BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

Petition for Review of Initial Order of Shuttle Express, Inc.

Filing Date: January 3, 2014
Shuttle Express, Inc.

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INTRODUCTION

1 Pursuant to WAC 480-07-825(2), Respondent Shuttle Express, Inc. ("Shuttle Express") petitions for administrative review of the Initial Order issued this Docket on November 1, 2013.

2 Under the Commission's rule governing administrative review of initial orders, Shuttle Express may challenge "any finding of fact, conclusion of law, remedy, or result proposed by an initial order…." *Id*.

3 At the outset, Shuttle Express is particularly concerned at the Initial Order's characterization of Shuttle Express's supposed "intransigence," as well as findings of "blatant," "willful," and "knowing" violations.[1] The Initial Order would go so far as to strike the Shuttle Express post-hearing brief nearly entirely as being "non-responsive."[2] Further, the Initial Order seems to give weight to the parties' inability to file a joint brief as supporting stronger penalties against Shuttle Express. *Id*. Apparently the ALJ was expecting, if not directing, Shuttle Express to admit its violations and thereafter limit briefing to how it would cure the presumed violations. If the ALJ was requiring Shuttle Express to brief from the starting point of "guilty," that is not appropriate.[3]

4 The record in this case reflects neither intransigence nor willful disregard of Commission authority. To the contrary, it reflects a good faith dispute of the key factual and legal prerequisites to Commission jurisdiction over the operations at issue, namely, was Shuttle Express even "operating" the rescue service? This is a novel legal question that has never been

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[1] *E.g.,* Initial Order, ¶¶ 39, 42, 48, 55.

[2] Initial Order, ¶ 48 and Note 46.

[3] The ALJ may have misinterpreted a statement by Mr. Sherrell as an admission of guilt, when he 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…."). Ordinarily lay witnesses are not asked for a legal opinion on the ultimate legal issue in a case. Accordingly, anything other than a clear and unambiguous change of plea should be construed merely as lack of legal understanding, not an admission of guilt when guilt has been formally denied.

squarely addressed by the Commission until now. Until the issue is decided, Shuttle Express does not know if it is even out of compliance, nor does it know exactly what steps it needs to take to come into compliance—if any.

5 Due to the critical importance of the rescue service to the long-term viability of door-to-door share ride airporter service, it should not be taken as a sign of disregard that Shuttle Express has endeavored to serve the public to the best of its ability based on its good faith interpretation of the laws and rules and belief in the legality of rescue service. Staff has not cited any other violation by Shuttle Express aside from this disputed issue. Further, it is to be expected that Shuttle Express would defend itself and its operations in accordance with the procedures of the Commission and the APA.[4]

6 The issues of knowledge and willfulness are discussed further below. When the threshold legal issue is finally decided, providing clear and conclusive guidance going forward, Shuttle Express will seek such appropriate administrative or legislative relief as may be necessary and comply with all applicable laws and rules, pending such relief. Indeed, Shuttle Express has already taken a temporary and conditional step with its petition for exemption filed in Docket TC-132141. Shuttle Express has at all times acted in good faith in attempting to serve the public sustainably within the dictates of the public service laws and rules and will continue to do so for so long as it is able.

BACKGROUND

7 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

[4] Administrative Procedure Act, RCW Ch. 34.05.

what they wanted to do with us or … how we operate."[5] The regulation of Shuttle Express—an airport share ride door-to-door shuttle 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.

8 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 door-to-door service 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 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.

9 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 and the Initial Order threaten both of these critical requirements. Upholding the Initial Order in whole or in part could 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

[5] TR (transcript) at 147.

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.

10 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 the Initial Order should be reversed, the complaint dismissed, and 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 and find one or more violations, there should still be minimal or 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.

IDENTIFICATION AND DISCUSSION OF SPECIFIC CHALLENGES

I. The Initial Order Erred In Upholding the First Cause of Action Because Staff Failed to Demonstrate That the Shuttle Express "Rescue" Program Violated Any Applicable Law or Commission Rule or Order.

