

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

SHUTTLE EXPRESS, INC.,

Respondent.

DOCKET TC-120323

ANSWER OF COMMISSION STAFF  
TO PETITION FOR REVIEW OF  
INITIAL ORDER OF SHUTTLE  
EXPRESS, INC.

## I. INTRODUCTION

1 Pursuant to WAC 480-07-825(4), Staff of the Washington Utilities and Transportation Commission (Commission) submits this Answer to Shuttle Express's Petition for Administrative Review of Initial Order dated January 3, 2014 (Petition). The Initial Order correctly found that Shuttle Express, Inc. ("Shuttle Express" or "Company") violated multiple rules as well as a Commission order in the course of operating the Company's independent contractor program. Because the Initial Order correctly interprets the laws and rules at issue, it should be affirmed.

2 This case represents Commission Staff's (Staff's) most recent attempt to bring Shuttle Express into compliance with respect to the Company's latest arrangement for illegally contracting out auto transportation services. Shuttle Express has a history reaching back to at least 2004 of devising and operating "independent contractor" programs. During the last decade, Staff has analyzed various iterations of these programs. Each one has a

different structure but shares the same purpose: eliminating or reducing the number of drivers Shuttle Express employs.

3           When Shuttle Express first proposed an independent contractor program in 2004, Staff informed the Company that the independent contractor program it had proposed was illegal. In a rulemaking that concluded in 2006, Shuttle Express proposed language that would allow it to operate with “sub-carriers” rather than its own employee drivers, but the Commission rejected the proposal as inconsistent with RCW 81.68. In 2008, the Commission assessed a penalty against Shuttle Express for violations of WAC 480-30-213 in conjunction with the independent contractor program Shuttle Express was then using. This rule requires that auto transportation companies provide passenger transportation using their own employees.

4           Notwithstanding this history, Shuttle Express would have the Commission believe that the Company considered the so-called “rescue” transportation it outsourced daily to limousine and town car owner-drivers to be fully compliant with laws and rules enforced by the Commission. In actuality, Shuttle Express knows full well that, under Commission rules, the Company must use its own employees to provide auto transportation services. When it did not use its own employees to provide service authorized under its certificate, the Company violated WAC 480-30-213(2); and the passenger carriers that Shuttle Express contracted with to provide this service violated the law prohibiting carriers from providing auto transportation service without a certificate.

## II. BACKGROUND

5           The Commission classified Shuttle Express as an auto transportation company and granted the Company's application for a passenger transportation certificate in 1989.<sup>1</sup> In its classification order, the Commission found, as a matter of law, that, because "Shuttle Express drivers use any number of streets or highways to pick up and deliver passengers but ultimately rely on a few major state highways to transport passengers between the airport and the nearby city or town[,] [t]hese operations represent regular route travel within the meaning of RCW 81.68.010(3)."<sup>2</sup> The Commission authorized Shuttle Express to provide service "in the Seattle Commercial Zone or within a radius of 25 miles of any airport located in that commercial zone" but restricted Shuttle Express's service to "on-call, door-to-door type service between airports served and any points within the territory served, including residences, hotels and other business locations."<sup>3</sup> At that time, Jimmy Sherrell was the Company's president.<sup>4</sup> Since then, Shuttle Express's territory has expanded.<sup>5</sup>

6           In 2004, Mr. Sherrell informed Staff that Shuttle Express planned to replace its employee drivers with independent contractors because employee drivers were economically unsustainable.<sup>6</sup> After a number of contacts with the Company, Staff informed Shuttle Express in 2005 that the independent contractor arrangement, as proposed, would violate

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<sup>1</sup> *In the Matter of Determining the Proper Carrier Classification of San Juan Air Services, Inc. d/b/a Shuttle Express*, Order M.V.C. No. 1810, Hearing No. H-4976 Commission Decision and Order Affirming Proposed Order Determining Classification (April 21, 1989) ("Classification Order"); *In the Matter of the Application SAN JUAN AIRLINES, INC., d/b/a SHUTTLE EXPRESS for a Certificate to Operate Motor Vehicles in Furnishing Passenger and Express Service as an Auto Transportation Company*, Order M.V.C. No. 1809, Hearing No. D-2566, Commission Decision and Order Granting Application as Amended in Part (April 21, 1989) ("Order Granting Certificate").

<sup>2</sup> Classification Order at p. 10.

<sup>3</sup> Order Granting Certificate at p. 30.

<sup>4</sup> See Order Granting Certificate at p. 2.

