

[Service date November 1, 2013]

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET TC-120323
TRANSPORTATION COMMISSION,	)	
	)	
Complainant,	)	ORDER 03
	)	
v.	)	
	)	INITIAL ORDER
SHUTTLE EXPRESS, INC.,	)	
	)	
Respondent.	)	
.....	)	

**BACKGROUND**

- 1 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, Inc. (Shuttle Express or Company) alleging that between October 2010 and September 2011, the Company was operating an unlawful independent contractor program. Shuttle Express is an automobile transportation company providing regulated share-ride door-to-door service in multi-passenger vans. The Company holds certificate of public convenience and necessity C-975.<sup>2</sup>
  
- 2 The Complaint alleges that Shuttle Express violated WAC 480-30-213(2) on 5,715 occasions by relying on independent contractors to transport passengers when the Company’s own drivers and equipment were not readily available to ensure timely travel to or from Seattle-Tacoma International Airport. The Complaint also alleges that Shuttle Express failed to maintain sufficient reserve equipment, in violation of WAC 480-30-216(6), and improperly released private customer information, in violation of WAC 480-30-456. Finally, the Complaint alleges that the Company’s

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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.

<sup>2</sup> Exh. SE-1.

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independent contractor program was a repeat offense, violating the terms of Order 01 in Docket TC-072228.

3 On May 24, 2013, Shuttle Express filed a Response denying all allegations. The Company denied violating WAC 480-30-213(2) but indicated it had “reasonable circumstances” to explain its actions. The Company characterized the alleged violations of WAC 480-30-216 and WAC 480-30-456 as “unfounded.” Shuttle Express also asserted that Order 01 in Docket TC-072228 did not apply to its current independent contractor program, characterizing the Complaint allegations as “unrelated to any previous actions by the Commission.” The Company requested a hearing on the matter.

4 The Commission conducted an evidentiary hearing 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.

5 *Representatives.* Jennifer Cameron-Rulkowski, Assistant Attorney General, Olympia, WA, represents Staff. Jimmy Sherrell, *pro se*, Renton, WA, represented Shuttle Express at hearing; on August 6, 2013, Brooks E. Harlow, Seattle, WA, entered a Notice of Appearance to represent Shuttle Express in all further proceedings.

### EVIDENCE

6 Shuttle Express operates a “share ride” door-to-door airport shuttle service in which multiple customers share the same van for travel between the airport and their residence or workplace.<sup>3</sup> Shuttle Express offers a “flight guarantee” pursuant to which the Company pays all expenses a customer incurs if the Company fails to get passengers to the airport in time to board their flight.<sup>4</sup>

7 Shuttle Express owns approximately 80 multi-passenger vans to support its share ride service and 16 buses to support its scheduled service.<sup>5</sup> Mr. John Hagen, Shuttle Express’ Revenue Manager, estimates that up to 15 percent of the vehicle fleet might be out of service for maintenance at any one time, leaving approximately 68 vans in service on any given day.<sup>6</sup> The Company employs 184 drivers, 140 on a full-time

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<sup>3</sup> Exh. BY-1 at 85 and 141. Shuttle Express also offers bus service on scheduled routes (regulated by the Commission) and luxury transportation in owner-operated limousines and town cars (regulated by the Department of Licensing).

<sup>4</sup> Hagen, TR. 100:12-21.

<sup>5</sup> *Id.* at 120:7-19; *see also* Exh. SE-2.

<sup>6</sup> Hagen, TR. 120:9–121:1.

basis, of which up to 50 might typically be on the road at any one time.<sup>7</sup> According to Mr. Hagen, the Company has enough vehicles to meet all of its customers' transportation demands.<sup>8</sup>

8 Shuttle Express plans its daily staffing, schedules, and routing based on advance reservations and past experience, but the Company also accepts same day reservations and welcomes walk-up traffic for customers departing the airport.<sup>9</sup> The Company groups trips geographically, trying to maximize the number of passengers each vehicle transports.<sup>10</sup>

9 To honor its flight guarantee, Shuttle Express occasionally relies on independent contractors driving town cars or limousines to pick up passengers, but only when delays to a van's routing, such as traffic snarls or mechanical breakdowns, might cause a customer to miss a flight.<sup>11</sup> Shuttle Express refers to this backup arrangement as its "rescue service." The Company does not schedule independent contractors in advance to transport passengers but turns to them in developing situations that demand a more immediate response.<sup>12</sup>