A. Specific challenged findings and conclusions.

Shuttle Express challenges the following findings and conclusions[6] related to the First Cause of Action:

> "Any driver servicing the Company's regulated multi-stop routes thus must be a Shuttle Express employee." Initial Order, ¶ 15.
>
> "Shuttle Express appears to recognize that an independent contractor program does not comply with Commission rules. * * * Despite this experience in Docket TC-072228, Shuttle Express implemented and operated another independent

[6] The Initial Order blends the findings of fact and conclusions of law. Accordingly, this Petition separates the findings and conclusions by cause of action or proposed remedy, but otherwise lists them in paragraph order as set forth in the Initial Order.

contractor program from at least October 2010 to September 2011." Initial Order, ¶ 16.[7]

"Under Commission rules, there can be no dispute that the Company is not allowed to rely on non-employees to transport passengers to the airport, even when circumstances develop that might cause a passenger to miss a flight." Initial Order, ¶ 18.

"The Commission finds that each time Shuttle Express sends an independent contractor to pick up passengers on a multi-stop route, the Company violates WAC 480-30-213(2). The evidence demonstrates that from October 2010 to September 2011, Shuttle Express violated this rule a total of 5,715 times. The record also indicates that the Company is continuing to violate WAC 480-30-213(2)." Initial Order, ¶ 19.

"Shuttle Express, Inc., 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." Initial Order, ¶ 64.

B. <u>Legal and record support for challenges re First Cause, WAC 480-30-213(2)</u>.

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

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

12 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 <u>operated by</u> 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

[7] Just because its non-lawyer witness could articulate a legal analysis on the stand does not mean that Shuttle Express ever "recognized" that its rescue service did not comply with Commission rules. TR at 135. The Answer to the Complained denied the allegations. Response from Shuttle Express at 2 (May 24, 2013). The passage cited in support of this finding is discussing the 2007 independent contractor program, which the company steadfastly denies is the same as the rescue service. TR at 134.

employee. Staff failed to prove that any of the 5,715 operations were **operated by** Shuttle Express. If anything, Staff conclusively proved otherwise.

13 The Staff's case 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.

14 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,"[8] 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.

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

15 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 operators 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.

16 The Staff apparently concluded—with almost no analysis or explanation—that Shuttle Express is the operator of the limousines because it "dispatches them" and because Shuttle 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, which the Initial Order failed to recognize or even acknowledge.

17 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)

18 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 and the Initial Order. TR at 27.

19 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,[9] 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 8-16.

20 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 8-16. 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 in this case, as discussed below.

[9] Docket TC-072228.

21 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*.

22 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:

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

23 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.*

24 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. Further, limousines may carry up to 14 passengers in a "stretch" automobile or a van. WAC 308-83-010(12).

25 Rescue service meets the definition of a limousine service because Shuttle Express prearranges the transportation with the passengers and, in some cases, groups them.[10] 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.

[10] 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.

26 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).

27 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.*

28 Even assuming, for the 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.

29 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).

30 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 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.

31 The statute that defines "auto transportation" states, "[t]he words "between fixed termini or over a regular route" means "the termini or route between or over which any auto transportation company usually or ordinarily operates 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.

II. The Initial Order Erred In Upholding the Third Cause of Action By Failing to Recognize an Exception in WAC 480-30-456 Which Allows Use of Passenger Information to Provide the Requested Service.

A. Specific challenged findings and conclusions.

Shuttle Express challenges the following findings and conclusions[11] related to the Third Cause of Action:

> "WAC 480-30-456, however, includes no exceptions to its prohibition on disclosing private customer information." Initial Order, ¶ 28.
>
> "The Commission finds that Shuttle Express, through operation of its rescue service, violates WAC 480-30-456 each time the Company sends an independent contractor to pick up passengers on a multi-stop route. The evidence demonstrates that from October 2010 to September 2011, Shuttle Express violated this rule a total of 5,715 times. If Shuttle Express is continuing to offer a rescue service, the Company is continuing to violate WAC 480-30-456." Initial Order, ¶ 29.
>
> "Shuttle Express, Inc., violated WAC 480-30-456 on 5,715 occasions by releasing private customer information to the Company's independent contractors without first obtaining written permission from the customer." Initial Order, ¶ 69.

