

Decision 98-05-019 May 7, 1998

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ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into why the Passenger Stage Corporation Certificate and the Charter-Party Carrier Certificate [PSG 8939] issued to North Shuttle Service, Inc. (respondent), doing business as Yellow Airport Express, should not be revoked.

Investigation 97-01-028  
(Field January 23, 1997)

In the Matter of the Application of Eugene Yen for Authority to Control North Shuttle Service, Inc., dba Yellow Airport Express, pursuant to Section 854 of the Public Utilities Code.

Application 97-04-002  
(Field April 1, 1997)

Daniel W. Baker, Attorney at Law, for North Shuttle Service, Inc., respondent and applicant; Martin B. Smith, for himself, respondent; Kim K. Thompson, Angela Ching, Attorney at Law, and Paul A. Spiegel, Attorney at Law, for Eugene Yen, intervenor and applicant.

Wondewossen Mekbib, for himself, protestant.

Carol Dumond, Attorney at Law, for the Consumer Services Division.

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## OPINION

### 1. Summary

The Commission finds that respondents North Shuttle Service, Inc. (North Shuttle), a passenger stage corporation and charter-party carrier doing business as Yellow Airport Express, and Martin B. Smith (Smith), have committed numerous violations of the Public Utilities Code and of the Commission's general orders (GOs) that pertain to regulated passenger carrier operations. Based upon these findings, and the nature and extent of the violations, the Commission determines that the operating authorities held by North Shuttle should be revoked and that Smith should be prohibited from participating substantively, by ownership, management, or control, in regulated passenger operations for a period of one year from the date of this order.

The Commission reaffirms its policy, established in *Re Royya's Transportation, Inc., dba Express Airport Shuttle* (1994) 57 CPUC 2d 289 (Royya's), which holds that whenever the appropriate remedy for violations committed by a passenger carrier is revocation of that carrier's operating authority, the Commission will not waive such revocation and instead permit another party to purchase the operating authority or acquire control of and operate the carrier, even if the purchasing or acquiring party would be qualified to conduct such operations and correct such violations in the future. The application of Eugene Yen and North Shuttle for authority pursuant to Section 854<sup>1</sup> to transfer control of North Shuttle to Eugene Yen is therefore dismissed as moot. While the issue of Yen's fitness to conduct regulated passenger operations was raised and

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<sup>1</sup> All section references herein are to the Public Utilities Code.

extensively litigated in this matter, the Commission declines to make findings on the issue in light of dismissal of the Yen/North Shuttle application.

## 2. Background

### 2.1. Overview of Respondents

North Shuttle holds a certificate of public convenience and necessity (CPCN) which was granted by Decision (D.) 95-11-046, issued on November 21, 1995 in Application (A.) 93-11-037. The CPCN (PSC-8939) became effective February 13, 1996. It authorizes North Shuttle to conduct operations as a passenger stage corporation on an on-call basis between points in San Francisco, Marin, San Mateo, Santa Clara, Alameda, and Contra Costa Counties on the one hand, and the San Francisco, Oakland, and San Jose International Airports on the other. North Shuttle also holds a charter-party certificate (TCP-8939-B) which authorizes operations from points within 125 miles of San Francisco to points within the State of California.<sup>1</sup> North Shuttle also holds 13 licenses to serve San Francisco International Airport (SFO) and 13 licenses to serve Oakland International Airport.

Martin B. Smith is the majority stockholder and president of North Shuttle. As more fully described in subsequent sections of this opinion, Smith has previously been involved in other passenger operations serving SFO. These include Yellow Cab Cooperative, Inc. (Yellow Cab), doing business as Yellow

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<sup>1</sup> A.97-01-002 states (at pp. 2-3) that North Shuttle "possesses and operates as a charter-party carrier of passengers under Certificate No. TCP-8146-B ..." However, the Business Stock Sale Agreement attached to the application and received in evidence as Exhibit 29 states that North Shuttle's operations as a charter-party carrier are conducted under TCP 8939-B. (Exhibit 29, p. 1.) Exhibit 1 confirms that TCP 8939-B is the correct number. (Exhibit 1, Declaration, p. 4.)

Airport Van and Tour Service, and Southbound Inc. (Southbound), doing business as Yellow Airport Van and Tour.

**2.2. Order Instituting Investigation**

Having determined that there was substantial evidence as a basis for doing so, on January 23, 1997 the Commission instituted Investigation (I.) 97-01-028, on its own motion,

"into the operations and practices of the respondents, North Shuttle Service, Inc., a corporation, holding a certificate of public convenience and necessity as a passenger stage corporation, and a charter-party carrier certificate, and those of Martin B. Smith, an individual, President and General Manager of North Shuttle Service, Inc., doing business as Yellow Airport Express (Yellow). Smith, North Shuttle Service, Inc. and Yellow are all respondents." (Order Instituting Investigation 97-01-028 (OII), Ordering Paragraph 1.)

In Ordering Paragraph 2 of the OII, the Commission found good cause to believe that Yellow and Smith had violated numerous provisions of the Public Utilities Code and of the Commission's GOs.<sup>3</sup> The enumerated charges are

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<sup>3</sup> We take this opportunity to clear up any potential confusion regarding the identification of respondents in the OII. Ordering Paragraph 1 names North Shuttle, Smith, and Yellow as respondents. We recognize, however, that "Yellow Airport Express" (to which the editorial shortcut "Yellow" refers) is a fictitious name under which North Shuttle does business. Upon review, we find that no reasonable reading of the OII can lead to any conclusion other than that North Shuttle Service, Inc. and Martin B. Smith are the two respondents in this investigation. Ordering Paragraph 7 confirms this. Accordingly, the reference to "Yellow and Smith" in the first line of Ordering Paragraph 2 should be read and interpreted as "North Shuttle and Smith."

We also note that the primary staff investigative document indicates that the editorial shortcut "Yellow" refers to "Yellow Airport Shuttle," a fictitious name under which Smith allegedly operated. (Exhibit 1, p. 1.) However, Exhibit 1 also uses "Yellow" to refer to Southbound and North Shuttle. (Exhibit 1, *passim*.) Sorting out the references

*Footnote continued on next page*

(1) failing to maintain evidence of public liability and property damage insurance on file with the Commission; (2) failing to enroll all drivers in the Department of Motor Vehicles (DMV) Pull Notice Program; (3) employing drivers with suspended and/or expired California drivers' licenses; (4) failing to comply with safety or traffic rules and regulations of an airport authority; (5) employing workers without maintaining a certificate of workers' compensation insurance coverage for their employees, or a certificate of consent to self-insure issued by the Director of Industrial Relations, on file with the Commission; (6) conducting operations during periods of suspension and after revocation of their operating authorities; (7) failing to respond within 15 days to written customer complaints and staff inquiries concerning transportation service provided or arranged by the carrier; (8) failing to assess tariff rates on file with the Commission through the use of fare devices; (9) failing to include their PSC and TCP numbers in advertisements; and (10) failing to maintain records. In Ordering Paragraph 6 of the OII the Commission expressly permitted its staff to present additional evidence beyond that described in the order.

After the issuance of a CPCN, the Commission exercises continuing oversight of the carrier's fitness to operate. Section 1033.5 authorizes the Commission at any time, for good cause, to suspend a CPCN or to revoke it upon notice to the holder and opportunity to be heard. Section 5378 similarly authorizes the Commission to cancel, revoke, or suspend a carrier's charter-party authority for any of nine stated grounds. The Commission provided that respondent North Shuttle could appear at hearings to be set and

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intended by use of "Yellow" and assuring attribution to the appropriate entity has complicated review of the record. The importance of accurately and clearly stating the names of respondents in our enforcement proceedings, and of distinguishing between legal and fictitious business names, should not be overlooked.