10 Shuttle Express requires each of its independent contractor drivers to sign an Independent Contractor Agreement to be eligible for rescue service referrals from the Company.<sup>13</sup> The Agreement states that an employer-employee relationship "does not exist" between Shuttle Express and the contractor.<sup>14</sup> Each contractor must have specified licenses, credentials, and insurance.<sup>15</sup> Each contractor must also agree to keep confidential the identity of Shuttle Express customers and certain other Shuttle Express trade secrets.<sup>16</sup> The independent contractor charges passengers the same

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<sup>7</sup> *Id.* at 120:9–121:14; *see also* Exh. SE-3. The most vans Mr. Hagen can remember ever scheduling is "70-some vehicles at one time." Hagen, TR. 122:15-19.

<sup>8</sup> Hagen, TR. 72:25–74:3, 120:25–121:1, and 122:15–124:7; *see also* Sherrell, TR. 130:13-17.

<sup>9</sup> Hagen, TR. 93:10–95:12; *see also* Hagen, TR. 67:4–70:21 and 72:15-21.

<sup>10</sup> Nelson, TR. 45:13–46:11; *see also* Hagen, TR. 94:3-11.

<sup>11</sup> Nelson, TR. 47:13–48:24; *see also* Hagen, TR. 95:16 – 97:21.

<sup>12</sup> Sherrell, TR. 129:11-18 ("...rescue service is a reaction of immediacy. ... We see an immediate urgency, and the immediacy is something that we have to react to with whatever resources...."). *See also* Exh. BY-1 at 11-12 and 141-142.

<sup>13</sup> Exh. SE-6.

<sup>14</sup> *Id.* at 2, Section 1(a); *see also Id.* at 17.

<sup>15</sup> *Id.* at 4, Sections 5(a-d) and at 7-8, Sections 7(a-b); *see also* DeAngelo, TR. 55:13–56:14.

<sup>16</sup> Exh. SE-6, at 5, Section 5(g); *see also* DeAngelo, TR. 58:15-23.

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fares approved by the Commission in Shuttle Express' tariffs and pays Shuttle Express a referral fee of 34 percent of the fare collected.<sup>17</sup>

- 11 When an independent contractor driver accepts a rescue service referral, the Company provides the driver with the customer's name, address, and telephone number to enable the driver to locate or communicate with the customer.
- 12 This is not the first independent contractor program the Company has used. In its previous independent contractor program, Shuttle Express contracted with carriers who held charter and excursion authority from the Commission. The Company's current rescue service uses independent owner-operators of limousines or other for-hire vehicles who are not regulated by the Commission.<sup>18</sup>
- 13 On July 11, 2008, the Commission entered Order 01, Initial Order Approving and Adopting Settlement Agreement (Order 01) in Docket TC-072228.<sup>19</sup> In that case, Shuttle Express admitted to violating WAC 480-30-213(2) by using independent contractor drivers instead of its own employees to transport passengers. As part of the settlement agreement, the Company agreed to pay a penalty of \$9,500 and to comply with all applicable rules and statutes of the Commission, including WAC 480-30-213, one of the rules at issue here.<sup>20</sup>
- 14 Staff's investigation of the Company's current program determined that Shuttle Express resorted to independent contractors to carry approximately four percent of its passengers in 2011.<sup>21</sup> According to its own records, Shuttle Express used independent contractors to carry passengers on multi-stop rescue trips on 5,715 separate occasions from October 2010 to September 2011.<sup>22</sup> Staff determined that Shuttle Express retained revenues of \$241,549 associated with its rescue service for that period.<sup>23</sup>

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<sup>17</sup> Exh. SE-6 at 11, Sections 11(a-b), at 12, Section 12(b), and at 19.

<sup>18</sup> Nelson, TR. 46:12-47:10 and 51:6-52:19; *see also* Sherrell, TR. 128:23-129:10.

<sup>19</sup> Exh. BY-1 at 43-57 (Appendix C).

<sup>20</sup> *Id.* at 45 (¶ 11), 47 (¶ 16), 53 (¶ 7), and 54 (¶ 9).

<sup>21</sup> Exh. BY-1 at 9-10 and 127.

<sup>22</sup> *Id.* at 12 and 143-144.

<sup>23</sup> *Id.* at 15-16; *see also* Young, TR. 144:10-13. The Company's independent contractor revenue between October 2010 and September 2011 totaled \$710,438, or approximately 5 percent of overall Company revenue. *See* Exh. BY-1 at 9-10 and 127.