[11] The Initial Order blends the findings of fact and conclusions of law. Accordingly, this Petition separates the findings and conclusions by cause of action or proposed remedy, but otherwise lists them in paragraph order as set forth in the Initial Order.

B. Legal and record support for challenges re Third Cause, WAC 480-30-456.

32 Staff's testimony did establish that certain customer information is provided to the independent contractors, a fact that was not in dispute. The Third Cause of Action alleged 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…." But in the context of this case, that action is clearly not a violation of the rule based on another provision that the Staff and Initial Order both failed to acknowledge.

33 The Complaint paraphrased and focused solely on subsection 3 of the rule. It ignored 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. For reasons that are not clear, the Initial Order chose to strike the portion of the Shuttle Express brief discussing this important exception to the customer information rule, and therefore made no mention of it.

34 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 independent contractor 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 (Visa and MasterCard), for example.

35 WAC 480-30-456(3), on which the Complaint and Initial Order rely, 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 bore 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.

36 When the rule is considered in full and in context, it is clear that the challenged findings and conclusions are erroneous and should be reversed on administrative review. Even if the Commission upholds the First Cause of Action, it does not automatically follow that the carrier is prohibited by WAC 480-30-456 from sharing the information to provide the customer with the service they requested, albeit using a differently-classified carrier.

III. The Initial Order Erred In Upholding the Fourth Cause of Action By Upholding the First Cause and By Failing to Recognize Significant Differences Between the Nature of Operations Challenged in 2007 Compared to 2012.

A. Specific challenged findings and conclusions.

37 Shuttle Express challenges the following findings and conclusions[12] related to the Fourth Cause of Action:

> "As described in detail with regard to the First Cause of Action, Shuttle Express violated WAC 480-30-213(2) on thousands of occasions from October 2010 to September 2011 and is continuing to do so. The Commission concludes that the

[12] The Initial Order blends the findings of fact and conclusions of law. Accordingly, this Petition separates the findings and conclusions by cause of action or proposed remedy, but otherwise lists them in paragraph order as set forth in the Initial Order.

Company's past and ongoing violations of this rule also amount to violations of Order 01 in Docket TC-072228." Initial Order, ¶ 31.

"Shuttle Express attempts to distinguish its current rescue service from the independent contractor program it agreed to discontinue in Docket TC-072228 by claiming that all of the town car or limousine drivers it has been using for rescue services own their vehicles, while the charter bus companies owned the vehicles used under the discontinued program. This distinction makes no difference. The ownership of the vehicles is irrelevant. The status of the drivers is the issue, and in both instances, the drivers were not Shuttle Express employees in violation of WAC 480-30-213(2)." Initial Order, ¶ 32.

"When Shuttle Express signed the settlement agreement in 2008, it knew that it could no longer use non-employee drivers to transport passengers without violating Order 01 in Docket TC-072228. The evidence demonstrates 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. The Company violated Order 01 in Docket TC-072228 each time it sent an independent contractor to pick up passengers on a multi-stop route, a total of 5,715 times between October 2010 and September 2011." Initial Order, ¶ 33.

"Shuttle Express violated WAC 480-30-213(2), WAC 480-30-456, and Order 01 in Docket TC-072228 on 5,715 occasions each, for a total of 17,145 violations." Initial Order, ¶ 34.

"Shuttle Express, Inc., violated Order 01 in Docket TC-072228 on 5,715 occasions by operating an independent contractor program after agreeing not to do so." Initial Order, ¶ 71.

