

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re Petition of

SHUTTLE EXPRESS, INC.,

For Exemption From WAC 480-30-213(2)  
and WAC 480-30-456, Pursuant To  
WAC 480-07-110

DOCKET \_\_\_\_\_

PETITION AND REQUEST FOR  
EXPEDITED CONSIDERATION

TO: STEVEN V. KING, Executive Director and Secretary, Washington Utilities and  
Transportation Commission, P.O. Box 47250, Olympia, Washington, 98504-7250

**I. SUMMARY OF RELIEF REQUESTED**

1 Petitioner Shuttle Express, Inc. (“Shuttle Express” or “Petitioner”) respectfully requests that  
the Commission:

A. Open a proceeding and consider this Petition on an expedited basis at a  
Commission open meeting on or before December 12, 2013.

B. Grant Shuttle Express a *temporary and conditional*<sup>1</sup> exemption, pursuant to  
WAC 480-07-110, from compliance with WAC 480-30-213(2) and WAC 480-30-  
456 (if applicable), to permit Shuttle Express to operate its “rescue service” through  
the holiday period beginning on December 13, 2013 and ending on January 15, 2014.

2 Specifically, Shuttle Express seeks conditional exemption from the provision of WAC 480-  
30-213(2) that “The driver of a vehicle operated by a passenger transportation company  
must be the certificate holder or an employee of the certificate holder.”

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<sup>1</sup> A lengthy list of proposed conditions to further limit the extent of the waiver and ensure that  
public safety and the broader public interest are protected is set forth in Section IV., below.

3 Further, Shuttle Express seeks conditional exemption from the provision of WAC 480-30-  
456(3) that “Any sale or release of customer information without the written permission of  
the customer is prohibited.”

4 This Petition is based on the transcript of Docket TC-120323,<sup>2</sup> the Declaration of Jimy  
Sherrell filed herewith, and the discussion and analysis set forth below.

5 Shuttle Express files this petition solely to better serve the public interest during the  
upcoming holidays, without creating regulatory uncertainty and risks. Nothing herein  
should be construed as an admission that any past or proposed operations of Shuttle Express  
are contrary to any law or Commission order or rule.

## **II. BACKGROUND**

### **A. Business of Shuttle Express and Challenges.**

6 Shuttle Express operates a share ride door-to-door on demand service between Sea-Tac  
Airport and homes and businesses throughout most of King County as well as in portions of  
neighboring counties. The service Shuttle Express provides is extremely popular and serves  
a very critical niche between the very expensive but direct and convenient taxi service and  
the very low-cost but indirect and inconvenient public transit buses and trains. Shuttle  
Express is now the largest “bus” company the Commission regulates, and carries close to  
three quarters of a million passengers a year.

7 The niche that Shuttle Express serves is incredibly narrow. The nature of its service and the  
competitive and cost pressures it faces are unlike any other “bus” company.<sup>3</sup> It is extremely

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<sup>2</sup> Incorporated herein by reference and cited herein as “TR.”

<sup>3</sup> There are other “airporter” companies in Washington, serving Bellingham, Bremerton, Olympia, and Tacoma, for example. But these operate much more like traditional bus companies, picking up or dropping off passengers in distant cities and transporting them long-distances without stopping. For such distant cities, taxis are not a cost-effective option for airline passengers and public transit

difficult to provide share ride service in the Seattle area on a sustainable basis. The spread between the costs of a door-to-door service and the competing rates of taxis is small. *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 auto. The challenges of operating a complex share ride service are compounded by the time sensitivity of airline passengers. Being late for a pickup 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.

8 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 by operating efficiently. This is challenging in the best of circumstances. But on occasion, traffic, weather, vehicle breakdowns, unexpected demand, and other factors that cannot be forecasted or avoided, resulting in Shuttle Express having airline passengers with reservations or requesting service and not being able to get a driver and van into position to provide timely service.

**B. Description of Shuttle Express “Rescue Service.”**

9 Due to unpredictable<sup>4</sup> and unavoidable problems that arise regularly in an operation of the size and complexity of Shuttle Express, from its inception Shuttle Express has always needed to find an alternative to its company-owned vans and employed drivers to ensure high-quality and timely service that airline passengers demand and require. Shuttle Express currently meets these exigencies with its “rescue service,” consisting of substituting a

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does not exist. Therefore, these airporters have a greater margin between their operating costs and the “competition.”