## DISCUSSION AND DECISION

### *A. First Cause of Action – Violation of WAC 480-30-213(2)*

- 15 WAC 480-30-213(2) requires that “the driver of a vehicle operated by a passenger transportation company must be the certificate holder or an employee of the certificate holder.” Any driver servicing the Company’s regulated multi-stop routes thus must be a Shuttle Express employee. There are no exceptions to the rule.
- 16 Shuttle Express appears to recognize that an independent contractor program does not comply with Commission rules. Jimmy Sherrell, president of Shuttle Express, explained the Company’s 2007 independent contractor program as follows:

When I chose to put independent contractors in vans and provide door-to-door service, of the service that we were fined for, I had asked for all Staff communications involving the use of independent contractors. In that communication, I found that a top UTC official had recommended to the commissioners that they could react in two different ways: One, they could ignore the fact; or two, they could cause it to cease and desist. I chose to put it in place, hoping that it would be ignored and it wasn’t, so I paid a [\$9,500] fine and I discontinued the service.<sup>24</sup>

Despite this experience in Docket TC-072228, Shuttle Express implemented and operated another independent contractor program from at least October 2010 to September 2011.<sup>25</sup> At hearing, the Company acknowledged that after a few months of desisting from the use of independent contractors, it has returned to the practice.<sup>26</sup>

- 17 Shuttle Express contends that if it did not use independent contractors, the Company would have to assign standby drivers to specific regions or zones in anticipation of delays that might never occur. According to Mr. Hagen, such a plan would be impractical, and the additional labor costs would quickly make Shuttle Express fares uncompetitive.<sup>27</sup> The Company believes that not using independent contractors results in provision of a lesser quality service to its customers.<sup>28</sup>

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<sup>24</sup> Sherrell, TR. 129:19 – 130:4.

<sup>25</sup> The Complaint addresses only this one year period. However, Mr. Hagen acknowledged at hearing that Shuttle Express has been using a rescue service “for a long time,” meaning “it’s been 15 to 20 years.” Hagen, TR. 107:7-16.

<sup>26</sup> Hagen, TR. 119:13-17. Mr. Sherrell “mandated” that the Company start relying on its rescue service again the week prior to the evidentiary hearing.

<sup>27</sup> *Id.* at 101:5-19 and 119:4-12.

<sup>28</sup> *Id.* at 112:9–113:5, 115:23–117:14, and 118:23–119:3.

18 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. At hearing, when Mr. Sherrell was asked if he thought Shuttle Express could make use of independent contractors and comply with WAC 480-30-213(2), he said “No, I do not. They are not employees.”<sup>29</sup> Nevertheless, the Company continues to rely on independent contractors as an integral part of its share ride service.

19 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).

***B. Second Cause of Action – Violation of WAC 480-30-216(6)***

20 WAC 480-30-216(6) requires auto transportation companies to “maintain sufficient reserve equipment to insure the reasonable operation of established routes and fixed time schedules.” The rule does not address company staffing levels.

21 Shuttle Express’ share ride service does not operate on established routes or a fixed time schedule, but establishes its routes and schedules daily, based on customer demand. As applied to Shuttle Express, WAC 480-30-216(6) requires the Company to have enough vehicles available to meet peak demand for rides to or from Sea-Tac International Airport.

22 The record evidence shows that Shuttle Express owns approximately 80 multi-passenger vans to support its share ride service, and normal maintenance requirements keep approximately 68 vans available each day. Typical days can have up to 50 vans in service at one time, but the Company has never required more than 70 of its vans to be in operation at any given time. If compliance with the rule is simply a mathematical exercise, Shuttle Express maintains sufficient reserve equipment to insure reasonable operation of its share ride service.

23 Staff argues that Shuttle Express does not maintain sufficient reserve equipment “because the [C]ompany did not have its own equipment to provide ‘rescue service’ and, instead, contracted out its auto transportation service to independent contractors.”<sup>30</sup> According to Staff, the mere existence of a rescue service indicates

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<sup>29</sup> Sherrell, TR. 135:7-13.

<sup>30</sup> Exh. BY-1 at 20.

that Shuttle Express does not maintain sufficient reserve equipment to meet its transportation commitments.<sup>31</sup> We disagree.