B. <u>Legal and record support for challenges re Fourth Cause, Order Violation.</u>

38 The Complaint alleged in the Fourth Cause that "Shuttle Express violated Order 01[13] in Docket TC-072228 by violating the rule that was at issue in that proceeding" in providing rescue service. The Initial Order accepted this allegation, thus bootstrapping the 5,715 citations in Cause One into 5,715 additional and distinct violations. But the Initial Order erred in agreeing with Staff that merely because the Complaint involved the same rule the Rescue program it can be considered the same violation as the 2007 case that the prior Order dealt with. To the contrary,

[13] Exh. BY-1 at 43-57 (hereafter, "the Order").

the Settlement Agreement[14] and Order were narrowly drawn and expressly limited to the specific facts of the 2007 case.

39 Again, the Initial Order seemingly ignores nearly the all the evidence (and struck the brief analyzing the evidence) that showed how the independent contractor driver program in 2007 was vastly different in nature, scope, and purpose from the current rescue program. Indeed, the evidence in this case established that the rescue service at issue now had been in existence for years by the time of the 2007 case,[15] but it was not mentioned in the Settlement Agreement or the Order at that time. The record does not show why the rescue operations were not addressed in the 2007 case. Perhaps they were not considered a violation at the time. More likely neither party had the rescue service in mind. Under either scenario, the rescue service would not have been addressed in the Settlement or Order in the 2007 case.

40 Staff's testimony reflected that Staff had 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.

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[14] Appendix to the Order, Exh. BY-1 at 52-57.
[15] TR at 107.

41 Quite simply, the Order in the 2007 case did not say "never use independent contractors again for anything." Rather, it said "never reinstitute your ***independent contractor driver program***." The Order on the 2007 program 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 and the Initial Order would have to be the same as—or at least substantially similar to—the "independent contractor driver program" that the Order dealt with in the 2007 case. It is not.

42 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 (emphasis added).

43 The Initial Order fails to correctly identify the issue raised by the Fourth Cause of Action. It narrowly summarized the company's defense and then summarized the issue thus: "The status of the drivers is the issue." Initial Order, ¶ 32. But the status of the drivers (employee/ independent contractor) is not the issue at all. The issue is the statute of the challenged passenger transportation operations. *See* WAC 480-30-213(2). Were the trips driven by the independent contractors "operated by" Shuttle Express? *Id*. Given the extensive management and control evident in the Order and underlying Settlement and Staff investigation in 2007, Shuttle Express admitted they were. In the case of rescue service, Shuttle Express denies that, based on

numerous factors. The Initial Order thus failed to correctly identify the issue and the company's defense.

44 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 demonstrated. 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 now have substantial independent work, in contrast to 2007. *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.

45 The Initial Order follows the logic of the Complaint, alleged that the rescue program violates the 2007 case 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 claims based on different facts.

46 The program at issue today could hardly 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.

47 Finally, not only were the 2007 managerial and operational facts very different from the rescue service, the whole ***purposes*** of the programs were 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.

48 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 the 5,715 alleged violations of WAC

480-30-213(2) violated the prior Order. The prior Order in no way addressed nor was intended by the Commission to address the rescue service at issue today.

49 If this Petition is upheld and the Initial Order is reversed as to the First Cause, then there can be no violation of the 2007 Order. But even if the First Cause is upheld that does not mean the Fourth Cause should also be upheld. The Commission should examine closely the narrow scope of the 2007 case Order and the specific program it addressed and then take note of the extensive evidence in this record of the differences between the 2007 program and today's program.

50 Finally, even if the Fourth Cause of action is upheld, that does not mean the violation was "knowing" or "willful," as the Initial Order held. *See, e.g.,* Initial Order, ¶ 33. ("When Shuttle Express signed the Settlement Agreement in 2008, it knew that it could no longer use non-employee drivers to transport passengers without violating Order 01 in Docket TC-072228.") To the contrary, the only thing Shuttle Express knew was that it could no longer use independent contractors on the regular, scheduled, and systematic basis as part of its regular operations as it had done in 2007. It also knew that it had been providing rescue service for some years using independent contractors and the rescue service was not mentioned in the 2007 Complaint, Settlement, or Order. *See* Exh. BY-1 at 43-57. The Commission may ultimately disagree with Shuttle Express's interpretation and understanding of the rules and 2007 Order. But the evidence shows that Shuttle Express was operating in good faith, not "in willful and deliberate disregard of Commission regulations." *Compare* TR. at 134 with Initial Order, ¶ 36.