"show cause why its passenger stage and charter-party carrier certificates should not be revoked pursuant to Public Utilities Code Sections 1033.5(a) and 5378(a), in view of the serious allegations made by staff and assuming the allegations are proven at the hearing." (OII, Ordering Paragraph 5.)

In accordance with Ordering Paragraph 7 of the OII, on January 27, 1997 a Commission staff member personally served the OII and accompanying investigation report on Martin B. Smith.

By D.97-01-058 dated January 30, 1997, the OII was corrected by removing the name of Commissioner Daniel Wm. Fessler and adding the name of Commissioner Josiah L. Neeper.

### **2.3. *Application to Acquire Control***

On April 1, 1997 Eugene Yen and North Shuttle filed A.97-04-002 for authority for Yen to purchase shares of stock and assume control of North Shuttle. Applicants represent that there are presently 19,040 shares of North Shuttle stock issued and outstanding. Of these, 10,040 are owned by Martin B. Smith, 3,000 are owned by Yen, and 6,000 are owned by Guadalupe Valle. Yen, Smith, and North Shuttle have entered into a Business Stock Sale Agreement (Sale Agreement) dated March 24, 1997 pursuant to which Yen will purchase all of the 10,040 shares owned by Smith. Applicants state that upon Commission approval of the proposed stock sale and assumption of control by Yen, Yen will become President of North Shuttle and Guadalupe Valle will be Secretary-Treasurer. Yen and Valle will be directors.

Applicants represent that for 20 years, Yen has operated a shuttle van service between SFO and San Francisco as a charter-party carrier specialized in transporting airline personnel and prearranged passengers. Applicants assert that Yen has the requisite experience and knowledge and is financially able to support and assure the continuation of the service provided by North Shuttle.

Applicants state that Martin B. Smith desires to transfer his interest in the corporation and control to Yen, and to withdraw from the airport passenger shuttle services and pursue other business interests. Applicants assert that Yen can "more adequately manage and operate the passenger stage corporation and charter services."

The Sale Agreement includes an acknowledgment by Yen that he is informed of and familiar with this OII as well as a complaint pending before the San Francisco Superior Court (Case No. 978403, *Wondewossen Mekbib v. Smith*) for specific performance, breach of fiduciary duty, etc. The Sale Agreement also provides a covenant not to compete. For three years following closing of the Sale Agreement, Smith will not engage in or have an interest in any entity that provides shuttle van service in the areas which North Shuttle is authorized to serve. In consideration of the sale, Yen agrees to pay Smith \$1.00 and to advance funds not to exceed \$25,000 to North Shuttle to be used as working capital.

Wondewossen Mekbib filed a written protest to the application. Mekbib claims to have had an agreement with Smith pursuant to which Mekbib was to receive an equal ownership in North Shuttle by virtue of the issuance of 10,000 shares of North Shuttle stock to Mekbib in consideration of \$10,000.00. Mekbib states that he filed a lawsuit against North Shuttle and Smith for specific performance, fraud, declaratory relief, and breach of contract when Smith assertedly failed to deliver a stock certificate evidencing 10,000 shares and 50% ownership, and Smith barred Mekbib from acting as an officer, director, or employee of North Shuttle despite Mekbib's having paid approximately \$8,500.00 and his offer to pay the remaining balance. Mekbib claims that Smith does not have the authority or the right to transfer stock to Yen; that the issuance of shares to Yen is null and void; that Smith has no authority to transfer controlling shares



to Yen, without his approval, for insufficient consideration of \$1.00; and that Yen is not qualified to operate North Shuttle as a result of using unlicensed drivers.

In reply to the protest, applicants claim, among other things, that the sole purpose of the protest is to have the Commission adjudicate the Superior Court suit. Applicants refer to Commission policy not to interfere with or make a decision concerning a matter that is pending before a civil court, and urge that the protest be rejected.

#### **2.4. Procedural History**

Respondents did not file an answer to the OII. By motion filed on April 1, 1997, North Shuttle, Smith, and Yen requested that I.97-01-028 and A.97-04-002 be consolidated. The Consumer Services Division (CSD)<sup>4</sup> filed a response agreeing to consolidation if it would not delay the proceeding. By oral ruling made at the April 14, 1997 prehearing conference, the motion was granted and the matters were ordered consolidated. (Tr. 5.)

On April 4, 1997 respondent North Shuttle filed a motion to disqualify the then-assigned Administrative Law Judge (ALJ) from participating in and deciding the issues or outcome of I.97-01-028. North Shuttle alleged there was substantial doubt that the ALJ would be impartial in this case and conduct a fair and impartial hearing. By ruling dated April 10, 1997, the Chief ALJ denied

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<sup>4</sup>The individuals who undertook the staff investigation which led to the initiation of this proceeding were assigned to the former Safety and Enforcement Division during earlier stages of their investigation. Through a restructuring of Commission staff organizations, certain functions of the former Safety and Enforcement Division, including passenger carrier matters, were assumed by the Rail Safety and Carriers Division. However, the staff members who worked on this matter prior to the reorganization were reassigned to CSD. Accordingly, the moving party in the investigation proceeding is CSD.

the motion on the merits. In the interests of focusing on the merits of the allegations against the respondent, however, the matter was reassigned.

On April 8, 1997, North Shuttle filed an omnibus motion to correct asserted errors in the OII, exclude irrelevant information, restrict hearsay testimony, and have the charges against respondents described with greater specificity. CSD filed a response in opposition to the motion. The ALJ referred the motion to correct errors in the OII to the Commission. (Tr. 62.) The other parts of the omnibus motion were denied, although respondents were permitted to raise specific relevancy and hearsay objections as the hearing proceeded. (Tr. 62, 67.)

Nine days of hearings in this consolidated proceeding were held from April 14, 1997 to May 1, 1997 with Assigned Commissioner Henry M. Duque sitting and ALJ Wetzell presiding. During the hearings CSD moved for an order for immediate suspension of North Shuttle's operating authority. The motion was taken under consideration. (Tr. 493, 764, and 768.) No determination was made that immediate suspension could and should be ordered by the ALJ, and the motion is now moot. The matter was briefed, and was submitted upon filing of concurrent reply briefs.<sup>5</sup>

### **3. Investigation of North Shuttle and Martin B. Smith**

#### **3.1. Preliminary Matters**

##### **3.1.1. Motion to Correct the OII**

In its April 8, 1997 omnibus motion, North Shuttle asserts there are two errors in the OII which require correction. North Shuttle claims

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<sup>5</sup> North Shuttle, Smith, and Yen filed joint opening and reply briefs through attorney Daniel W. Baker, whose appearance at hearing was entered only on behalf of North Shuttle.

these errors are the results of "what appears to be deliberate misrepresentations made to the Commission by the PUC staff."<sup>6</sup> The first asserted error appears at page 3 of the OII, where the Commission recites a portion of the license history pertaining to respondents, stating:

"The Commission in D.93-04-016 authorized the transfer of the certificate of public convenience and necessity from Yellow Cab Cooperative, Inc. [PSC 1297] to Southbound, Inc., Martin B. Smith, President and General Manager, doing business as Yellow Airport Van and Tour, and under other business names (Yellow/PSC 8008)."