- 24 The Company correctly points out that just adding more vans to its fleet would not solve the problem of honoring the flight guarantee.<sup>32</sup> Shuttle Express schedulers cannot know with any degree of certainty when a van will break down with a mechanical issue or where traffic snarls will develop. The Company's rationale for using independent contractors to "rescue" passengers is not related to the availability of equipment, but rather to concerns with scheduling drivers who would otherwise be idle for long periods of time.
- 25 The Commission finds that Shuttle Express has enough vans to meet the demands of the traveling public for door-to-door airport shuttle service, even during times of peak demand. The Company has not violated WAC 480-30-216(6).

***C. Third Cause of Action – Violation of WAC 480-30-456***

- 26 WAC 480-30-456 prohibits a company from releasing customer information without first obtaining written permission from the customer. The rule defines customer information to include the customer's name, address, and telephone number.
- 27 As described above, when a rescue is needed to get a passenger to the airport on time, Shuttle Express provides that customer's name, address, and telephone number to an independent contractor driver. Shuttle Express' Independent Contractor Agreement prohibits that driver from making any further use of this information, but customers are not asked to provide written permission prior to the Company releasing this information to its independent contractors.
- 28 Shuttle Express argues that it would be impossible to get a customer's written permission in advance of sending an independent contractor driver to ensure a timely trip to the airport. The Company also contends that no customer has ever filed a complaint for being provided with the rescue service, even if the driver is not a Shuttle Express employee. WAC 480-30-456, however, includes no exceptions to its prohibition on disclosing private customer information. The Company's obligation is to structure its operations to comply with Commission rules, not to ignore legal restrictions that do not accommodate its business practices.

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<sup>31</sup> See TR. 152:4-9 where Staff argues that "[r]egardless of driver counts or how many vans are on the street and in the lot or in the garage, reserve equipment isn't sufficient if Shuttle Express can't pick up everyone it wants to." See also TR. 71:22-72:-4.

<sup>32</sup> Hagen, TR. 101:5-19.

29 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.

*D. Fourth Cause of Action – Violation of Order 01 in Docket TC-072228*

30 When Shuttle Express signed the settlement agreement in Docket TC-072228, the Company agreed to comply with all applicable rules and statutes of the Commission, including WAC 480-30-213(2). The Commission's Order 01 in Docket TC-072228 approved the agreement, transforming Shuttle Express' pledge of future compliance to a legal obligation to comply with that Commission order.

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

32 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.<sup>33</sup> 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).

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. 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.

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<sup>33</sup> Sherrell, TR. 128:23–129:10.



***E. Enforcement Policy***

34 RCW 81.04.380 authorizes penalties of up to \$1,000 per violation of a Commission rule or order. 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. Under RCW 81.04.380, the maximum penalty the Commission could impose in this case would exceed \$17 million. The Commission thus must determine the appropriate amount to penalize the Company for these violations.

35 The Commission adopted an enforcement policy on January 7, 2013,<sup>34</sup> in which the Commission explained that it considers at least 11 factors in determining the type of enforcement action to take and the level of penalty to impose in any particular case:

- 1) How serious or harmful the violation is to the public;
- 2) Whether the violation is intentional;
- 3) Whether the company self-reported the violation;
- 4) Whether the company was cooperative and responsive;
- 5) Whether the company promptly corrected the violations and remedied the impacts;
- 6) The number of violations;
- 7) The number of customers affected;
- 8) The likelihood of recurrence;
- 9) The company's past performance regarding compliance, violations, and penalties;
- 10) The company's existing compliance program; and
- 11) The size of the company.

36 After considering each of these factors, Staff recommends that the Commission impose a penalty of \$250,000 in this matter.<sup>35</sup> Staff characterizes the Company's behavior as "deliberately" ignoring the rule and Staff's ongoing technical advice about use of independent contractors.<sup>36</sup> Staff also points out that Shuttle Express is likely to continue violating the rules set out in the Complaint, as well as Order 01 in Docket TC-072228.<sup>37</sup> According to Staff, Shuttle Express places much greater emphasis on conducting its business to honor its flight guarantee than complying with Commission rules.<sup>38</sup> The penalty assessment issued in Docket TC-072228 was the

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<sup>34</sup> Docket A-120061.

<sup>35</sup> Exh. BY-1 at 21-24.

<sup>36</sup> *Id.* at 22.

<sup>37</sup> *Id.* at 23-24.

<sup>38</sup> Young, TR. 140:11-20.