IV. Even Should the Commission Uphold Some or All of the Initial Order, No Penalties Can or Should be Assessed.

A. Specific challenged findings and remedies.

51 Shuttle Express challenges the following findings and proposed remedies contained in the Initial Order:

"Now, faced with a second violation of the same rule, the Company does not even beg forgiveness but instead remains intransigent." Initial Order, ¶ 39.

"Shuttle Express should and will be penalized for violating Commission rules." Initial Order, ¶ 40.

"However, the Company's use of independent contractor drivers puts the public at risk by using drivers over whom the Commission has no regulatory oversight." Initial Order, ¶ 41.

"The evidence demonstrates that Shuttle Express intentionally violated WAC 480-30-213(2) by using independent contractor drivers. The Company has shown complete disregard for this Commission rule and continues to do so. The Company's consequential violation of WAC 480-30-456 regarding release of customer information was not as blatant, but was also intentional, as was the Company's violation of Order 01 in Docket TC-072228." Initial Order, ¶ 42.

"The record demonstrates that Shuttle Express provided extensive information to Staff, but not always promptly or in an open manner. The Company maintained a dialogue with Staff but could have been more forthcoming during the course of Staff's investigation." Initial Order, ¶ 44.

"Over the course of a year, Shuttle Express violated the independent contractor rule 5,715 times. Consequently, the Company also violated the customer information rule and a Commission order 5,715 times. The Commission finds the sum total of 17,145 violations to be significant." Initial Order, ¶ 46.

"Number of Customers Affected. Shuttle Express' violations affected over 5,000 customers whose private information was released to independent contractors." Initial Order, ¶ 47.

"Shuttle Express appears determined to continue to violate WAC 480-30-213(2), WAC 480-30-456, and Order 01 in Docket TC-072228 for the foreseeable future. The presiding officer requested the parties to work together to file a post-hearing brief addressing a forward-looking resolution of the issues presented by the Company's reliance on a rescue service. However, Shuttle Express filed a separate brief that was largely non-responsive and failed to identify a realistic course of action to bring the Company into compliance with Commission rules. (Given the degree of non-responsive material in Shuttle Express' post-hearing brief, the Commission strikes the brief in its entirety, except for ¶¶ 52-58.)" Initial Order, ¶ 48 (and Note 46).

"Shuttle Express, however, recently increased the size of its vehicles without first seeking to amend its authority to do so, which highlights the Company's apparent disregard for laws that it views as inconsistent with its business operations." Initial Order, ¶ 49.

"Shuttle Express has demonstrated a continuing refusal to adopt any program to comply with the law at issue in this case but otherwise is in compliance with other Commission rules and regulations." Initial Order, ¶ 50.

"Considering all of the foregoing factors together, the Commission concludes that Shuttle Express should be forced to bring its operations into compliance with Commission rules with a sizeable financial penalty." Initial Order, ¶ 52.

"Nevertheless, the Company's choice to use independent contractors was unlawful." Initial Order, ¶ 54.

"Shuttle Express paid a $9,500 penalty five years ago but soon returned to using an independent contractor program that it knew violated WAC 480-30-213(2). Given this repeat violation of the same rule, we find it appropriate to impose an even larger penalty for a second violation." Initial Order, ¶ 55.

"The Commission will impose a penalty of $120,000 on Shuttle Express …." Initial Order, ¶ 57.

"Additionally, this penalty should not jeopardize the Company's long-term financial security." Initial Order, ¶ 58.