<sup>4</sup> It is predictable that problems will arise and do arise almost every day of Shuttle Express’s operations. But what is **NOT** predictable is exactly *when and where* the problems will arise. This is why a flexible solution is required.

limousine or town car owned and operated by an independent contractor who is licensed as a limousine carrier under RCW Ch. 42.72A. Most of these substitutions involve a single person or party, but to meet demand and need, Shuttle Express sometimes also needs to combine groups, resulting in more than one stop by the limousine carrier to pick up or drop off passengers.

10 Shuttle Express does not use independent contractors as part of its regular schedule and operations as it did in 2007. Rather, while the rescue service may sometimes be frequent, it is completely irregular. Independent contractors are only used to cover situations that cannot be forecasted. The number one cause is traffic delays. Other causes include breakdowns, weather, and unexpected demand. Rescue service comprises less than 5% of Shuttle Express's door-to-door trips. Further details of the rescue service, how it dovetails with Shuttle Express's operation, and the need it serves are provided at TR at 54-74; 93-113.

**C. Need For and Benefits of Rescue Service in a Door-to-Door Operation.**

11 Rescue service has been a tremendous benefit to the public interest. First, from the passenger perspective, 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 rebook. Second, the rescue service is viewed by passengers as an upgrade of service at no additional charge.

TR at 104-05. Instead of a van with 3 or more stops, they ride in a limousine, in most cases with no other stops. TR at 61-62.

12           Second, 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 at 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.

13           Rescue has always been essential to successful operation of Shuttle Express’s share ride service and always will be. TR at 107, 147. The need for rescue service in a share ride airporter operation serving major metropolitan areas is further confirmed by the experience of SuperShuttle, which has a very similar operation and service in cities such as Dallas, Denver, Los Angeles, Minneapolis, Orlando, Phoenix, and over two dozen other cities. Just like Shuttle Express in Seattle, SuperShuttle also must occasionally substitute limousines or town cars to ensure economical and timely service in its cities. Sherrell Declaration, ¶ 3.

#### **D. Recent Regulatory Activity Relating to Rescue Service.**

14           Earlier this year the Commission issued a complaint on the request of its Staff that threatens rescue service and indeed therefore the very viability of Shuttle Express’s share ride door-to-door model. *See* Complaint, Dkt. TC-120323 (May 1, 2013). The Complaint alleges that Shuttle Express’s rescue service violates WAC 480-30-213(2) and WAC 480-30-456, among other things. Shuttle Express has denied the complaint. An initial order would grant the Complaint, as to WAC 480-30-213(2) and WAC 480-30-456, would impose a penalty of up to \$120,000, and would require Shuttle Express to “cease and desist” the operation of its

rescue service. See Order 03, Initial Order, Dkt. TC-120323 (Nov. 1, 2013) (“Initial Order”).

15 Shuttle Express plans to challenge the Initial Order on a number of grounds and believes it will prevail ultimately. Also, the Initial Order is not yet effective because it is not a final order. Nevertheless, due to the uncertain regulatory status and risk of additional penalties, Shuttle Express is voluntarily complying with the cease and desist provision of the Initial Order by not asking limousine carriers to make multi-stop rescue trips. Unfortunately, Shuttle Express tried this approach before and the result was a significant degradation of service. *E.g.*, TR at 112-13.

16 Voluntary compliance with the Initial Order is already harming the travelling public by materially degrading Shuttle Express’s service. It is resulting in longer wait times at airport due to the need to redirect vans for inbound priority. Sherrell Declaration, ¶ 4. Often the passenger becomes impatient and takes a taxi to get home, forcing them to pay a much higher fare and creating bad will for Shuttle Express and possible loss of repeat business. *Id.* Shuttle Express now has to pick up people earlier due to bad routing to get a rescue from another van, making the service less convenient and discouraging repeat business. *Id.* Further, passengers are getting to airport closer to their departure time and giving them high anxiety. *Id.* Sometimes Shuttle Express has to ask people drive and park to not miss their flight, costing Shuttle Express a high parking fee reimbursement. *Id.* While that is some compensation, it is really a failure to deliver the service the passenger requested and could have received if rescue were allowed. *Id.*