North Shuttle claims that the reference in the quoted language to Smith and his position is in error since Smith is not named, referred to, or mentioned in D.93-04-016.

The second asserted error also appears within the "License History" section of the OII (at page 4). It states:

"the Commission in D.95-11-046 granted a certificate of public convenience and necessity to North Shuttle Service, Inc., Martin B. Smith, President and General Manager, doing business as Yellow Airport Express, and under other business names (Yellow/PSC 8939)."

North Shuttle similarly claims that the reference in this quotation to Smith and his position is in error because neither Martin B. Smith, nor Smith as President and General Manager, is mentioned or referred to in D.95-11-046.

In response, CSD recognizes that Smith did not appear by name in the decision on Southbound (Tr. 17), and it stipulated that neither

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<sup>6</sup> It was developed at hearing that CSD's lead investigator Christy Jackman participated in the drafting of the OII.

D.93-04-016 nor D.95-11-046 mentions Smith. (Tr. 848.) However, CSD argues, Smith signed an application before this Commission as administrative director or general manager (Tr. 17.), and the Southbound articles of incorporation were signed by Smith (Tr. 18). Also, CSD notes, North Shuttle's CPCN application was signed and verified by Smith as president. (*Id.*)

The statements with the assertedly offending references to Smith are neither inaccurate nor misleading, and the fact that Smith's name does not appear in either decision is of little consequence. Notably, respondents do not claim that Smith was not involved in the entities indicated in the OII, and the record demonstrates that he clearly was involved. Arguably, the offending statements could be read to indicate that the decisions granted CPCNs to Smith. However, such a reading is strained, and the context makes it less reasonable than the alternative reading, which is that Smith was the President and General Manager of the corporations to which the decisions granted authority. The "License History" section of the OII perhaps would have been more clear if, for example, references to Smith and his positions with the subject entities had been put in parentheses instead of set aside by commas. Nevertheless, this is at most a minor editorial flaw. We find no defect in the OII that requires the corrections proposed by North Shuttle. More importantly, the references to Smith in the quoted passages in no way demonstrate any attempt by CSD investigators to mislead the Commission as North Shuttle claims, and they do not demonstrate any bias on the part of the investigators. North Shuttle's motion for correction of the OII is denied.

### 3.1.2. Evidentiary Issues

North Shuttle raised several evidentiary objections during the course of the proceeding, and requested leave to submit an exhibit (Exhibit 24) specifying, for briefing purposes, those portions of Exhibit 1 to which North

Shuttle objected on hearsay grounds. For administrative efficiency, Exhibit 1 was received in evidence subject to further ruling, and, with CSD's concurrence, the ALJ granted North Shuttle's request. The ALJ also granted (at Tr. 1189) North Shuttle's request to submit an exhibit (Late-Filed Exhibit 47) identifying for briefing purposes portions of staff exhibits sought to be excluded on grounds that no witness testified to verify the evidence therein. CSD filed a response to Exhibits 24 and 47. Exhibit 47 was styled as a motion, and we will treat Exhibits 24 and 47 as motions to strike. Although Exhibit 47 exceeds the scope permitted by the ALJ, we will nevertheless address each of the five categories of objections raised by North Shuttle therein.

North Shuttle raised approximately 62 hearsay objections to statements appearing on 34 different pages of the staff declaration included in Exhibit 1. Rule 64 of the Commission's Rules of Practice and Procedure provides that "[a]lthough technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved." Under this rule the Commission allows admission of hearsay although it is given less weight than other evidence. In general, hearsay in administrative proceedings is admissible if a responsible person would rely upon it in the conduct of serious affairs, regardless of its possible inadmissibility in civil actions.

Where the staff investigator interviewed a passenger who used a respondent's services, statements made by the passenger to the staff investigator concerning the service provided on a given date and corroborated by the respondent's business records may be admitted, but the weight given such evidence reflects the fact that the passenger did not appear as a live witness. On the other hand, a statement made to the staff investigator by a former employee that "Martin Smith is a crooked and evil individual and he needs to be stopped"

should not be admitted for the truth of the matter asserted. (Although we admit it not for its truth but to show that the statement was made to the investigator. We do so in view of the attacks on staff conduct in this case and to show evidence that the former employee was frustrated in her dealings with Smith).

We have reviewed respondent's Exhibit 24 and CSD's response with the foregoing discussion in mind. Many of the statements objected to by North Shuttle are not hearsay because they are not offered to prove the truth of the matter asserted. Therefore, the hearsay rule is not applicable to them. In other cases hearsay statements are supported by business records which are in evidence or by testimony. These statements are clearly admissible in an administrative proceeding to supplement the testimony or business record evidence. By according appropriately reduced weight to the subject statements, respondents' substantial rights are preserved in accordance with Rule 64. We deny North Shuttle's request to strike portions of Exhibit 1 indicated in Exhibit 24.

In Exhibit 47 North Shuttle first moves for exclusion of all information, documents, testimony, and evidence which are dated or which occurred before February 13, 1996, the date on which North Shuttle's CPCN became effective. This request must fail both because CSD has alleged that North Shuttle provided regulated passenger service prior to being authorized to do so and because Smith is a named respondent whose actions prior to February 13, 1996 are also at issue. Second, North Shuttle repeats its request for exclusion of asserted hearsay statements listed in Exhibit 24. This request was addressed previously and requires no further discussion. Third, North Shuttle moves for exclusion of certain documents in Exhibit 1 for which no witness appeared to prove the truth or establish the credibility of statements therein. This request in part duplicates objections noted by North Shuttle in Exhibit 24 and in part

augments those in Exhibit 24. No new arguments are raised, and for the reasons previously discussed in connection with Exhibit 24, respondent's motion for exclusion is denied. Fourth, North Shuttle reiterates its request for correction of the OII, which again requires no further discussion. Finally, North Shuttle moves for exclusion of charges for or reference to violations that preceded acceptance of the Settlement Agreement between Commission's staff and Yellow Cab, approved by D.93-04-016 on April 7, 1993 (Yellow Cab Settlement). We agree that it would be inappropriate to consider violations that preceded the Yellow Cab Settlement. Moreover, the operations of Yellow Cab are not at issue in this investigation. We note that in its response, CSD states that no charges or references are made prior to February 22, 1994. Accordingly, these violations will not be considered in the disposition of this proceeding.

### **3.1.3. Conduct of Investigation**

Throughout the course of this proceeding, North Shuttle has persistently attacked and criticized CSD and its investigators regarding the conduct of this investigation. Applicant Yen has joined in the criticisms. The criticisms focus on (1) the fact that the investigation took place during a period of more than two and one-half years; (2) a suggestion that the investigation was not adequately supervised by staff managers; (3) the facts that lead investigator Jackman compiled over 1,400 pages of paper and that she made hundreds of telephone calls pertaining to North Shuttle's predecessors; (4) CSD's alleged attempt to mislead the Commission in its drafting of the OII; and (5) implications of impropriety related to contacts between staff and Wondewossen Mekbib.