"To meet this condition, Shuttle Express must immediately cease its unlawful use of independent contractor drivers, pay $35,000 of the penalty amount, and then comply with WAC 480-30-213(2) and WAC 480-30-456 for the next three years, through October 31, 2016. If Shuttle Express uses any independent contractors to provide service during this three-year period, the $85,000 penalty will immediately become due and payable to the Commission." Initial Order, ¶ 59.

"Shuttle Express, Inc., should pay a penalty for violating Commission rules and for violating a Commission Order." Initial Order, ¶ 72.

"Shuttle Express, Inc., shall immediately cease and desist its use of independent contractors to provide multi-stop service along its regulated routes." Initial Order, ¶ 73.

"Shuttle Express, Inc., shall be assessed a penalty of $120,000." Initial Order, ¶ 74.

"Shuttle Express, Inc., shall be responsible to pay $35,000 of the assessed penalty with an option to make installment payments as specified no later than the following due dates:

$15,000	December 15, 2013
$10,000	January 15, 2014

$10,000 February 15, 2014" Initial Order, ¶ 75.

B. <u>Legal and record support for challenges re remedies and related findings.</u>

1. <u>*The violations, even if upheld, were not knowing or willful and do not reflect intransigence.*</u>

52 Based on the defenses discussed above, Shuttle Express continues to hold a good faith belief that its actions do not violate the rules or prior Order, as alleged in the Complaint. The Initial Order's characterization of Shuttle Express's supposed "intransigence," as well as findings of "blatant," "willful," and "knowing" violations[16] are surprising, giving the ALJ's remark at the close of the hearing that, "I don't see any recalcitrance here." TR at 158. The only change since the hearing was the filing of the brief, which provided good faith legal arguments, based on extensive evidence in the record, to bolster Mr. Sherrell's personal belief that the rescue operations were not the same as the independent contractor operations in 2007. A party's exercise of its right to defend itself based an issue of law that is reasonably debatable (if not winnable) should not be considered "intransigence," even if ultimately the issues of law are resolved against it.

53 The Initial Order would go so far as to strike the Shuttle Express post-hearing brief nearly entirely as being "non-responsive." Initial Order, ¶ 48 and Note 46. Further, the Initial Order seems to give weight to the parties' inability to file a joint brief as supporting stronger penalties against Shuttle Express. *Id*. The post-hearing brief has nothing to do with "intransigence." The ALJ requested a "kind of a freestyle assignment of a brief" that addressed "how Shuttle Express can meet the needs of its passengers and how Shuttle Express can comply with all applicable Commission rules." TR at 156, 159.

54 In its post-hearing brief, Shuttle Express declined to admit guilt, and in so doing provided a thorough analysis of its rescue service and a good faith argument why it may already comply

[16] *E.g.,* Initial Order, ¶¶ 39, 42, 48, 55.

with applicable Commission rules. Thus, the Shuttle Express brief—while it may not have taken the direction the ALJ expected—was responsive to the request for briefing on "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." Notice Requiring Post-Hearing Briefing (Aug. 5, 2013). The threshold issue for future compliance is whether any change is needed at all. The Shuttle Express addressed that issue by demonstrating why it could continue the rescue service without action by the Legislature or the Commission and why that course of action was in the public interest.

55 Moreover, contrary to possible implications of the Initial Order, Shuttle Express pursued a joint filing with the Staff vigorously and in good faith. The fact the parties could not agree should not be grounds to penalize Shuttle Express, anymore than Staff should be penalized for not adopting Shuttle Express's legal theories. The parties have been in fundamental disagreement on the key legal issue underpinning WAC 480-30-213. Until that issue is ultimately resolved, there can be no agreement on operations and applicable regulations going forward.

56 Other than implications for the amount of the penalty, if any, the issue of briefing should be moot at this stage. Shuttle Express has, of necessity, repeated its legal arguments herein. And there can be no question under the Commission's rules and the Administrative Procedure Act that Shuttle Express is entitled to make any pertinent legal argument at this stage on the threshold question of whether the Staff proved any violations of Commission rules. *See, e.g.*, RCW 34.05.464(5); WAC 480-07-825.