17 And in the long run, if the Commission penalizes and/or bars rescue service, the degradation of service could reduce ridership to the point where the type of service Shuttle Express

offers would cease to be viable. *See* TR at 101, 154; Sherrell Declaration, ¶ 6. Hundreds of thousands of passengers annually would have to find alternative door-to-door services, almost certainly at higher cost and most likely not on a share ride, door-to-door basis. *See* TR at 104. This would directly harm the traveling public and also increase traffic, pollution, and congestion at the airport. Hopefully a long run solution to the issue will be forthcoming early next year with a conclusion in the Complaint case that serves the public interest.<sup>5</sup>

**E. Heightened Need for Rescue Service During the Busy Holiday Season.**

18 In the immediate short run, compliance with the cease and desist during the Christmas and New Year holiday puts the traveling public at particular risk. Year-end and New Year holiday air travel volumes are particularly high. Sherrell Declaration, ¶ 5. Compounding the challenges for ground transportation providers is winter weather, which often impacts air transportation, ground transportation, or both. *Id.* Fog, snow and ice on the ground can greatly increase the need for rescue service. *Id.* Many travelers who ordinarily would drive themselves to the airport will take Shuttle Express if there is snow or a threat of snow. *Id.* Likewise, flight delays often result in unexpected demand at the airport at unexpected times. *Id.* So demand for service and unpredictability are both high around the holidays.

19 In sum, the latter part of December and early January create the potential for the “perfect storm” in airport ground transportation. Accordingly, Shuttle Express seeks a limited and conditional exemption from two Commission rules so that it can use multi-stop rescue service during the holiday period. After early January, air traffic drops off substantially until the spring, by which time hopefully the Complaint case will be resolved in favor of Shuttle Express. If not, Shuttle Express can seek a longer-term exemption at that time.

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<sup>5</sup> Either by the Commission overturning the Initial Order on administrative review or by Shuttle Express seeking a long term exemption.

### **III. DISCUSSION**

20 The standard for consideration of a request for exemption is broadly stated as “the public interest standard.” WAC 480-07-110(2)(c). The Commission will grant an exemption in a case if the request is, “consistent with the public interest, the purposes underlying regulation, and applicable statutes.” WAC 480-07-110(1). Examining each of these three prerequisites, it is clear that a limited and conditional exemption allowing for the rescue service as proposed by Shuttle Express for a period of about four weeks easily meets the Commission’s standards.

#### **A. The Public Interest Requires Rescue Service During the Holiday Season.**

21 The regulation of Shuttle Express—an airport shuttle “share ride door-to-door” service—under laws and rules designed in the first half of the last century to regulate traditional bus companies has long been a classic case of trying to fit a square peg in a round hole. From the inception, Shuttle Express has had to use some form of rescue service. Sherrell Declaration, ¶ 6. Traditional regular-route bus companies had no such need. Buses operated between terminals, often with a garage attached or nearby. If a bus was full, either another bus was pulled around the corner from the garage, or passengers just waited for the next scheduled bus. Indeed, Shuttle Express itself also offers *scheduled* airporter service to locations such as downtown Bellevue and downtown Seattle. *Id.* at 7. In those scheduled operations, Shuttle Express does not use rescue service. *Id.*

22 Shuttle Express cannot operate like a traditional bus company. Airline passengers cannot wait another hour or two for the next “bus.” And unexpected need or demand can arise without warning from the far corners of the county to everywhere in between. Shuttle



Express cannot get a van where it needs to be in time for the passenger's flight. Nor can it station vans and drivers all over the county, just in case.

23 Fortunately, Shuttle Express has developed relationships with independent contractors who own and operate limousines and town cars. These independent contractors operate licensed limousine services all over the Puget Sound region. Accordingly, when a rescue trip is needed, it is often possible to locate an available independent contractor who is close enough to the passenger to perform the service under contract with Shuttle Express. Rescue service has been extremely well-received by Shuttle Express's passengers. Indeed, Staff was not aware of a single passenger complaint against Shuttle Express. TR at 31.

24 Shuttle Express has gone to great lengths to ensure that rescue service is not only timely, convenient, and comfortable, but also safe. The independent contractors are all subject to background checks, inspections, drug tests, and strict contractual obligations to ensure safe and comfortable operations in the case of rescues. Their limousines are licensed and inspected by the DOL. TR at 56, 59-60. Shuttle Express does its own inspections of the contractors' vehicles that go beyond the requirements of both the DOL and typical Commission inspections. Sherrell Declaration, ¶ 8. All independent contractor drivers are drug tested, both at the outset and randomly. TR at 55-56. Each 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.