<sup>5</sup> See Exh. No. SE-1, Certificate No. C-975.

<sup>6</sup> Exh. No. BY-2, Report of Staff Investigation of Shuttle Express, Inc., Docket TC-072228, April 2008 (2008 Investigation Report), p. 5.

multiple laws. Staff noted that the arrangement would require the independent contractor drivers to obtain auto transportation authority under RCW 81.68.040, and that the arrangement would constitute a lease of Shuttle Express's certificate or other carrier property, which requires Commission approval under RCW 81.68. Staff stated, "Without the approvals and certificates identified above, Shuttle Express would be in violation of state law if it conducted its business in the manner described."<sup>7</sup> In addition, Staff advised Shuttle Express multiple times that it could seek a formal determination by the Commission on the legality of the proposed arrangement.<sup>8</sup> Staff further advised Shuttle Express that it could petition for approval to lease the Company's certificate or other properties; or seek a change in the statutes.<sup>9</sup> Shuttle Express has never sought a declaratory ruling on the legality of any of its independent contractor operations.<sup>10</sup> When Staff asked Mr. Sherrell at the hearing on August 1, 2013, whether he had ever sought a change in the statutes through the legislature, he answered, "No, I wouldn't do that."<sup>11</sup>

7 In 2006, the Commission completed a rulemaking related to passenger transportation companies.<sup>12</sup> Shuttle Express participated in the rulemaking and proposed a new rule that would allow the Company to replace its drivers with independent contractors.<sup>13</sup> The key language of the proposal read as follows:

The driver of a vehicle operated by an auto transportation company must be the certificate holder or under the complete supervision, direction and control of the operating carrier as:

- An employee of the certificate holder; or

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<sup>7</sup> Exh. No. BY-2, p. 5.

<sup>8</sup> Exh. No. BY-2, pp. 6 and 56.

<sup>9</sup> *Id.* at pp. 6 and 56.

<sup>10</sup> TR. 131:9-132:3.

<sup>11</sup> TR. 133:18-20.

<sup>12</sup> *In the Matter of Repealing, Amending, and Adopting Rules in Chapter 480-30 WAC and Chapter 480-40 WAC Relating to Passenger Transportation (Bus) Companies*, Docket No. TC-020497, General Order No. R-533, Order Repealing, Amending, and Adopting Rules Permanently (June 7, 2006) (Order R-533).

<sup>13</sup> Exh. No. BY-2, p. 6.

- An employee of a sub-carrier; or,
- An independent owner-driver who holds sub-carrier charter carrier authority and is operating as a sub-carrier.

The Commission rejected Shuttle Express's proposal, stating, "Legal staff advised that Chapter 81.68 RCW does not allow auto transportation companies to use sub carriers as proposed"<sup>14</sup> and citing "advice that the law under chapter 81.68 RCW does not allow the proposed arrangement."<sup>15</sup> In this same order, the Commission adopted the language of the vehicle and driver rule that is in effect today and at issue in this case: "The driver of a vehicle operated by a passenger transportation company must be the certificate holder or an employee of the certificate holder." WAC 480-30-213(2).

8           A year after the new passenger transportation rules were adopted, Shuttle Express contacted Staff about an independent contractor program the Company was implementing to replace employee drivers with independent contractors who would obtain charter certificates.<sup>16</sup> Staff launched an investigation of the program, which is documented in Staff's 2008 Investigation Report (Exh. No. BY-2). At the time of this investigation, Jimmy Sherrell was the president of Shuttle Express.<sup>17</sup> At the conclusion of the investigation, the Commission assessed a penalty against Shuttle Express in the amount of \$9,500 based on 95 violations of WAC 480-30-213(2).<sup>18</sup> Shuttle Express entered into a settlement with Staff, which was adopted by the Commission in an initial order served July 11, 2008.<sup>19</sup> In the

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<sup>14</sup> Order R-533, Appendix A, p. 20.

<sup>15</sup> *Id.*, Appendix A, p. 22.

<sup>16</sup> See Exh. No. BY-2, p. 7.

<sup>17</sup> Exh. No. BY-2, p. 5.

<sup>18</sup> Docket TC-072228.