57 The only direct evidence in the record of intent was provided by Mr. Sherrell, who testified that, "in my mind, [the prior independent contractor program] had nothing to do with using 16 independent contractors for rescue service." The discussion above shows why that view is

reasonable, if not controlling, in this case. Moreover, Shuttle Express had been running its rescue program for years before, during, and after the Staff's 2007 investigation. TR at 134. The Staff pursued enforcement of the 2007 independent contractor program, but did not cite the rescue service. It was not unreasonable for Shuttle Express to have concluded that the 2007 program and rescue service were different.

58 Finally, the key rule and statute on which it is based are not models of clarity. The key rule is vague in the context of this case. WAC 480-30-213(2) states: "The driver of a vehicle ***operated by*** a passenger transportation company must be … an employee of the certificate holder…." (Emphasis added). But, as one Commissioner noted at the open meeting discussion in TC-132141, "who is the operator?"[17] Are the rescue trips referred to independent contractors by Shuttle Express "operated by" Shuttle Express? Even if the Commission holds that they are, the rule is not so clear that Shuttle Express's actions can possibly be deemed "willful" or "intransigence."

59 The statute on which the rule is based is, even worse in the clarity department; a true model of obscurity. The statutory definition of an "auto transportation company" is circular, incorporating the term it purports to define as one of the essential elements of the business: "transporting persons … on the vehicles of auto transportation companies." RCW 81.68.010(3)(emphasis added). The other prerequisite to being defined as an "auto transportation company" is operating "between fixed termini or over a regular route." *Id.* (emphasis added). What that phrase means is likewise defined in a circular fashion: "The words 'between fixed termini or over a regular route' mean the termini or route between or over which any auto transportation company usually or ordinarily operates…." *Id.* sub. (5)(emphasis added). Thus, to determine if you are ***operating***

[17] Open Meeting Audio Recording (Goltz)(December 12, 2013).

as an auto transportation company, you first have to know if you ***are*** an auto transportation company.

60 The Legislature itself has recognized that the determination of what constitutes operation as an "auto transportation company" is inherently factual and subject to determination by the Commission based on the specific facts of each operation investigated. *See* RCW 80.36.010(5)(classification is "a question of fact, and the finding of the commission thereon is final and is not subject to review.") Until the Commission classifies operations of the rescue trips, it remains unclear whether they constitute "auto transportation" service and, if so, who is the "operator" of the service.

61 Since the 2007 program, Shuttle Express has always endeavored to operate in good faith and there is no evidence of the "disregard for laws" as the Initial Order would find. *See* Initial Order, ¶ 49.[18] If the Commission should uphold the Initial Order in any respect, the company will again do what it takes to get in compliance with the Commission's interpretation of the laws and rules.

2. *Penalizing Shuttle Express in this case would violate due process.*

62 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 upholds some or all of the Initial Order's findings of violations. Constitutionally, the statutes, rules, and orders are just too vague to apply to the rescue service except going forward.

63 As is discussed above, the Commission's statutes, rules, and order do not define the term "operated by," in the context of the rescue service, yet the Staff proposes a significant penalty on

[18] The citation for this proposed finding is Docket TC-091931. But that was not an enforcement proceeding. It was a voluntary application by Shuttle Express to ensure that its operations comported with its certificate. Id., Transcript at 88-89. Shuttle Express believed that acquisitions of authority over the years gave it the authority to operate 10 passenger vans. The company went to the great expense of a contested case to ensure it was operating legally. This is hardly proof of "disregard" of Commission laws.

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).

64 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).

65 Accordingly, it is well established that if an agency's 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.

66 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.

67 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.

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

68 The Staff conceded 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 independent contractor 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.

69 Thus, Initial Order's finding that "the Company's use of independent contractor drivers puts the public at risk" is not supported by the record. Initial Order, ¶ 41. 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.[19] Thus, the issue is not safety, but rather a technical regulatory issue relating to the number of stops made when a rescue is required. Can the Commission realistically uphold a decision that finds limousines, school busses, taxis, and other forms of for hire transportation to be "unsafe" merely because they are not regulated by the Commission?

