of the regulations would be the equivalent of administrative “Russian Roulette,” which due process prohibits. This position is not even facially plausible.
- 36 Shuttle Express knew that WAC 480-30-213 prohibits the Company from using independent contractors to provide regulated auto transportation service. Mr. Sherrell conceded as much during the hearing. That rule, moreover, is not vague but as discussed above, uses the word “operated” according to its plain meaning and consistent with the use of that term throughout WAC ch. 480-30. For the last ten years, the Commission and Staff have relied on this rule and RCW ch. 81.68 to reject the Company’s repeated attempts to use independent contractors to provide regulated service. The rule provides adequate notice of the prohibited conduct at issue in this proceeding. The Company alone was playing any game of administrative “Russian

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<sup>33</sup> RCW 34.05.330; WAC 480-07-240.

<sup>34</sup> Shuttle Express Petition ¶ 63.

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Roulette,” and Shuttle Express used its own Derringer. Penalizing the Company for its knowing violation of WAC 480-30-213 and Order 01 in Docket TC-072228 is fully consistent with constitutional due process.

*Nature of the Violation*

- 37 Shuttle Express contends that the violations at issue concern a “technical regulatory issue,” rather than safety,<sup>35</sup> because the Department of Licensing (DOL) and the Company itself monitor the independent contractors for safety compliance, and Staff concedes that “rescue service” provided on a single-stop basis complies with Commission regulations. On the other hand, the Company asserts, customers benefit from the service, which “makes share ride door to door service possible at a viable cost and price to airport passengers.”<sup>36</sup> Shuttle Express raises the specter that “[i]f the Commission penalizes and/or bars rescue service, Shuttle Express may well cease to be viable,” which “would directly harm the travelling public and also increase traffic, pollution, and congestion at the airport.”<sup>37</sup> Again, Shuttle Express misunderstands the Commission’s regulatory responsibilities.
- 38 The Commission rules in Part 5 of WAC ch. 480-30, including WAC 480-30-213, are designed to protect the safety of the passengers to whom Shuttle Express and other auto transportation companies provide service. These rules specify a variety of safety standards for both vehicles and drivers to which certificated companies must adhere, and the rules authorize Staff to conduct inspections to verify compliance. By using independent contractors driving their own vehicles to provide regulated service, Shuttle Express was evading Commission oversight. It is immaterial whether DOL and the Company monitored the independent contractors. The Commission has not delegated its statutory enforcement obligations to those entities, and we have no intention of doing so. As structured, the Commission had no ability to inspect the independent contractors or their vehicles used to provide “rescue service” to ensure compliance with Commission safety requirements. The lack of past harm to passengers would be cold comfort to any future customers who are injured because of a failure to follow Commission rules. The Company’s violation of WAC 480-30-213, therefore, is not a “technical regulatory issue” but a threat to the safety of the customers Shuttle Express agreed to serve.

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<sup>35</sup> *Id.* ¶ 69.

<sup>36</sup> *Id.* ¶ 72.

<sup>37</sup> *Id.*

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39 We do not find credible the Company's claims that it will cease to be a viable enterprise if it cannot provide "rescue service" as it was configured. No record evidence supports such a conclusion. Nor is there any indication that Shuttle Express has seriously explored alternatives to that service.<sup>38</sup> Indeed, the Company refused even to discuss such options with Staff in response to the ALJ's request for post-hearing briefing on that subject. Shuttle Express has consistently insisted on providing "rescue service" as the Company chooses. Accepting that Shuttle Express cannot use independent contractors to provide any portion of its regulated auto transportation service should provide the Company with sufficient incentive to work with Staff to develop a service guarantee program that passes regulatory muster.<sup>39</sup>

*Request for Stay*

40 Shuttle Express requests that the Commission not impose any penalties and that we stay enforcement of WAC 480-30-213 to enable the Company to seek a permanent exemption from that rule. "Shuttle Express does not believe any other carrier operates or could operate a rescue service like that described in the record in this case," and accordingly statutory changes or a rulemaking would unnecessarily "consume great time and resources."<sup>40</sup> The Company argues that "[a]llowing rescue service to continue pending an exemption petition would best serve the overall public interest. In return, Shuttle Express commits to being more proactive in seeking regulatory guidance and permissions when it modifies its operations and specifically will review **any** independent contractor operations or operational changes whatsoever with the Commission in advance."<sup>41</sup>

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<sup>38</sup> A Shuttle Express witness testified that there were service quality issues with limiting "rescue service" to single stop limousines or taxis, but there was no testimony that the Company had undertaken a thorough examination of how to ensure customers receive the service they request other than by using "rescue service" as the Company operated it.