The vehement criticism by respondent and applicants warrants a comment here. In short, we find no impropriety on the part of CSD and predecessor staff organizations or investigator Jackman. Jackman testified that she worked on other significant matters during the period that her

investigation of Smith and North Shuttle was open. The record discloses no reason to conclude that Jackman was engaged in an unmanaged, one-person crusade of persecution against respondents. The evidence shows that staff managers were aware of and approved of her conduct of the investigation. We find nothing unreasonable or even remarkable about the fact that a comprehensive investigation would involve numerous telephone calls or yield significant quantities of paper. We have already discussed and rejected North Shuttle's allegations that staff's participation in the drafting of the OII demonstrates an attempt to mislead the Commission or bias on the part of the investigator. Finally, we note that despite repeated efforts on cross-examination of staff witnesses and Mekbib himself, there is utterly no indication that Mekbib's contacts with the staff were improper.

In their joint opening brief, respondents and applicants request that staff be censured for its assertedly deliberate misleading of the Commission in drafting the OII and for its reference to violations preceding the Yellow Cab Settlement. The request is unfounded for the reasons discussed previously and is therefore denied.

### **3.2. Respondents' Responsibility for Alleged Violations**

Many if not most of the alleged violations occurred when Southbound was authorized to perform passenger operations, and predate Commission-authorized operations by North Shuttle. Respondents claim that alleged violations which occurred after February 13, 1996 are relatively minor infractions. Thus, at issue is whether violations that are found to have been committed should be charged to respondent North Shuttle or respondent Martin B. Smith. The following history, drawn primarily from Exhibits 1, 15, 19, and 42 and related testimony, will assist in our analysis:

01/20/93 Southbound is authorized to conduct charter-party operations.



- 06/16/93 Southbound is authorized to conduct passenger stage operations (PSC-8008) pursuant to transfer of Yellow Cab CPCN authorized by D.93-04-016. Underlying application is signed on 8/7/92 by Martin B. Smith, President, who owned 50% of Southbound and was its incorporator in 1990. Tariffs received for filing on 5/24/93 show Smith as manager of Southbound.
- 08/01/93 Smith's ownership share of Southbound is reduced to 45%. Smith is President of Southbound and manager of its airport side.
- 11/03/93 North Shuttle's articles of incorporation are filed with the Secretary of State.
- 11/12/93 North Shuttle files A.93-11-037 for CPCN. At this point North Shuttle is a cooperative of shuttle carriers in response to SFO policy to limit number of carriers. "Yellow Airport Van and Tour - Martin Smith" is one of 11 owners. Ownership shares are not stated in Exhibit 42.
- 01/10/94 Ten of 11 North Shuttle owners withdraw following change in SFO policy. Smith now owns 10 of 40 North Shuttle shares outstanding (25%).
- 01/15/94 North Shuttle permitted by SFO Airport Commission to operate at SFO. (Permit was signed by Smith, President, on 12/16/93.)
- 06/15/94 North Shuttle ownership changed; Smith owns 40 of 40 shares outstanding.
- 07/19/94 Southbound files for bankruptcy under Chapter 11, operates under control of trustee.
- 11/21/95 D.95-11-046 grants CPCN (PSC-8939) to North Shuttle.
- 01/19/96 Southbound's charter-party authority expired.
- 02/13/96 North Shuttle's CPCN becomes effective.
- 03/21/96 Southbound's CPCN (PSC-8008) is voluntarily revoked.
- 04/10/96 North Shuttle's charter-party authority is granted.

06/06/96 10,000 additional shares of North Shuttle issued to Smith.

03/01/97 North Shuttle ownership changed; Smith owns 10,040 of 19,040 North Shuttle shares outstanding.

We find that Smith was substantially and continuously involved in Southbound since its inception by virtue of his significant degree of ownership and management thereof. Smith incorporated Southbound, and he had a 50% ownership position in it in April 1993 when D.93-04-016 authorized the transfer of the certificate, assets, equipment and properties of Yellow Cab to Southbound. He retained a 45% ownership position in Southbound after August 1993. The preponderance of evidence shows that for purposes of evaluating Smith's fitness to conduct regulated passenger operations, any failings on the part of Southbound can reasonably and properly be attributed to his management and operation of Southbound. Smith cannot escape this responsibility by his testimony that the payment of Southbound's bills was handled by other Southbound shareholders, or his testimony that the hiring and firing of drivers was the responsibility of a shareholder holding 22.5% of Southbound's shares outstanding and a dispatcher. Similarly, Smith cannot escape responsibility by claiming that the bankruptcy trustee controlled Southbound after July 1994.

Smith was also substantially involved in and dominated the operations of North Shuttle since its inception, and, beginning in 1994, to an even greater degree than he was in Southbound. In A.97-04-002 North Shuttle admits that Smith was one of the organizers of North Shuttle and that he is now the holder of 52.7% of the outstanding shares of its stock. After June 15, 1994 Smith owned 100% of the shares outstanding of North Shuttle, and in the subsequent years he never owned less than 50% (even if Mekbib's ownership claims were to be sustained). In dealings with SFO and with this Commission, Smith represented North Shuttle as its President and Manager. The preponderance of

evidence shows that for purposes of evaluating Smith's fitness to conduct regulated passenger operations, any failings on the part of North Shuttle can reasonably and properly be attributed to his ownership, management, control, and operation of the firm. Moreover, if Smith is not fit to manage and operate passenger operations by virtue of his association with and operation of Southbound, North Shuttle can be held accountable for Smith's failings in that regard by virtue of Smith's association with and operation and control of North Shuttle.

The parties dispute whether North Shuttle provided Commission-regulated transportation prior to February 13, 1996, when it was first authorized by this Commission to do so. The facts that North Shuttle was incorporated and applied for a CPCN in 1993 and was permitted by SFO to conduct operations in January 1994 indicate that North Shuttle could have provided transportation as early as January 1994 even though it was not authorized by the Commission to do so until more than two years later. The fact that Southbound filed for bankruptcy protection six months later is consistent with staff's contention that Smith provided transportation through North Shuttle prior to its being authorized to do so. Mekbib testified that Smith presented his operations to the public as North Shuttle and to the Commission as Southbound. However, even if North Shuttle did not operate before February 13, 1996, and the subject transportation was performed by Southbound, it is clear from the foregoing analysis North Shuttle is the continuation of Southbound without substantive change. In the words of Smith on February 9, 1996, "Southbound is changing thier (sic) name to North Shuttle Services Inc. There is no change of ownership." (Exhibit 1, Tab W, p. 25.) We therefore determine that North Shuttle and Smith

are each accountable for violations that are found to have occurred on and after February 22, 1994.

### **3.3. Alleged Violations**

#### **3.3.1. Failure to Maintain Evidence of Liability Insurance**

GOs 101-B and 115-F require passenger carriers to maintain proof of adequate public liability and property damage (PL&PD) insurance (or equivalent liability protection) on file and in effect with the Commission. Section (9) of GO 101-B provides in part that as to passenger stage corporations, "[n]o operation shall be conducted on any highway of the State of California unless a certificate of insurance, certificate of self-insurance coverage, bond, or the other securities or agreement of indemnity hereinabove specified, shall be in effect and on file with the Commission." Section (9) of GO 115-F provides the same with respect to charter-party carriers. Pursuant to these GOs, and Sections 1040, 1041, 5387, and 5391, it is unlawful for carriers to conduct for-hire services without insurance or other protection in effect and on files.

The declaration in Exhibit 1 (pages 22-23) shows that Southbound failed to maintain evidence of PL&PD insurance on file with the Commission for 149 days during 1994 and 1995 and that North Shuttle failed to maintain evidence of PL&PD insurance on file for 29 days during March and April of 1996. As discussed in Section 3.3.6, staff demonstrated that Southbound and North Shuttle conducted unlawful passenger operations during these periods.