<sup>19</sup> *Washington Utilities and Transportation Commission v. Shuttle Express, Inc.*, Docket TC-072228, Order 01.

settlement agreement, Shuttle Express committed to “comply with all applicable rules and statutes enforced by the Commission, including those at issue in this proceeding.”<sup>20</sup>

9           In December 2011, Shuttle Express filed a proposed rate increase with the Commission. During the course of Staff’s review of the Company’s accounting records, Staff discovered revenues and expenses associated with regulated transportation services provided by non-regulated carriers under contract with Shuttle Express. Staff undertook a further investigation of this contract, separate from the rate case analysis.<sup>21</sup> Mr. Sherrell was directly involved in responding to Staff’s requests for information. At the time of the investigation, he was listed in online Secretary of State corporation records as the Secretary, Chairman, and Director of Shuttle Express.<sup>22</sup> From its investigation, Staff concluded that Shuttle Express was operating another independent contractor program that violated the law.

10           The independent contractor program that Shuttle Express currently operates is governed by a contract called “Independent Contractor Agreement” (IC Agreement).<sup>23</sup> Under the IC Agreement, independent contractors are required to have a “Washington State Limousine Business License” a “Seattle Tacoma Airport Ground Transportation Permit,” and “[a]ny other Licenses as required by the Port, DOL, DOT, or WUTC.”<sup>24</sup> The independent contractors, who own and operate limousines or other for-hire vehicles, do not have auto transportation authority from the Commission.<sup>25</sup>

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<sup>20</sup> Docket TC-072228, Settlement Agreement, ¶ 9.

<sup>21</sup> Exh. No. BY-1, Report of Staff Investigation of Shuttle Express, Inc., Docket TC-120323, March 2013 (2013 Investigation Report), p. 6.

<sup>22</sup> Exh. No. BY-1, p. 42.

<sup>23</sup> Exh. No. SE-6; Exh. No. BY-1, pp. 58-76. The document comprising Exh. No. SE-6 and the document at Appendix D in the 2013 Investigation Report are textually identical. Further references will be made only to Exh. No. SE-6.

<sup>24</sup> Exh. No. SE-6, p. 4.

<sup>25</sup> See Exh. No. BY-1, p. 19.

11 During the investigation period, from October 2010 through September 2011, Shuttle Express outsourced a regular portion of its auto transportation service to independent contractors. According to Mr. Sherrell, the independent contractors provided 5,715 multi-stop trips during the investigation period, which breaks down to approximately 15.5 per day.<sup>26</sup> Shuttle Express dispatches these independent contractors when a Shuttle Express vehicle and driver are not available to timely complete the trip. To enable the independent contractor to pick up the customer, Shuttle Express discloses the customer's name, address, and telephone number to the independent contractor<sup>27</sup> but does not obtain written or any other kind of explicit permission from the customer.<sup>28</sup> The Company terms this transportation "rescue service."<sup>29</sup> There is no evidence that Staff was aware of Shuttle Express's "rescue service" prior to this investigation.

12 The enforcement in this proceeding addresses only the multi-stop (that is, share-ride) transportation provided by independent contractors on behalf of Shuttle Express. Staff witness Betty Young explained this at hearing in response to Judge Torem's questions:

Q [By Judge Torem] So is it Commission Staff's position, then, that anytime Shuttle Express dispatches somebody for regulated service, and it's in a vehicle operated by them under their certificate, it has to be an employee of the company?

A [Betty Young] That's what the Commission's rules require, yes.

Q [Judge Torem] If an independent contractor drives, for whatever reason, it's a violation of this particular rule [WAC 480-30-213(2)]. Is that the Commission's position?

A [Betty Young] 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.<sup>30</sup>

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<sup>26</sup> Exh. No. BY-1, p. 12.

<sup>27</sup> Exh. No. BY-1, p. 21.

<sup>28</sup> See Exh. No. BY-1, p. 97; TR. 136:4-12.

<sup>29</sup> Exh. No. BY-1, p. 9; Hagen, TR. 105:14-106:3.

<sup>30</sup> TR. 36:3-21.

13 According to Mr. Sherrell, the Company changed its policy in January 2012, to reduce the number of “rescue” trips.<sup>31</sup> At hearing on August 1, 2013, however, Shuttle Express made clear that it intended to return to regularly outsourcing its provision of multi-stop transportation to independent contractors. Mr. Hagen, Shuttle Express’s revenue manager, testified that “rescue service is absolutely needed in our business”<sup>32</sup> and that, without the use of independent contractors, service quality would drop.<sup>33</sup> He admitted that Shuttle Express continues to dispatch multi-stop “rescue” service<sup>34</sup> and testified also that top management had recently mandated a return to use of multi-stop “rescue” service.<sup>35</sup> Mr. Sherrell represented Shuttle Express at the hearing and also testified as a witness. In sworn testimony, he admitted that he could not continue to use independent contractors and comply with WAC 480-30-213(2):<sup>36</sup>

Q [By Judge Torem] Do you see any way to comply with [WAC 480-30-213(2)] and still make use of independent contractors?