25 Staff concedes that independent contractors operating rescue on a single stop basis are perfectly compliant with Commission regulations. Obviously a town car or limousine is no less safe when making two stops compared with making one stop, all other things being

equal.<sup>6</sup> Thus, the issue is not safety, but rather a technical regulatory issue relating to the number of stops made when a rescue is required. To further ensure that public safety is protected, Shuttle Express proposes a condition that will allow the Commission to exercise the same safety oversight of the independent contractors as company-owned and operated vans. *See* Section IV.J., below.

**B. The Conditional Exemption Serves the Purposes Underlying the Rules.**

26 The purpose behind WAC 480-30-213(2) is ultimately safety, through more direct regulatory oversight over auto transportation operations. But there is nothing that makes an employee driver inherently a safer driver than an independent contractor driver. If adequate supervision, controls, and oversight are in place, the Commission can ensure that independent contractor drivers are every bit as safe as employee drivers. The conditions Shuttle Express already imposes on its independent contractors—coupled with the conditions proposed herein below—ensure more than adequate oversight, both by the Commission and Shuttle Express. *See, e.g.*, TR at 54-59

27 The purpose underlying WAC 480-30-456(3), is to prohibit release of customer information to third parties for purposes unrelated to the providing or billing of the transportation services requested, such as to airlines to market air travel. But Shuttle Express made it clear in the Complaint case that it does not use customer information in that way. TR at 58, 135-36. And in the cases of the 5,715 violations alleged by Staff in the Complaint case, 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 WAC 480-30-456(2)(a) of the rule expressly permits).

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<sup>6</sup> And limousine regulations allow up to 14 passengers in a single vehicle, larger than Shuttle Express's typical van. WAC 308-83-010(12).

28 In the case of rescue service, it is not practical for Shuttle Express to get written permission from passengers to release their names and addresses to the independent contractor. Sherrell Declaration, ¶ 9. By its nature, the need for rescue service arises unexpectedly and arrangements are made at the last minute. Since Shuttle Express only allows limousine drivers to use the customer information to serve the customer's request for airport ground transportation, the underlying purpose of WAC 480-30-456(3) is already met. *See* WAC 480-30-45692)(a). To further promote this purpose, Shuttle Express proposes conditions below that would make it liable for any use or disclosures by the independent contractors inconsistent with the rule. *See* Section IV.L., below.

**C. The Proposed Exemption is Consistent With the Applicable Statutes.**

29 In the Complaint case, Staff took the position that an exemption could not be granted, asserting that any variation from WAC 480-30-213(2) would violate "state law."<sup>7</sup> Staff's theory is that because RCW 81.68.040 prohibits "[a]n auto transportation company" from transporting passengers "between fixed termini or over a regular route" without an auto transportation certificate, then every independent contractor used by Shuttle Express must have its own certificate.<sup>8</sup> This issue was not really joined meaningfully in the Complaint case, because the parties filed a single round of simultaneous briefs. Shuttle Express will demonstrate herein why the Staff's conclusion is incorrect and inconsistent with the Complaint. Shuttle Express hopes Staff will reconsider its position on review of this petition. If not, the Commission will have to decide which party is correct.

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<sup>7</sup> Staff Post-Hearing Brief at 6.

<sup>8</sup> Staff also cites the Commission's adoption order, Order Repealing, Amending, and Adopting Rules Permanently, Gen. Order No. R-533, Dkt. TC-020497 (2006). But that order merely recites the advice of staff and provides no legal analysis of the issue. Indeed, the Commission's comment on the issue stated that Shuttle Express was "encouraged to participate in Docket No. TC-060177 and to bring this issue forward for [further] discussion in that proceeding." Order No. R-533, Appendix A at 22.

30 Staff's theory under the First Cause of Action in the Complaint case is that Shuttle Express, in contracting with limousine drivers to perform multi-stop rescue service, was operating in violation of WAC 480-30-213(2), because the drivers were not employees of Shuttle Express. While Shuttle Express continues to dispute that characterization, if the Complaint is ultimately upheld then it must be that Shuttle Express is the operator of the rescue service.<sup>9</sup> The rule specifically states: "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)(emphasis added).

31 Thus, for the First Cause of Action in the Complaint to be upheld, the Commission would have to find that the rescue service was "operated by" Shuttle Express. Since this petition presumes (but without conceding) that the Complaint and Initial Order are valid, then the statute requires *only Shuttle Express*—as the purported operator—to have a certificate. Thus only the rule requires the drivers to be employees, not the statute. Nothing in the statute itself requires drivers for auto transportation companies to be employees. Since it is undisputed that Shuttle Express has a certificate, it is not inconsistent with the statute to allow the services to be provided under the proposed exemption from WAC 480-30-213(2).