North Shuttle brought in evidence (Exhibit 37) consisting of a statement to show that it had a PL&PD insurance policy with Greenwich Insurance Company in effect from February 13, 1996 to April 27, 1997 and a PL&PD insurance policy with Legion Insurance Company in effect from February 27, 1997 to February 27, 1998. Smith claimed to have either the

insurance policies or documents reflecting their existence in the hearing room, but North Shuttle did not offer the policies or documents in evidence.

It is not sufficient for passenger carriers to merely possess PL&PD insurance. GO 101-E and GO 115-F require passenger carriers to have minimum amounts of coverage that depend on the seating capacity of vehicles operated, and to provide insurance in a form approved by the Commission. North Shuttle did not show that the asserted Greenwich or Legion policies met the minimum coverage requirements or other requirements applicable under the GOs. Staff has shown that Southbound and North Shuttle repeatedly and frequently operated without evidence of PL&PD insurance on file with the Commission. Respondents have not shown that Southbound or North Shuttle provided adequate liability protection during these periods as required by statute and by general order of this Commission.

### **3.3.2. Failure to Enroll Drivers in the Pull Notice Program**

Pursuant to Section 5.02 of GO 158,<sup>7</sup> passenger stage corporations are required to enroll in the DMV pull notice program as defined in Vehicle Code Section 1808.1. Section 5.02 of GO 157 establishes the same requirement for charter-party carriers. Subdivisions (b) and (c) of Vehicle Code Section 1808.1 provide that:

(b) The employer of a driver who drives any vehicle specified in subdivision (l) shall participate in a pull notice system, which is a process for the purpose of providing the employer with a report showing the driver's current public record as recorded by the

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<sup>7</sup> GO 158, which governs operations of passenger stage corporations and which became effective in 1989, was replaced by GO 158-A effective January 1, 1996. Reference to GO 158 hereinafter includes GO 158-A. Similarly, reference to GO 157, which governs charter-party carrier operations, includes GO 157-A, GO 157-B, and GO 157-C.

department, and any subsequent convictions, failures to appear, accidents, driver's license suspensions, driver's license revocations, or any other actions taken against the driving privilege or certificate, added to the driver's record while the employer's notification request remains valid and uncanceled. As used in this section, participation in the pull notice system means obtaining a requester code and enrolling all employed drivers who drive any vehicle specified in subdivision (l) under that requester code.

(c) The employer of a driver of any vehicle specified in subdivision (l) shall, additionally, obtain a periodic report from the department at least every six months, except that an employer who enrolls more than 500 drivers in the pull notice system under a single requester code shall obtain a report at least every 12 months. The employer shall verify that each employee's driver's license has not been suspended or revoked, the employee's traffic violation point count, and whether the employee has been convicted of a violation of Section 23152 or 23153. The report shall be signed and dated by the employer and maintained at the employer's principal place of business. The reports shall be presented upon demand to any authorized representative of the Department of the California Highway Patrol during regular business hours.

The Commission's requirement for participation in the pull notice program is designed to ensure that carriers use only properly licensed drivers to operate vehicles in regulated service. The pull notice program is driver-specific; that is, each and every driver must be enrolled. The carrier must not only obtain a DMV requester code and enroll all of its drivers, it must also obtain from the DMV, for each driver, and no less frequently than every six months, a report on that driver's public record. It then must take positive action to verify that each driver remains qualified to drive, and sign and date the reports and maintain them at its principal place of business.

On March 19, 1996 North Shuttle informed the Commission that it proposed to employ 9 drivers in its charter-party operation. Of these, only 3 were enrolled in the pull notice program, and these 3 were enrolled under the account of a subcarrier. In addition, Smith failed to sign records as required. During 1995 and 1996 Smith employed 5 drivers who were never enrolled in the pull notice program. Mekbib testified that while Smith enrolled some drivers in the pull notice program, others "would get hired for a week, and some were hired from the homeless food line. Anybody that comes (sic) in there was taken." (Tr. 82-83.)

Smith testified that North Shuttle obtained 42 pull notice reports from July 8, 1996 to March 31, 1997.<sup>4</sup> However, this does not demonstrate that each employed driver was enrolled at all times that respondents were operating. Staff has shown that respondents failed to enroll all drivers in the pull notice program as required.

### **3.3.3. Employing Drivers With Suspended/Expired Drivers' Licenses**

Section 5.01 of GOs 157 and 158 provides that every driver of a passenger carrier shall be licensed as required under the Vehicle Code. As noted in the previous section, the employer is obliged to verify that its drivers' licenses have not been suspended or revoked. Staff has shown in Exhibit 1, pages 35-37 and Attachments X and Y to Exhibit 1 that in 1995 and 1996, respondents employed drivers whose licenses were suspended or revoked by DMV. Ariel Cruz drove for Yellow from October 1995 through June 1996. His California

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<sup>4</sup> We note that the heading of North Shuttle's Exhibit 38 is "Department of Motor Vehicles Pull Notice Reports, Dates of Pull Notice Reports Received by North Shuttle Service, Inc. Between February 21, 1996 and March 18, 1997." The exhibit is a simple listing of 42 dates beginning July 8, 1996 and ending March 31, 1997.

driver's license (CDL) was suspended August 16, 1995 and again October 23, 1996. Larry Martin was employed as a Yellow driver from November 1995 through November 1996, while his CDL expired May 29, 1996 and was suspended by the DMV on October 25, 1996. Wayne Jones was a Yellow driver from March 1996 through June 17, 1996, and his CDL was suspended for speeding and other violations for five months, from January 10 to June 3 of 1996. Samford Robinson drove for Yellow when he was involved in an injury accident on May 16, 1996. One of his licenses was suspended October 18, 1996 and revoked on January 21, 1997 for filing a fraudulent DMV application. (Exhibit 1, pp. 5-8.)

In addition to this evidence, witnesses Mekbib (Tr., 82:18-84:8; 84:27-85:10) and Walter (Tr., 286:6-299:5 and Exhibit 10) testified about Smith's practices with respect to unlicensed drivers. Respondents brought no evidence at all to disprove this allegation.

#### **3.3.4. Compliance With Airport Authority Safety & Traffic Rules**

Section 3.01 of GO 158 and Section 3.02 of GO 157 require passenger carriers to comply with safety or traffic rules and regulations of an airport authority, and provide that consistent failure to do so may result in suspension or revocation of the carrier's authority.

CSD documented 15 violations of SFO rules and San Jose Airport rules in 1995 and 13 violations in 1996 by Southbound and North Shuttle. A lieutenant in the SFO Police Department and the Supervisor of SFO Ground Transportation Unit, SFO Landside Operations testified to solicitation complaints and other rules violations by respondents resulting in admonishments from Landside Operations at SFO. SFO officials suspended North Shuttle during the pendency of this proceeding. The record shows that respondents have violated



Section 3.01 of GO 158 and/or Section 3.02 of GO 157 by failing to comply with airport authority rules.

### **3.3.5. Workers' Compensation Insurance**

Sections 460.7 and 5378.1 require each passenger carrier to file with the Commission either a certificate by an admitted insurer of workers' compensation coverage for its employees, a certificate of consent to self-insure, or a statement under penalty of perjury that it does not employ any person so as to become subject to workers' compensation laws.