A [By Jimmy Sherrell] No, I do not. They are not employees.

14 In its investigation, Staff evaluated whether Shuttle Express “operated” the independent contractor vehicles during “rescue” transportation.<sup>37</sup> To that end, Staff requested information relating to management and contracts relating to the independent contractors; operation of vehicles; customer charges and contractor compensation; reservations and dispatching; and fare tickets.<sup>38</sup> Staff concluded that Shuttle Express was the “operator” with respect to multi-stop “rescue” transportation.

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<sup>31</sup> Exh. No. BY-1, pp. 12-13.

<sup>32</sup> TR. 101:3-19.

<sup>33</sup> TR. 117:2-4.

<sup>34</sup> TR. 113:1-14.

<sup>35</sup> TR. 119:13-17.

<sup>36</sup> TR. 135:6-13.

<sup>37</sup> Exh. No. BY-1, p. 14.

<sup>38</sup> *Id.* at pp. 14-17.



15           The IC Agreement documents a detailed contractual relationship between Shuttle Express and the independent contractors, with a significant amount of control and oversight over the independent contractors accorded to Shuttle Express. For example, the “Contractor Obligations” section requires at least 10 types of documentation, completion of seven specified courses, particular accounting procedures, compliance with specific business and other governmental regulations, and confidentiality with respect to customers (sec. 5). In addition, the IC Agreement contains detailed insurance requirements (sec. 7), requires independent contractors to use Shuttle Express-provided Drive Cams and to make their vehicles available to Shuttle Express for inspection at any time (sec. 8). The IC Agreement expressly allows the independent contractor to use Shuttle Express logos, etc., while performing services under the IC Agreement (sections 2 and 4), and mandates a particular dress code (sec. 10). Further, under the IC Agreement, Shuttle Express controls the fares the independent contractor can charge (sec. 11), and prohibits independent contractors from soliciting or making “sales overtures of any kind to such clients which may encourage Company clients to deal directly with Contractor in lieu of making travel arrangements through the Company” (sec. 5(h)).

16           Shuttle Express participates in the “rescue” transportation in additional ways. The Company provides insurance that ostensibly covers the independent contractor services.<sup>39</sup> Shuttle Express takes reservations for share-ride transportation that is ultimately outsourced to independent contractors providing multi-stop “rescue” service.<sup>40</sup> Shuttle Express dispatches independent contractors to provide “rescue” transportation. For a “rescue,” customers do not pay any more than the auto transportation rate they were quoted by Shuttle

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<sup>39</sup> Exh. No. BY-1, p. 15.

<sup>40</sup> Exh. No. BY-1, p. 16.

Express.<sup>41</sup> Customers make payment directly to the independent contractor, but Shuttle Express processes credit card payments, and the fare tickets show the logo of Shuttle Express at the top of the ticket.<sup>42</sup> Photocopies of fare tickets, provided by Shuttle Express, are contained in Appendix I of the 2013 Investigation Report.<sup>43</sup>

17 Shuttle Express provides auto transportation services in King, Pierce, Snohomish, and Island counties. The Company's gross intrastate operating revenues for 2011 totaled approximately \$13.1 million.<sup>44</sup>

### III. ARGUMENT

18 This proceeding is an enforcement proceeding to stop Shuttle Express from operating an independent contractor program that causes it as well as its independent contractors to violate various laws and rules. The transportation at issue in this proceeding is auto transportation provided by Shuttle Express pursuant to its authority from the Commission. By outsourcing this transportation to limousine carriers, Shuttle Express seeks to convert the nature of the transportation. Whether a passenger ultimately rides in a van or a limousine, however, Shuttle Express passengers contract for and receive share-ride service and travel over Shuttle Express routes. Accordingly, regardless of the kind of carrier Shuttle Express outsources share-ride transportation to, the service is auto transportation.

19 As the certificate holder and the "operator" of passenger transportation service under its auto transportation authority, Shuttle Express is obligated by WAC 480-30-213(2) to personally provide this service and is prohibited from outsourcing it. Shuttle Express's independent contractors were not providing service under their authority from Department

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<sup>41</sup> Exh. No. BY-1, p. 15.

<sup>42</sup> Exh. No. BY-1, p. 16.

<sup>43</sup> According to Shuttle Express, the ten fare tickets are for "'rescue' and 'luxury transportation' services" and the Company does not identify which ones are in which category. Exh. BY-1, p. 98.