<sup>39</sup> While we do not prejudge the issue, we have serious doubts that requesting a permanent exemption from WAC 480-30-213 is a viable option. The Commission rarely, if ever, grants permanent exemptions from its rules. Amending the rule is the more appropriate approach in such circumstances. Staff has also raised concerns that the statute prohibits "rescue service" as it was provided. If so, any rule waiver would be ineffective. As we have discussed above, moreover, the Commission also would need to waive other rules in WAC ch. 480-30 to allow uncertificated entities to provide regulated auto transportation services, which we are unlikely to do, particularly if the result is abdicating the Commission's oversight of vehicle and driver safety requirements.

<sup>40</sup> *Id.* ¶ 79.

<sup>41</sup> *Id.* ¶ 85 (emphasis in original).



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- 41 We will not stay enforcement of WAC 480-30-213. Indeed, the Company cites no authority by which we could forbear from legislatively mandated regulation even if we were inclined to do so, which we are not. Staff and the Company have been discussing the use of independent contractors for 10 years, and Shuttle Express has had ample opportunity during that time to explore means of either complying with or changing the applicable regulations. The briefing the administrative law judge (ALJ) authorized in this proceeding encouraged the parties to discuss how the Company could operate its “rescue service” consistent with existing regulations or at least begin to take steps to make necessary changes to the law.<sup>42</sup> Shuttle Express declined that option, preferring to advocate that its “rescue service” is lawful as currently structured. That was the Company’s choice to make, but Shuttle Express must now accept the consequences of that choice.
- 42 The Commission, moreover, will not bargain with the Company for its commitment to be “more proactive in seeking regulatory guidance and permissions when it modifies its operations.” We expect every regulated company to work with the Commission and its Staff to ensure compliance with applicable statutes and rules. Shuttle Express has repeatedly refused to do so,<sup>43</sup> and permitting the Company to continue to violate Commission rules would only encourage such behavior. We find that enforcing compliance with Commission rules and assessing a penalty for the Company’s past violations is a more appropriate means of both encouraging Shuttle Express to recognize and comply with its regulatory obligations and punishing the Company for its unacceptable prior conduct.

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<sup>42</sup> Shuttle Express repeatedly complains that the ALJ improperly struck most of the post-hearing brief the Company filed. *E.g., id.* ¶ 3. To the extent Shuttle Express seeks reversal of that action, we deny the request. The ALJ sought briefing for the limited purpose of addressing “the options and prospects for resolving the apparent conflict between WAC 480-39-213(2) and the operational demands of providing door-to-door airport shuttle service.” Notice Requiring Post-Hearing Briefing (Aug. 5, 2013). The Company’s brief primarily argued the merits of its legal position, which was outside of the scope of the requested briefing. The ALJ, therefore, properly struck and refused to consider that part of the brief.

<sup>43</sup> In addition to implementing independent contractor programs, the Initial Order correctly observes that the Company also unilaterally increased the size of its vans without first seeking to remove the vehicle capacity restrictions in its certificate. Initial Order ¶ 49. Shuttle Express attempts to distinguish that case as a voluntary proceeding to ensure the Company was operating legally, which “is hardly proof of ‘disregard’ of Commission laws.” Shuttle Express Petition at 27 n.18. Shuttle Express misses the point. The Company initiated that proceeding at Staff’s request long after Shuttle Express had purchased and begun operating the larger vehicles in violation of its certificate. Such conduct further demonstrates the Company’s improper approach that the law should conform to Shuttle Express’ business operations, rather than the reverse.

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*Penalty Amount and Payment Schedule*

- 43 Shuttle Express contends that the \$120,000 penalty assessed in the Initial Order is excessive because “no fine of the magnitude of the Initial Order 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.”<sup>44</sup> The Company also asserts that the assessed penalty is disproportionate to its benevolent violations when compared to the far lower penalties assessed against another transportation company for violations that resulted in harm to the public. “Shuttle Express suggests the amount of \$60,000, with all [but] \$20,000 suspended would be more reasonable,” and the Company requests that payments of the non-suspended portion not begin until July 2014.<sup>45</sup>
- 44 The Initial Order properly considered the factors the Commission reviews when determining an appropriate remedy for violations of statutes and rules, and we largely agree with that analysis.<sup>46</sup> We nevertheless modify the penalty assessment.
- 45 We understand the business needs that underlie the Company’s “rescue service” and agree that Shuttle Express should provide regulated auto transportation service in a manner that ensures customers receive the service to which they are entitled. However, we cannot condone the Company’s conduct in deliberately flouting a Commission rule, Commission order, and the Company’s own commitment to comply with applicable law. Accordingly, the penalty we assess should provide a sufficient incentive for Shuttle Express to modify its behavior to meet, rather than evade, its regulatory obligations. The Company suggests a penalty of \$60,000 with all but \$20,000 of that amount suspended. We accept the former recommendation but not the latter.
- 46 In Docket TC-072228, Shuttle Express agreed to pay \$9,500 as a penalty for violating WAC 480-30-213, calculated as \$100 for each of the 95 violations. A penalty based on that same calculation in this case would be excessive, but the \$60,000 the Company recommends is approximately \$10 for each of the 5,715 occasions on which Shuttle Express violated the rule and the prior order. We find that this amount is sufficient to encourage compliance and punish the violations.