32 The statute on which Staff relies does not even mention "employees." It addresses only the term "operate." RCW 81.68.040; see also, RCW 81.68.010(3)("operating"). The term "operat[or]" in the context of RCW Ch. 81.68 does not mean the same thing as "driver." Although Shuttle Express and the Staff reach different conclusions on the proper interpretation of the terms for purposes of the Complaint,<sup>10</sup> the very existence of the

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<sup>9</sup> If the independent contractors were the operators of the service, then the Commission would have to seek to classify them and take appropriate action against them. But that is a matter for another docket and another day.

<sup>10</sup> Which Shuttle Express will address in detail in a petition for review of the Initial Order, now due on January 3, 2014.

Complaint demonstrates it is a reasonable interpretation of RCW 81.68.040 that the independent contractors may operate under Shuttle Express's certificate when they are performing rescue service.

#### **IV. DETAILS OF PROPOSED EXEMPTION AND CONDITIONS**

33 Having established that an exemption from WAC 480-30-213(2) and WAC 480-30-456 would meet the criteria of the Commission's rule on exemptions and the underlying auto transportation statute, Shuttle Express proposes the following details and conditions to be applicable to the exemption. These conditions provide further assurance that the exempted operations will be consistent with the purposes of the underlying regulations and the overall public interest. Shuttle Express proposes that:

- A. Rescue must be for interrupted service or to serve a guest request when Shuttle Express is unable to timely fulfill its commitment due to circumstances not reasonably within its control.
- B. Rescue can only be provided by a company (contractor) licensed as a limousine carrier by the Department of Licensing ("DOL") under RCW Ch. 42.72A. The contractor must operate in accordance with the requirements of its license in all respects, except that under a single contract with Shuttle Express unrelated parties may be carried on the same trip and multiple pickups and drop offs may be made.
- C. Shuttle Express must ensure that the contractor meets all WUTC applicable safety regulations such as equipment, operations, drug testing, drivers' licenses, safe driving, etc. (all Commission safety regulations applicable to auto transportation companies).

D. Passengers must be informed verbally or in writing reasonably in advance (under the circumstances of the exigent event) of the pickup and given the option to use rescue service or not. Passengers who decline rescue service will be given a full refund of any prepaid fare and will be given any courtesy adjustment (*e.g.* reimburse airport parking or airline fees or fare increases) consistent with Shuttle Express's policies for late or delayed service.

E. Rescue service is not to be a scheduled or planned event by Shuttle Express to utilize rescue service as a regulated service or part of the auto transportation company. Shortage of equipment is not a viable reason for a rescue, but an unexpected shortage of drivers or equipment not being timely available at the particular pickup location is.

F. No up-charge may be levied on the passenger receiving rescue; the original tariffed or quoted fares must be honored.

G. In the aggregate during the exemption period, no more than 5% of the total business—by trips or revenue, whichever is less—of Shuttle Express may be served by rescue service.

H. Rescue service to the airport may only be used when Shuttle Express cannot otherwise ensure the passenger will make their flight.

I. Rescue service from the airport may only be utilized when wait times exceed reasonable staging times—typically more than 45 minutes—caused by unexpected circumstances or unforeseen numbers of passengers seeking service that were not pre-booked.

J. The independent contractor must agree to voluntarily submit to Commission safety inspections upon request under the same conditions applicable to vans owned and operated by Shuttle Express and other auto transportation companies.

K. Insurance procured by either the contractor, Shuttle Express, or a combination thereof must be obtained covering the contractor for rescue trips with the same amount of coverage required by the Commission for Shuttle Express.

L. The contractor must agree not to use customer information for any sales or marketing purposes of its own and to protect and not disclose customer information to the full extent required by WAC 480-30-456. Shuttle Express agrees that any violation of such agreement by a contractor will be deemed and treated as a violation of WAC 480-30-456 by Shuttle Express itself.

**V. CONCLUSION**

34 For the foregoing reasons, Shuttle Express should be granted a temporary exemption as requested, and subject to the conditions proposed herein.

Respectfully submitted this 19<sup>th</sup> day of November, 2013.

LUKAS, NACE, GUTIERREZ & SACHS, LLP



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