<sup>44</sup> Exh. No. BY-1, p. 6.

of Licensing; rather, they were providing a share-ride service that is under the jurisdiction of the Commission. A person operating as an auto transportation company must obtain a certificate from the Commission before providing service in Washington, but none of the independent operators possessed passenger transportation authority from the Commission.<sup>45</sup> Shuttle Express promised in a settlement with Staff in a prior enforcement proceeding to comply with all applicable Commission laws and rules, which includes those at issue here. When the Company failed to keep its commitment under its settlement, Shuttle Express violated the Commission order adopting the settlement. Because of Shuttle Express's history with the laws and rules implicated by putative "independent contractor" programs, the Company knew or should have known its current independent contractor program was illegal. The rule is not vague, and Shuttle Express was on notice, by its own admission, that the rule means the Company must use its own employees to drive vehicles it is operating to provide auto transportation service. When Shuttle Express dispatched an independent contractor to pick up a customer, Shuttle Express necessarily disclosed the customer's name, address and telephone number. This is protected information under WAC 480-30-456, and Shuttle Express violated this rule when it released the customer information to a third party. For all of these reasons, which are discussed in greater detail below, the penalty assessed in the Initial Order should not be further reduced and payment of the penalty should not be stayed.

20 By law, the Commission is vested by the Legislature with the authority and duty to supervise and regulate auto transportation companies.<sup>46</sup> In furtherance of this mandate, the Commission has promulgated passenger transportation rules that apply to auto transportation

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<sup>45</sup> RCW 81.68.040.

<sup>46</sup> RCW 81.68.030.

companies.<sup>47</sup> In these rules, the Commission defines “auto transportation company” as “every person owning, controlling, operating, or managing any motor-propelled vehicle not usually operated on or over rails, used in the business of transporting persons over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the incorporated limits of any city or town.”<sup>48</sup> “Public highway” means every street, road, or highway in this state.”<sup>49</sup> One of the primary issues that the Petition raises concerns the interpretation of one of the Commission’s regulations, WAC 480-30-213(2), which states, “The driver of a vehicle operated by a passenger transportation company must be the certificate holder or an employee of the certificate holder.”

**A. For Purposes of WAC 480-30-213(2), Shuttle Express “Operated” the Limousines and Town Cars it Dispatched for Share-Ride Transportation.**

21 Shuttle Express disputes that it was “operating” the limousines and town cars the Company dispatched to transport its passengers on share-ride trips. The definition of “operate” as a transitive verb includes “to control or direct the functioning of” and “to conduct the affairs of: manage.”<sup>50</sup> When Shuttle Express outsourced to independent contractors the share-ride transportation it is authorized and obligated to provide under its passenger transportation certificate, Shuttle Express was the “operator” for purposes of WAC 480-30-213(2). Each time an independent contractor agreed to perform a “rescue” trip, it subjected its vehicle and service to the control and management of Shuttle Express under the IC Agreement. Had Shuttle Express used certificated auto transportation companies as independent contractors without a Commission-approved lease of its

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<sup>47</sup> See WAC 480-30.

<sup>48</sup> WAC 480-30-036. “Auto transportation company” is defined in statute at RCW 81.68.010(3). As counsel for Shuttle Express notes in the Company’s Petition, the definition is circular; the definition in rule is free of the circularity, and this Answer will, therefore, use the Commission’s definition.

<sup>49</sup> RCW 81.68.010(4); WAC 480-30-036.

<sup>50</sup> Webster’s II New College Dictionary (1995).

certificate authority, Shuttle Express would have remained the “operator” and its program still would have violated WAC 480-30-213(2).

22           Because the reservation was on Shuttle Express’s system, indistinguishable from other share-ride reservations, because Shuttle Express controlled the rate to be charged, dispatched the independent contractors, provided Shuttle Express fare tickets, and carried liability insurance covering the “independent contractors,” Shuttle Express “operated” the independent contractor vehicles. Shuttle Express was not acting as a referral service or “agent,” which is defined in the passenger transportation rules as “a person authorized to transact business for, and in the name of, another.”<sup>51</sup> Under the law of agency, the principal has control over the actions and conduct of his agent within the scope of the business being carried on by him.”<sup>52</sup> “Control is the vitally essential element in the relationship of principal and agent.”<sup>53</sup> Because Shuttle Express exercised a large degree of control over and essentially directed the function of the “rescue” transportation performed by independent contractors, Shuttle Express is not an agent of the independent contractors. Under the IC Agreement, independent contractors are prohibited from developing their own business with any Shuttle Express “rescue” customer. Clearly, Shuttle Express considered each “rescue” customer to be a Shuttle Express customer and the business of transporting that customer to belong to Shuttle Express. When an independent contractor was assigned to a “rescue,” Shuttle Express managed and directed nearly every aspect of the service. But for the IC Agreement, the independent contractors would not have provided the auto transportation services only Shuttle Express is authorized under its certificate to provide.<sup>54</sup>

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<sup>51</sup> WAC 480-30-036.