Company's only violation over the past 10 years, marring an otherwise commendable compliance history.<sup>39</sup> In Staff's evaluation, a penalty of \$250,000 is appropriate because that amount approximates the revenues retained by Shuttle Express from its independent contractor program and strikes a balance between the number of violations and the Company's willful and deliberate disregard of Commission regulations.<sup>40</sup>

37 Shuttle Express contends that its rescue service is "in the public interest" and that "Shuttle Express has never ever willingly, knowingly broke [*sic*] any rule or regulation for its own interest and it will always provide service in the public interest."<sup>41</sup> In his closing argument, Mr. Sherrell confirmed that Shuttle Express will continue to offer a rescue service, but suggested a willingness to do so lawfully, in a way that complies with Commission rules.<sup>42</sup>

38 The Company claims that the Commission does not understand the nature of its door-to-door business and is "forced to violate part of the Commission rules."<sup>43</sup> The Company's president goes so far as to claim that "it's an oversight of the Commission, of not knowing how to regulate us."<sup>44</sup> Mr. Sherrell argued that no penalty should be imposed, stating that a \$250,000 penalty would bankrupt Shuttle Express.<sup>45</sup>

39 Shuttle Express has it backwards. It is the Company's responsibility to conform its business in accordance with all applicable laws and regulations. Shuttle Express is a regulated company and therefore obligated to comply with Commission rules. If a regulated company finds it impossible, impracticable, or even just inconvenient to comply with a Commission rule, that company must petition for an exemption to the rule or otherwise seek a change to the regulation. Shuttle Express has never asked the Commission for an exception nor sought permission to operate its rescue service with independent contractors. Now, faced with a second violation of the same rule, the Company does not even beg forgiveness but instead remains intransigent.

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<sup>39</sup> Exh. BY-1 at 24.

<sup>40</sup> *Id.* at 25.

<sup>41</sup> Sherrell, TR. 147:13-25.

<sup>42</sup> *Id.* at 148:1-5.

<sup>43</sup> *Id.* at 43:6-19.

<sup>44</sup> *Id.*

<sup>45</sup> Sherrell, TR. 148:6-9.

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- 40 Shuttle Express should and will be penalized for violating Commission rules. The amount must be determined by review of the 11 factors set out in our Enforcement Policy.
- 41 *Harm to the Public.* The Commission understands that Shuttle Express intended no harm to the public through operation of its independent contractor program. To the contrary, the Company seeks only to provide its customers with the promised service. 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.
- 42 *Intentional Violation.* 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.
- 43 *Self-Reporting.* Shuttle Express did not self-report its return to an independent contractor program; Staff only became aware of the Company's actions during review of a proposed rate increase. Shuttle has never sought a declaratory ruling or otherwise requested a Commission opinion on implementing its rescue service lawfully.
- 44 *Cooperation and Responsiveness.* 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.
- 45 *Prompt Correction of Violations.* Shuttle Express adjusted its business practices to reduce or eliminate reliance on independent contractors in 2012. However, the Company has since returned to operating the rescue program and thus has not corrected the violations, which continue to occur.
- 46 *Number of Violations.* 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.
- 47 *Number of Customers Affected.* Shuttle Express' violations affected over 5,000 customers whose private information was released to independent contractors.

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- 48 *Likelihood of Recurrence.* 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.<sup>46</sup>
- 49 *Past Performance Regarding Compliance.* Shuttle Express has demonstrated compliance with other Commission rules and regulations. Aside from the \$9,500 penalty imposed in Docket TC-072228, the Company has not been penalized. Shuttle Express, however, recently increased the size of its vehicles without first seeking to amend its authority to do so,<sup>47</sup> which highlights the Company's apparent disregard for laws that it views as inconsistent with its business operations.
- 50 *Existing Compliance Program.* 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.
- 51 *Size of the Company.* Shuttle Express is the largest auto transportation company regulated by the Commission. Its 2011 operating revenues exceeded \$13 million.
- 52 The Commission's overarching goal is for regulated companies to comply with its rules. Penalties serve as an incentive for compliance and, when imposed in the right amount, deter future violations. 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.
- 53 To date, Shuttle Express has not approached the Commission to seek an exemption from rule or otherwise attempt to reach a mutual understanding on if, how, or when a rescue service that relies on non-employee drivers might be allowed or approved. The Company's rejection of a Commission rule is simply unacceptable and unlawful.
- 54 The record in this case demonstrates that Shuttle Express has a legitimate business need for a rescue service. Customers expect to get to the airport on time and the Company selected a strategy that was fiscally sensible to all involved to meet this legitimate expectation. Nevertheless, the Company's choice to use independent contractors was unlawful. Shuttle Express learned in 2008 that the Commission will

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<sup>46</sup> 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.