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<sup>44</sup> Shuttle Express Petition ¶ 80.

<sup>45</sup> *Id.* ¶ 82.

<sup>46</sup> Initial Order ¶¶ 40-54.

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- 47 However, we will not suspend any portion of that penalty amount. Suspended penalties are most effective in circumstances when the threat of having to pay a substantial amount is sufficient to ensure regulatory compliance. Such circumstances are not present in this case. This is the second time Shuttle Express has violated WAC 480-30-213, and the Company has repeatedly demonstrated that it believes it may ignore the law when regulation conflicts with how Shuttle Express wants to operate its business. We find that imposing the full penalty amount is the most effective way to discourage such conduct in the future.
- 48 Nor will we permit Shuttle Express to pay the penalty in installments or delay payment until July, as the Company requests. We do not penalize rule and order violations at the violator's convenience. The record, moreover, is devoid of any evidence that Shuttle Express cannot pay the entire \$60,000 penalty now or that such a payment would threaten the viability of a company with over \$13 million in annual revenues.<sup>47</sup> A penalty should result in financial discomfort, particularly for a repeat offender, and we believe that requiring the Company immediately to pay \$60,000 sends the appropriate message to Shuttle Express that the Commission will not tolerate flouting of its rules and orders.

### **FINDINGS AND CONCLUSIONS**

- 49 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, and practices of public service companies, including automobile transportation companies, and has jurisdiction over the parties and subject matter of this proceeding.

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<sup>47</sup> Shuttle Express asserts that “[t]here is no support in the record for the finding that the penalty in the Initial Order would not jeopardize the Company’s long-term financial security. Considering the company’s attorney fees for this and related proceedings, the case has been very costly to the company.” Shuttle Express Petition at 35 n.21 (citation omitted). Shuttle Express has it backwards. There is no evidence that a substantial penalty would jeopardize the Company’s financial health in light of the magnitude of its annual revenues. Nor is the amount Shuttle Express has paid in attorneys fees included in the record, much less germane. The Company chose to litigate this case, and paying attorneys fees to do so is solely the responsibility of Shuttle Express. We do not consider such fees to be a relevant factor in determining the appropriate penalty to assess.

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- 50 (2) Shuttle Express, Inc., is an auto transportation company and holds certificate of public convenience and necessity C-975 to transport passengers.
- 51 (3) Between October 2010 and September 2011, Shuttle Express, Inc., relied on independent contractors to provide a portion of the regulated automobile transportation service the Company is authorized to provide.
- 52 (4) Shuttle Express, Inc., knowingly and willfully violated WAC 480-30-213(2) on 5,715 occasions by relying on independent contractors to provide multi-stop service along its regulated routes between October 2010 and September 2011.
- 53 (5) Shuttle Express, Inc., provided independent contractors with the names, addresses, and telephone numbers of certain customers to enable those independent contractors to provide those customers with the service they had requested from Shuttle Express, Inc.
- 54 (6) Shuttle Express, Inc., did not violate WAC 480-30-456 by disclosing customer information to independent contractors to provide the service those customers requested.
- 55 (7) On July 11, 2008, the Commission entered Order 01 in Docket TC-072228 approving a settlement agreement in which Shuttle Express, Inc., committed to comply with all applicable statutes and Commission rules, including WAC 480-30-213.
- 56 (8) Shuttle Express, Inc., knowingly and willfully violated Order 01 in Docket TC-072228 on 5,715 occasions by operating an independent contractor program in violation of WAC 480-30-213(2).
- 57 (9) Shuttle Express, Inc., should pay a penalty of \$60,000 for knowingly and willfully violating WAC 480-30-213(2) and Order 01 in Docket TC-072228.

**ORDER**

THE COMMISSION ORDERS that

- 58 (1) The Petition for Review of Initial Order of Shuttle Express, Inc., is DENIED in part and GRANTED in part, as discussed in the body of this Order.

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- 59 (2) Shuttle Express, Inc., shall not use independent contractors to provide its  
“rescue service” or any other automobile transportation service the  
Commission regulates.
- 60 (3) Shuttle Express, Inc., is assessed a penalty of \$60,000 for 5,715 violations of  
WAC 480-30-213(2) and Commission Order 01 in Docket TC-072228, and  
that penalty is due and payable within 30 days after the date of this Order.
- 61 (4) The Commission retains jurisdiction over the subject matter in, and parties to,  
this docket to enforce the terms of this Order.

Dated at Olympia, Washington, and effective March 19, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, 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 480-07-850, or a petition for rehearing pursuant to  
RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.**