<sup>52</sup> *McCarty v. King Co. Med. Etc. Corp.*, 26 Wn.2d 660, 680 (1946).

<sup>53</sup> *Id.* at 681.

<sup>54</sup> If they had, Shuttle Express likely would have complained to the Commission. TR. 139:7-15.

23 Shuttle Express argues that Shuttle Express cannot be the operator because its employees were not the drivers.<sup>55</sup> Although “operate” can mean “drive,” it has a broader spectrum of meaning. It is important to note that the rule does not say, “the driver of a vehicle driven by a passenger transportation company must be the certificate holder or an employee of the certificate holder.” Rather, the rule states “operated by a passenger transportation company.” Staff has interpreted “operated” in WAC 480-30-213(2) consistently to encompass the sense of “controlling,” “directing,” and “managing” with respect to past and present enforcement against Shuttle Express. Thus, according to Staff’s interpretation, just as a company can “operate” a restaurant, Shuttle Express “operated” the independent contractor vehicles for purposes of WAC 480-30-213(2). If the Commission wishes to change the rule to clarify its meaning prospectively, or wishes to change the rule entirely, the Commission can do so.

24 Shuttle Express’s independent contractor program presented a situation in which every independent contractor providing multi-stop “rescue” service was operating as an auto transportation company without the certificate required by RCW 81.68.040. The Commission could have instituted a classification proceeding against each one. Indeed, under Shuttle Express’s theory, which views the independent contractor as the “operator,” only the independent contractors violated any laws or rules, and not Shuttle Express.

25 Black’s Law Dictionary defines “independent contractor” as “[o]ne who is hired to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.”<sup>56</sup> The definition further states, “Unlike an employee, an independent contractor who commits a wrong while carrying out the work does not create

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<sup>55</sup> Petition at ¶ 8.

<sup>56</sup> Black’s Law Dictionary 774 (7th ed. 1999).

liability for the one who did the hiring.” When a court analyzes an employment relationship to determine whether it has the character of an employer and employee relationship or a relationship between an employer and an independent contractor, it considers not only whether there is “an actual exercise of control over the manner in which the work is performed” but also “whether there is a retention of the right to direct the manner in which the work is performed.”<sup>57</sup> This inquiry derives from the Restatement Second of Torts:

[T]he employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.<sup>58</sup>

While an analysis under labor law of whether the limousine carriers are truly independent contractors is beyond the scope of this proceeding, it is clear that Shuttle Express exercises sufficient control over the limousine carrier’s service to raise the question. Shuttle Express may be able to avoid liability for the limousine carriers’ violations of RCW 81.68.040 based on its contractual relationship with them, but the facts point to Shuttle Express as the initiator and facilitator of all of the violations at issue in this proceeding by all of the participants in the Company’s independent contractor program. With regard to compliance with WAC 480-30-213, Shuttle Express is the certificate holder and is the only “auto transportation company” at issue.

26           During the investigation period, Shuttle Express operated an auto transportation business that was unable to accommodate share-ride passengers on an average of 15.5 trips per day. Violating WAC 480-30-213(2), as Mr. Sherrell admitted, is central to Shuttle

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<sup>57</sup> *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121 (2002).

<sup>58</sup> *Id.* at 121.

Express's business model. The Initial Order correctly found that Shuttle Express violated WAC 480-30-213(2).

**B. When Shuttle Express Outsourced Share-Ride Service to Independent Contractors, the Independent Contractors Provided Service Regulated by the Commission.**

27 In its Petition, Shuttle Express attempts to turn share-ride service into charter service.

“Limousine carrier” is defined in statute as “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.”<sup>59</sup>

Limousine carriage is a type of charter service. Shuttle Express's theory in its Petition is that Shuttle Express arranges for the transportation of multiple people or groups of people under a single contract with the independent contractor. This theory conflicts directly, however, with the IC Agreement. Under the IC Agreement, each fare is the property of the independent contractor, whether prepaid to Shuttle Express or paid directly to the independent contractor.<sup>60</sup> The effect of this payment arrangement is that each passenger or group of passengers (such as a family) contracts separately with *the limousine carrier* for transportation.