Smith filed "Workers' Compensation Declaration Forms" (Form TL 706-K) dated December 7, 1994 and January 10, 1995 stating under penalty of perjury that "I DO NOT have any employees." Smith signed the latter declaration in the presence of a License Section staff member who testified to that effect. Staff showed that Southbound did in fact have employees on those dates. Staff showed that North Shuttle failed to maintain evidence of workers' compensation insurance in effect and on file with the Commission from February 28, 1996 to May 16, 1996, and that Southbound failed to maintain coverage on file for extended periods.

North Shuttle brought in evidence (Exhibit 37) consisting of a statement to show that it had workers' compensation insurance with Zenith Insurance Company in effect from February 13, 1996 to February 27, 1996, with Pacific Rim Insurance Company in effect from February 27, 1996 to February 27, 1997, with Legion Insurance Company in effect from February 27, 1997 to April 29, 1997, and with State Compensation Insurance Fund in effect from April 29, 1997 to April 1, 1998. Smith claimed to have either the insurance policies or documents reflecting their existence in the hearing room, but North Shuttle did not offer the policies or documents in evidence. Respondents made no showing that Southbound was in compliance with Sections 460.7 and 5378.1

for the extended periods when no evidence of coverage was on file with the Commission. We conclude that Southbound and North Shuttle have violated Sections 460.7 and 5378.1 by failing to maintain proof of workers' compensation insurance on file with the Commission while using employees to provide service.

### **3.3.6. Operations During Suspension/After Revocation of Authorities**

Sections 702, 1031, and 5379 provide that no regulated passenger operations shall be conducted without authority from the Commission. It is unlawful for a carrier to operate during any period that the carrier's authority is suspended or revoked. Staff has shown through Exhibit 1, Attachment L, page 24, Attachment J, pages 1-4, and supporting testimony of witnesses Gendrenv (Tr. 404-405), Bracero (Tr. 500-503), and Alemayehv (Tr. 735-736) that North Shuttle operated unlawfully for a total of 35 days while suspended, from March 12, 1996 to April 9, 1996 and from May 9, 1996 to May 16, 1996.

### **3.3.7. Response to Written Complaints and Staff Inquiries**

GOs 157 and 158 (Section 7.01 in each GO) provide that passenger carriers shall respond within 15 days to written complaints concerning their transportation service. Staff has shown that there have been numerous complaints regarding respondents' transportation service: 30 in 1994, 31 in 1995, 31 in 1996 through September, and 15 from November 1996 to March 1997. Staff itself investigated and reported on these complaints, and the behavior of respondents described by staff is in some cases very troubling. However, staff has not demonstrated that respondents generally failed to respond to most of

these complaints in violation of Section 7.01 of the GOs.<sup>9</sup> We note that in at least one case, the August 1996 complaint of James Simmons transmitted by staff to North Shuttle on September 6, 1996, the facts indicate that North Shuttle did respond timely in the week preceding September 16, 1996, even if the response was made at staff's prodding.

Nevertheless, the record evidence shows that respondents failed to timely respond to some complaints (e.g. that of Lee Ann Fujii; Tr. 39-40), and Smith was known to simply throw a written complaint in the trash (Tr. 81). Such treatment of complaints violates Section 7.01 of the GOs.

### **3.3.8. Failure to Assess Tariff Rates**

Section 494 requires common carriers, including passenger stage corporations, to strictly observe the applicable rates, fares, and charges specified in schedules filed with the Commission and in effect at the time. Staff demonstrated that in 1996 North Shuttle issued and accepted coupons for fares of \$7.99 to or from SFO in violation of its filed tariffs. The lowest published fare for transportation to or from SFO was \$10.

### **3.3.9. Failure to Include PSC and TCP Numbers in Advertisements**

Sections 702, 1039, 5381, and 5386, and Section 3.07 of GO 157 and Section 3.05 of GO 158 provide that in every written or oral advertisement, every passenger carrier shall state the number of its certificate or identifying symbol as specified by the Commission.

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<sup>9</sup> The requirement that a carrier respond within 15 days does not mean that the carrier is obligated to resolve the complaint in favor of the complainant. If the carrier believes in good faith that the complaint is unfounded, its obligation is to timely inform the complainant of that fact.

Staff showed that North Shuttle issued advertising material (a discount coupon) lacking the required identification.

### **3.3.10. Failure to Maintain Records**

Section 6.01 of GOs 157 and 158 require passenger carriers to institute and maintain at their offices records which reflect information as to the services performed. These records must be maintained for a minimum period of three years. These records must be produced for staff upon request pursuant to Rule 6.02. Staff showed that during the course of its investigation, respondents failed to produce all records requested, including maintenance records, inspection reports, subcarrier agreements, lease agreements, and payroll records.

### **3.3.11. Additional Evidence**

As noted earlier, the Commission expressly permitted its staff to present additional evidence beyond that described in the OII. CSD did so, showing, among other things, that North Shuttle failed to comply with Ordering Paragraph 4 of the OII and that even as the hearings were in progress, the company's drivers were involved in serious incidents at SFO. Ordering Paragraph 4 requires North Shuttle to submit to the CSD Director once every thirty days during the pendency of this proceeding a report signed under penalty of perjury listing all drivers employed during the last 30 days and certifying that they are enrolled in the pull notice program. Two such filings were required by the time that hearings were held the week of April 14, 1997.

Exhibit 14 shows that by letter dated April 17, 1997 and addressed to "Kenneth L Koss, Director of the Consumer Services Division," North Shuttle attempted compliance with Ordering Paragraph 4.<sup>19</sup> While we do

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<sup>19</sup> Mr. Koss was then and is now the Director of the Rail Carrier and Safety Division. William Schulte was and is the Director of CSD.

not condone respondent's failure to use the correct name of the CSD Director, the failure is of little consequence. However, North Shuttle showed a disregard for the order by delivering the letter to the Interstate Registration Unit for date stamping then to the Rail Carrier and Safety Division Director rather than submitting it to the CSD Director. More importantly, there is no evidence that North Shuttle was in compliance with Ordering Paragraph 4 prior to April 17, 1997.

CSD also brought in evidence (Exhibit 12) of two separate assaults by North Shuttle drivers, one on a driver for another carrier and one on a passenger, within a single week in April 1997. As discussed in the following section, these incidents support a conclusion that North Shuttle failed to adequately manage its drivers.

### **3.4. Conclusion**

#### **3.4.1. Remedy for Violations**

As discussed in the previous section, allegations of violations of statutes and GOs governing passenger operations by Southbound and North Shuttle have been proven at hearing. The violations are extensive, and they are not merely technical in nature. We reject North Shuttle's assertion that those which occurred after February 13, 1996 are relatively minor infractions, as it failed to maintain evidence of insurance coverage on file with the Commission, failed to fully participate in the pull notice program, operated during suspension, and used unlicensed drivers after that date. Many of these proven violations implicate public safety concerns and are of such a serious nature that suspension or revocation of the carrier's authority is a remedy under the law.

The public's expectation is that any carrier which is authorized by this Commission to provide passenger service is fully able to meet its financial obligations in the event it is found liable for damages in a motor vehicle accident.