70 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 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 three or more stops, they ride in a limousine, in most cases with no other stops. TR at 61-62.

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

71 The Initial Order errs in finding that information sharing "affected over 5,000 customers" was a factor favoring penalties. Initial Order, ¶ 47. The 5,000 customers were affected beneficially. Only harmful effects should support penalties. The record establishes only benefits to customers—such as getting to the airport on time—and not a single harmful effect.

72 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.

73 The Commission should reject the Initial Order entirely based on lack of a *prima facie* evidence supporting Staff's complaint. But even if the Commission upholds one or more of the alleged violations, in the wake of that Shuttle Express would hope the Commission would give Shuttle Express the chance to work proactively with it and its Staff to adapt its regulations to real-world realities. 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 stiff penalties here could severely damage the public interest, not serve it.

4. *<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 Long-Term Waiver Petition By Shuttle Express</u>*.

74 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 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);
> - 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 addressed each of the above bullet points in its post-hearing brief and will repeat them here, for convenience.

75 For the reasons discussed above, 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. Should the Commission disagree, 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. It also tried using taxis early in its operational history, but had concerns about safety, since taxi drivers are not drug tested. *Id.* at 99-100. Taxis were also not found to be reliable for rescue service. *Id.*

76 Shuttle Express does not see any point at this stage of the proceeding in a separate petition 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.

77 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.

78 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 a permanent exemption pursuant to WAC 480-07-110. It has already done so on a temporary basis, establishing a of pilot program. Order Granting Petition With Conditions, Order No. 1, Dkt. 132141 (Dec. 13, 2013). Shuttle Express hopes the *de facto* pilot will give Staff the chance to see first-hand that appropriate conditions in an exemption can give Staff essentially the same level of regulatory oversight over independent contractors as it currently has over employees.

79 Shuttle Express currently 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 could 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.

5. ***If the Commission Should Find that Penalties Should Be Assessed, the Amounts Should Be Reduced, Additional Time to Pay Should Be Allowed, and Any Cease and Desist Should Be Stayed Pending a Petition for Exemption.***

80 To the knowledge of counsel, 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. 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.

81 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.[20] Here there was no harm, nor a single complaint from a Shuttle Express customer. TR at 31. Despite the proposed finding of the Initial Order, safety was never compromised.

82 Not only is the recommended $120,000 fine unprecedented, it is out of proportion. 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. Shuttle Express requests that a fine, if any, be further reduced, both as to the initial amount and the suspended amount. Shuttle Express suggests the amount of $60,000, with all about $20,000 suspended would be more reasonable. That fine would be more than six times greater than the last penalty assessed, and more than 300 times the per violation fine against Waste Management. Moreover, as winter is the slowest time for air travel, Shuttle Express would request the non-suspended payments not begin until July of 2014.[21]

83 Finally, 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 a petition for a long-term exemption petition under WAC 480-07-110.

CONCLUSION

84 The Initial Order adopts a 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,

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

[21] There 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. Initial Order, ¶ 58. Considering the company's attorney fees for this and related proceedings, the case has been very costly to the company.

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.

85 The Commission should not penalize or prohibit a program that serves the broader public interest. Rather, it should allow Shuttle Express to work proactively with the Commission going forward 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. 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.

Respectfully submitted this 3rd day of January, 2014.

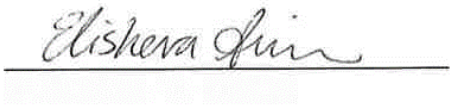
LUKAS, NACE, GUTIERREZ & SACHS, LLP

Brooks E. Harlow
Counsel for Shuttle Express, Inc.

Docket TC-120323
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached Unopposed Motion of Shuttle Express, Inc. for Extension of Time to Seek Administrative Review of Initial Order upon the persons and entities listed on the Service List below via e-mail and by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED at McLean, Virginia this 3rd day of January, 2014.



ELISHEVA W. SIMON

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