28 The situation is more complicated, however, because the contractual arrangement in the IC Agreement is a fiction. The actual operator of this transportation is Shuttle Express, the passengers are Shuttle Express customers, and each passenger or group of passengers arranges transportation separately with Shuttle Express and not with the independent contractor. It is not like strangers sharing a taxi to the airport where the taxi operator is not concerned with who pays the fare but simply that the correct fare be paid for the trip,

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<sup>59</sup> RCW 46.04.276.

<sup>60</sup> IC Agreement at p. 11.



regardless of how many people ride in the taxi. Unlike sharing a taxi, each auto transportation passenger or group of passengers in a multi-stop “rescue” pays a separate fare and, thus, contracts separately for the transportation. Shuttle Express does not contract with the independent contractor to provide *limousine* service to these passengers. Rather, the independent contractor provides auto transportation service on behalf of Shuttle Express. When Shuttle Express provides multi-stop service using an independent contractor limousine, the nature of the transportation does not suddenly and miraculously change from auto transportation to charter service.

**C. Because Shuttle Express Failed to Keep its Commitment to Comply with All Rules, the Initial Order Correctly Held that Shuttle Express Violated the Settlement Agreement.**

29 Shuttle Express misunderstands the violation in the fourth cause of action in this complaint proceeding. In the settlement agreement between Staff and Shuttle Express, which was adopted by the Commission in Order 01 in Docket TC-072228, Shuttle Express committed to comply with “all applicable rules and statutes of the Commission, including those addressed in this proceeding.” It is noteworthy that this language does not say that Shuttle Express promises not to violate the vehicle and driver rule in exactly the same way ever again. The violations of Order 01 are not “repeat” violations in the sense that the underlying act of the violation is exactly the same as that in Docket TC-072228. A violation by Shuttle Express of any statute or rule enforced by the Commission would be a violation of the order. Accordingly, the distinctions between the independent contractor program Shuttle Express operated in 2007 and the current independent contractor program are not material. Staff discusses the violation, starting on page 22 of the 2013 Investigation Report, several times within the discussion of the Commission’s enforcement policy. What was

important to Staff is that Shuttle Express was not violating just any rule by operating its current independent contractor program but, rather, exactly the same rule that was centrally at issue in Docket TC-072228.

**D. Shuttle Express Knew or Should have Known its Current Independent Contractor Program was Illegal.**

30 Because of Shuttle Express’s discussions and interaction with the Commission over a period of years on the legality of independent contractor programs, including a prior penalty assessment based on violations of the vehicle and driver rule, Shuttle Express should have had a good understanding of this area of Commission regulation. If Shuttle Express disagreed with Staff’s interpretations, the Company could have sought a formal opinion from the Commission. Staff suggested this to Shuttle Express multiple times, but Shuttle Express did not seek a formal opinion. Mr. Sherrell testified that he chose to implement the independent contractor program that caused the violations penalized in Docket TC-072228 “hoping that it would be ignored [by the Commission] and it wasn’t, so I paid a fine and I discontinued the service.” It appears that, when Shuttle Express implemented the current version of its independent contractor program, the Company took the same sort of calculated risk.

**E. The Rule Requiring Passenger Carriers to Use Their Own Employees as Drivers is Not Vague.**

31 Shuttle Express argues that “the Commission’s statutes, rules and order” are unconstitutionally vague because “they do not define the term ‘operated by’ in the context of the rescue service,”<sup>61</sup> but the Company has not met its heavy burden of demonstrating this. Exactly which provisions Shuttle Express is challenging is not clear, but the focus appears to

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<sup>61</sup> Petition at p. 27.

be on WAC 480-30-213(2), which contains the “operated by” language. In a decision involving an enforcement proceeding against a physician, in which the Washington State Supreme Court found that a law containing the phrase “moral turpitude” was not unconstitutionally vague, the Court set forth the law on statutory vagueness:

A statute is presumed to be constitutional. The party challenging a statute's constitutionality on vagueness grounds has the burden of proving its vagueness beyond a reasonable doubt. A statute is void for vagueness if it is framed in terms so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application”. The purpose of the vagueness doctrine is to ensure that citizens receive fair notice as to what conduct is proscribed, and to prevent the law from being arbitrarily enforced. The prohibition against vague laws is not absolute. Some measure of vagueness is inherent in the use of language. “Condemned to the use of words, we can never expect mathematical certainty from our language.” Therefore, “a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” (Citations omitted.)<sup>62</sup>

32 Shuttle Express cannot show that WAC 480-30-213(2) is vague because the meaning of the rule is clear, and Shuttle Express was on notice of the rule’s meaning. The vehicle and driver rule makes clear that only the certificate holder or its employees are permitted to be drivers. Because Shuttle Express discussed its independent contractor programs with Staff on many different occasions, because Shuttle Express participated in the rulemaking when this language was adopted, and because Shuttle Express received a penalty assessment for violating this very rule, the Company was on notice that the rule prohibited it from using anyone but employees to drive vehicles it was operating to provide service under its passenger transportation authority.