<sup>47</sup> See Docket TC-091931.

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not ignore violations of its rules. The Company should not expect the Commission to act differently now.

- 55 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. We aim to impose a penalty sufficient in amount to punish Shuttle Express for repeatedly disregarding Commission rules but not so large as to threaten the Company's survival.
- 56 Staff recommends a penalty of \$250,000, essentially voiding any net financial benefit Shuttle Express enjoyed from one year of operating its independent contractor program. The Company claims that a penalty of this size would lead to bankruptcy.
- 57 The Commission will impose a penalty of \$120,000 on Shuttle Express, which is approximately one half of the Company's share of the revenues generated by its independent contractor program during the time period at issue in this case. We agree with Staff that the Company should not be allowed to benefit financially from its unlawful independent contractor program. However, because Shuttle Express offers its rescue service to benefit customers, not take advantage of them, we choose not to completely divest the Company of its rescue service earnings.
- 58 A penalty of this size should provide Shuttle Express adequate motivation to quickly bring its rescue program into regulatory compliance. Additionally, this penalty should not jeopardize the Company's long-term financial security. Even so, the Commission recognizes that it may be possible to obtain its overall goal of compliance and avoid revisiting the topic of this adjudication a third time through use of a suspended penalty, forcing the Company to pay a portion of the penalty now and risk having to pay the remainder in the future. Suspended penalties are particularly appropriate when a company might be tempted to return to prior unlawful behavior.
- 59 The Commission is willing to suspend the majority of the penalty, \$85,000, on condition of future compliance. 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.

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60 We note that in the 2008 settlement, Shuttle Express sought out a payment schedule to pay the \$9,500 penalty imposed. We anticipate that Shuttle Express might find itself in a similar situation today. Therefore, we have included in our order a payment plan to spread the Company's current \$35,000 obligation over a three month period.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

61 Having discussed above in detail the evidence received in this proceeding regarding all material matters, the Commission now makes and enters the following summary of those facts and summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed findings:

- 62 (1) Shuttle Express, Inc., is an auto transportation company and holds certificate of public convenience and necessity C-975 to transport passengers.
- 63 (2) 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.
- 64 (3) Between October 2010 and September 2011, Shuttle Express, Inc., relied on independent contractors to provide regulated automobile transportation service.
- 65 (4) 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.
- 66 (5) At all times relevant to this matter, Shuttle Express, Inc., has owned and maintained approximately 80 multi-passenger vans to support its share ride service.
- 67 (6) Shuttle Express, Inc., has sufficient reserve equipment to insure the reasonable operation of its established routes and fixed time schedules and thus did not violate WAC 480-30-216(6).
- 68 (7) Shuttle Express, Inc., provided independent contractors with the names, addresses, and telephone numbers of certain passengers.

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- 69 (8) 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.
- 70 (9) On July 11, 2008, the Commission entered Order 01 in Docket TC-072228 approving a settlement agreement whereby Shuttle Express, Inc., agreed to comply with all applicable rules and statutes of the Commission, including WAC 480-30-213(2).
- 71 (10) 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.
- 72 (11) Shuttle Express, Inc., should pay a penalty for violating Commission rules and for violating a Commission Order.

**ORDER**

**THE COMMISSION ORDERS:**

- 73 (1) Shuttle Express, Inc., shall immediately cease and desist its use of independent contractors to provide multi-stop service along its regulated routes.
- 74 (2) Shuttle Express, Inc., shall be assessed a penalty of \$120,000.
- 75 (3) 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 |
- 76 (4) The Commission shall suspend collection of the remaining \$85,000 of the assessed penalty and waive enforcement or collection of that amount on November 1, 2016, subject to the following conditions:
- (a) Shuttle Express, Inc., immediately ceases using independent contractor drivers in providing regulated auto transportation services; and

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(b) Shuttle Express, Inc., strictly adheres to and complies with the independent contractor rule, WAC 480-30-213(2), and the customer information rule, WAC 480-30-456.

77 (5) The Commission retains jurisdiction to effect the terms of this order.

Dated at Olympia, Washington, and effective November 1, 2013.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM  
Administrative Law Judge



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## NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and **five (5)** copies of any Petition or Answer must be filed by mail delivery to:

Attn: Steven V. King, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
P.O. Box 47250  
Olympia, Washington 98504-7250