Possession of an insurance policy or equivalent coverage is a necessary but not a sufficient condition for lawful operations. Even if a policy of PL&PD insurance was in effect at certain times as claimed by Smith, respondents' operations in passenger service without having provided evidence of adequate coverage, in the proper form, on file with the Commission in accordance with the governing GOs demonstrates a lack of concern for the public interest. Operating passenger service without fully and completely participating in the DMV pull notice program demonstrates a troubling disregard for public safety, and respondents' use of unlicensed drivers on several occasions confirms that they do not take their public safety obligations seriously. That an employee was seen shooting heroin on company premises (Tr. 83), and that drivers assaulted another driver and a passenger (as discussed earlier), further demonstrate that respondents failed repeatedly to exercise reasonable control over the hiring and supervision of their drivers and other employees, which has profoundly negative public safety implications. Respondents' disregard for the public policy governing worker welfare as embodied in Sections 460.7 and 5378.1, as shown by their overly-casual approach to ensuring workers' compensation insurance was in effect and on file; their disregard for safety of the traveling public at the region's airports as evidenced by violations of the airports' rules and regulations; and their failure to observe consumer protection requirements embodied in rules on advertising and requirements for responses to complaints and for strict observance of filed tariffs demonstrate a lack of concern for consumers of passenger service and a lack of fitness to serve the public. Their disregard for Commission orders as shown by operations during periods of suspension, by failing to maintain and produce all required records, and by failing to comply with Ordering Paragraph 4 of the OII demonstrate a disdainful attitude for regulations which are designed to protect the public and which this Commission is charged with administering.

Respondents lack the requisite moral and technical fitness to conduct regulated passenger operations. Notwithstanding the findings of public convenience and necessity associated with the grant of authority to North Shuttle, it is clear that public convenience and necessity now require the removal of its authorized services. As framed by respondents and applicants in their joint opening brief, the primary issue in this proceeding is whether it is more important to the public for the Commission to allow the continuation of this shuttle service, which it found was required by public convenience and necessity, or to terminate it based on the justification that doing so would constitute notice to the carrier industry that the Commission will enforce its laws and regulations. The extensive and repeated nature of respondents' conduct demonstrate a willful disregard for their obligations that cannot be ascribed to ignorance or uncertainty about our requirements. We conclude that revocation of North Shuttle's operating authorities is the appropriate remedy for the violations that have been proven by staff. In addition, in light of our findings with respect to respondent Smith, we would be remiss if we did not address appropriate sanctions for the violations proven. We determine that Smith should be prohibited from participating substantively, by ownership, management, or control, in regulated passenger operations for a period of one year from the effective date of this order.

The OII places the burden on respondents North Shuttle to show why its authorities should not be revoked in light of the proven violations. North Shuttle asserts three primary grounds for not revoking its authorities. First, service between San Francisco and SFO would be diminished. Second, North Shuttle provides a benefit to its employees and contract drivers and their families. Third, respondents and applicants have a plan to remove Smith from owning and operating North Shuttle and transfer it to a more qualified owner-

operator, which would assertedly solve the problems that led to commission of the proven violations. As discussed in Section 3.4.2, 3.4.3, and 3.4.4 below, none of these grounds is sufficient to overcome the conclusion that North Shuttle's operations should be terminated by revocation of its authorities.

### **3.4.2. Reduction in SFO Service Capacity**

North Shuttle is permitted by SFO to operate 13 vehicles at SFO. Respondents showed that this represents 10% to 12% of the total number of vehicles permitted by SFO to operate between San Francisco and SFO.

Revocation of North Shuttle's operating authority will result in the loss of these permits due to a moratorium on new permits imposed by SFO and a prohibition on the transfer of existing permits. Respondents and applicants assert that revocation of North Shuttle's CPCN will cause a 10% to 12% diminution in total shuttle van service available to the public. Yen testified that his reason for proposing to purchase and assume control of North Shuttle rather than simply applying to the Commission for new authority is to obtain the SFO permits held by North Shuttle.

North Shuttle argues that we should not revoke the North Shuttle CPCN due to the negative impact of such revocation on the traveling public. We find this argument unpersuasive. Notwithstanding testimony that SFO's moratorium is permanent, we find little credible evidence that SFO is unable or would be unwilling to revise its policies regarding shuttle van service if and when conditions warrant. We note that SFO, which is concerned with provision of adequate land transportation services to the airport, itself suspended North Shuttle from operating during the pendency of this proceeding.

In addition, we note that respondents and applicants failed to show that a 12% reduction in the number of permitted shuttle vehicles leads to a significant cut in service to the traveling public. This is because there is no record



evidence regarding the use of existing shuttle vehicle capacity. It is just as reasonable to conclude that a 12% reduction in capacity (as measured by the number of permitted vans) would lead to greater overall efficiency in airport shuttle operations and improved service as it is to conclude that removal of North Shuttle's permits will lead to a 12% decline in service to the traveling public. Both conclusions are mere speculation, and we decline to make either of them.

We have a duty to ensure that passenger carriers subject to our jurisdiction are operating in compliance with laws and regulations which we are charged with administering and enforcing. Where a carrier has demonstrated an unwillingness or inability to provide safe and reliable service to the public as evidenced by that carrier's pattern of noncompliance with those laws and regulations, we will not hesitate in ordering a permanent cessation of that carrier's operations. Public convenience and necessity requires provision of safe and reliable service, and this record demonstrates that North Shuttle does not meet this requirement. Under the circumstances, the possibility of reduced levels of service to SFO does not constitute a valid reason to refrain from revoking its CPCN.

#### **3.4.3. North Shuttle as an Employer**

North Shuttle offered testimony that it provides support to 40 employees and their family members. As CSD noted, this estimate appears to be excessive since North Shuttle had discharged all but three of its employee drivers and used four independent contractors at the time of the hearings.

In any event, while unfortunate for those immediately affected, this concern does not outweigh our public obligations. Our primary concern is public safety and public convenience and necessity, not the private interests of those impacted by employment in a regulated carrier.

#### 3.4.4. Assumption of Carrier by More Qualified Operator

Respondents and applicants recommend that in lieu of revoking North Shuttle's authorities, we instead order North Shuttle to cease and desist from committing future violations and authorize Yen to take control of the carrier, with Smith removed from ownership and other involvement in North Shuttle and in the industry pursuant to the covenant not to compete.

Respondents and applicants contend that Yen is more qualified than Smith to conduct passenger operations, and that under their recommendation, the result sought by CSD in this proceeding will be achieved.

CSD recommends that North Shuttle's authority be revoked on policy grounds irrespective of Yen's qualifications and fitness. CSD contends that its recommendation is consistent with the policy of this Commission, embodied in the *Royya's* case, wherein it stated:

"We concur with staff that authorization of such a transfer [of stock] would be bad policy; that holding [the carrier] harmless from the consequences of its negligent management, or allowing it to profit from its negligent management, would signal the industry that there is no down-side to such behavior." *Re Royya's Transportation, Inc., dba Express Airport Shuttle* (1994) 57 CPUC 2d 289, 297.

In *Royya's* the Commission made it clear that it did not wish to bar any fit and proper person from entering the passenger stage business. Instead we stated that the intended purchaser could apply for a CPCN in its own name. (*Id.*) Implicit in this statement was such a purchaser's ability to buy all assets of Express Airport Shuttle other than the CPCN. The Commission stated this specifically in a case subsequent to *Royya's*. In *Re Philip Nicola dba Downtown Shuttle* (1995) 61 CPUC 2d 566, at 577-78, we stated:

"In any event, the Commission dealt with a similar request for a fine in lieu of revocation in *Royya's Transportation, Inc.*, D94-11-021,

issued on November 9, 1994. There, we concluded that such a remedy would suggest that an operator could violate regulations with impunity until an investigation was launched, then clean up its operation and seek a buyer for its stock."