33 Notably, none of the Shuttle Express witnesses at hearing, including Mr. Sherrell, stated that he did not understand the rule. Shuttle Express may have chosen unreasonably to

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<sup>62</sup> *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 739-40 (1991).

view WAC 480-30-213(2) and other laws and regulations in a manner that allowed the Company's business practices, but the Company certainly understood the rule.

**F. The Initial Order Correctly Held that Shuttle Express violated WAC 480-30-456.**

34 Under WAC 480-30-456, passenger transportation companies are allowed to use customer information only in particular ways. "Customer information" includes the customer's name, address, and telephone number. WAC 480-30-456(1). A company is allowed to use customer information to "[provide] and [bill] for services the customer requests," market new services or options to its customers, or provide information to its customers. WAC 480-30-456(2). The rule precludes the sale or release of customer information, however, without the written permission of the customer. WAC 480-30-456(3).

35 Shuttle Express argues that WAC 480-30-456 permits Shuttle Express to share customer information with independent contractors because the independent contractors are providing a service the customer requests. This is incorrect. First, although the rule provides that a company may "use" customer information to provide a service the customer requests, the rule does not say that the company may "release" customer information for this purpose. Shuttle Express's practice of providing customer information to the independent contractor constitutes "release" under the rule and not "use."

36 Even if the rule allowed release of customer information for the "use" purposes of section 2, Shuttle Express's practice would conflict with the rule because the service provided is not what the customer requests. The customer arranges for service with Shuttle Express not ABC Limo Company. Under Shuttle Express's proposed interpretation of the rule, a passenger transportation company could hand over customer information to a UPS

driver, for example, or a driver conducting mapping for Google's street view, and send him or her to pick up the customer; essentially, Shuttle Express could hand over customer information to anyone so long as that person transported the customer to the airport.

37 Shuttle Express argues that the rule permits it to *release* customer information to a "third party billing service, such as PayPal, a bank or a credit card company" because the rule permits *use* of customer information for billing for services the customer requests. Again, Shuttle Express is incorrect. Customers may use PayPal or a credit card to *pay* for services but companies do not use these systems to *bill*. Shuttle Express may not "share" customer information with third parties such as PayPal, a bank or a credit card company. The language of WAC 480-30-456 expressly prohibits release of the information to third parties, and the Initial Order correctly held that Shuttle Express violated this rule.

**G. The Penalty Assessed in the Initial Order Should Not be Further Reduced and Payment Should Not be Stayed.**

38 Allowing violations of Commission orders as well as statutes and rules enforced by the Commission does not serve the public interest. Shuttle Express violated WAC 480-30-213(2), WAC 480-30-456, and Order 01. As discussed above, Shuttle Express knew or should have known it was violating at least the vehicle and driver rule and Order 01. The Company's claims of economic exigencies and improved customer service do not justify allowing Shuttle Express to violate state laws or rules or Commission orders, especially given the technical assistance and enforcement history associated with these violations.

#### IV. CONCLUSION

39 The rule centrally at issue in this proceeding is WAC 480-30-213(2), the vehicle and driver rule. It ensures that passengers are transported by the certificate holder and not by anyone else or any other company. Shuttle Express violated this rule by using independent

contractors instead of employees to transport its customers during share-ride “rescue” service.

40 Shuttle Express would have the Commission consider the violations to be in the public interest because the Company identifies no harm and claims even that there is a benefit to customers. Shuttle Express forgets, however, that it is in the best interest of everyone in Washington, customers and passenger transportation companies alike, when public service companies all follow the same rules. Shuttle Express possesses the exclusive right to provide auto transportation services within its territory. With this right comes a duty to comply with all of the laws and rules enforced by the Commission. To encourage present and future compliance, the Commission should affirm the Initial Order and require Shuttle Express to pay penalties as provided therein.

Dated this 13th day of January, 2014.

Respectfully submitted,

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