In *Downtown Shuttle* we reaffirmed that such a stock transfer would be bad policy as stated in *Royya's*, (*Id.* at 578.) But we also declared that "we do not want to prevent Nicola from seeking to sell or otherwise convey Downtown Shuttle's assets to a qualified successor, who can then apply to the Commission for a certificate of public convenience and necessity to conduct operations in the successor's name." (*Id.*, emphasis added.) We also observed such a successor would have to demonstrate its fitness.

The *Royya's* case is not an aberration as respondents and applicants claim. They cite to *Investigation of Arturo Luna dba Bay Area Shuttle* (1997) D.97-02-044 (*Luna*), but this case involved a settlement. It also involved the revocation of operating authority and withdrawal of Arturo Luna as a partner of the applicant for new authority. They also cite *Re American Transportation Enterprises, Inc., dba Amtrans Airport Shuttle* (1993) 50 CPUC 2d 613 (*Amtrans*), in which the Commission approved a transfer of a CPCN where the staff had sought revocation. Again, *Amtrans* involved a settlement, and, moreover, the Commission's decision in *Amtrans* preceded the "no transfer" policy of revocation established in *Royya's* by more than a year. Finally, respondents and applicants cite to a proposed decision in *Re Universal Transit System, Inc., dba Airway Shuttle* (*Airway*). A final decision in *Airway* (D.97-12-086) was issued after the briefs were submitted in this case. The Commission's decision in *Airway* is distinguishable from *Royya's* (and this proceeding) because in *Airway*, the Commission did not find that revocation of the operating authority was an appropriate remedy for the violations at issue there. Thus, the no transfer policy of *Royya's* was not invoked in *Airway*. In addition, the stock transfer approved in

*Airway* was made retroactive to legitimize a 4-year old transfer made without our authorization.

Thus, we deny the request of Yen to acquire the stock of North Shuttle, which would transfer with it the CPCNs and related SFO permits. In doing so, after having determined that revocation of North Shuttle's operating authorities is an appropriate sanction for proven violations by respondents, we reaffirm our policy in *Royya's*, and find that it is applicable to the facts of this case. Even if we accept the assertions that Yen is more qualified than Smith to own and operate North Shuttle, we continue to believe that allowing the proposed transfer of stock would inappropriately signal to the industry and to the public generally that there is little down-side to the egregious type of conduct shown on this record.

If the plane of competition in the airport shuttle industry is defined by operators such as respondents, then we might only look forward to a succession of proceedings such as this one, while the traveling public suffers the consequences. There is a down-side to operating in the negligent manner that respondents have, which carriers should not be able to avoid through the expediency of transferring the authority to another operator. Any prospective purchaser may instead purchase all assets except the operating authority and apply for a CPCN in its own name. Therefore, respondents' and applicants' recommendation to allow transfer of control of North Shuttle in lieu of revocation should be denied.

#### 4. Other Matters

##### 4.1. *Application to Acquire Control of North Shuttle*

Our order in 1.97-01-028 provides for revocation of the operating authorities held by North Shuttle. The application for authority to transfer control of North Shuttle to Eugene Yen will therefore be dismissed as moot.

While the issue of Yen's fitness to conduct regulated passenger operations was raised and extensively litigated in this matter, we decline to make findings on the issue in light of dismissal of the application. Also, Mekbib's claims regarding ownership of North Shuttle shares are not at issue before the Commission.

#### **4.2. Post-Hearing Motions**

In its opening brief, CSD noted an apparent discrepancy in Smith's statement on the record that North Shuttle transported 112,738 passengers between San Francisco and SFO in 1996 on the one hand, and Smith's declaration under penalty of perjury for purposes of reporting North Shuttle's revenues subject to statutory fees under the PUC Transportation Reimbursement Account (PUCTRA) on the other hand. In the PUCTRA filing, Smith reported that North Shuttle's taxable revenues were \$270,120 in 1996. Since North Shuttle's fare for service between San Francisco and SFO is \$10, and transportation of 112,738 passengers between those points at tariff rates would have yielded \$1,127,380 in revenues for service between San Francisco and SFO alone, CSD believes that this demonstrates that Smith committed perjury either when he testified regarding the number of passengers transported or when he submitted the PUCTRA filing. In its reply brief, CSD responded to the statement in respondents' and applicants' opening brief that the transportation of 112,738 passengers occurred in 1996 and 1997 combined. CSD also referred in its reply brief to a June 24, 1997 letter from the SFO Airport Director addressed to Smith, in which respondents' airport operating permit was suspended for a three-day period.

On August 7, 1997 respondents and applicants filed a motion to strike or disregard this factual information, which was not included in the record, and the arguments based thereon. We will grant the motion by disregarding the 1996 PUCTRA report and the June 24, 1997 suspension letter in reaching our decision in this case. However, we direct the Executive Director to take any

action that may be appropriate with respect to North Shuttle's compliance with Sections 401 to 443 for 1996 and 1997, including determining whether North Shuttle underreported revenues and, therefore, paid less than the fees due.

On August 12, 1997 CSD filed a motion to amend its reply brief in order to respond to charges against CSD and its attorney made by respondents and applicants in their reply brief. CSD requests an opportunity to respond to allegations that CSD misled the Commission by deliberately misstating the record. The motion is granted for good cause shown. As discussed elsewhere in this decision, allegations of staff misconduct are wholly unfounded.

#### **4.3. Proposed Decision**

Comments and replies on the proposed decision of the ALJ were permitted pursuant to the procedures set forth in Article 19 of the Commission's Rules of Practice and Procedure. Respondents and applicants submitted joint comments on the proposed decision. CSD filed reply comments.

In large part, the comments reargue positions taken in briefs, in contravention of Rule 77.3. Without addressing in detail the claim that portions of the record were ignored inappropriately (which claim lacks merit) we note that the allegation by respondents and applicants that the proposed decision excluded and ignored specific portions of the record (Comments, p. 5) is clearly erroneous on its face in at least two respects. For example, the claim that Exhibit 37 was ignored and excluded is belied by the decision's explicit references (at pages 19 and 24) to Exhibit 37. Similarly, the claim that pages 995 through 1195 of the transcript were ignored and excluded is belied by specific references in the proposed decision to the testimony of Martin B. Smith (e.g., at pages 19, 22, and 24). Finally, in several respects the comments represent an inappropriate attempt by applicants and respondents to introduce new evidence after closure of the record.

We find no basis in the comments for modifying the proposed decision. Our order today adopts the proposed decision with certain editorial and other minor revisions.

We have revised the language of Section 3.4.4 in which we discuss the *Royya's* and *Downtown Shuttle* decisions. We do so to more clearly distinguish our policy on the transfer of stock of a respondent whose authority is subject to revocation from our policy on the sale and transfer of the respondent's assets. The revised language makes no substantive change to the outcome recommended in the proposed decision.

#### **4.4. *Petition to Set Aside Submission***

On April 20, 1998 respondents and applicants tendered a petition to set aside submission to consider whether North Shuttle "is now in compliance and if it presently is able to prove its ability and willingness to comport with the governing laws and regulations." Attached to the petition were declarations by Eugene Yen and Martin Smith dated April 16, 1998 to the effect that North Shuttle is in full compliance with governing laws and Commission rules and regulations related to insurance requirements, the pull notice program, and other areas addressed during the investigation. CSD filed a response, noting among other things that the declarations of Yen and Smith do not represent "new evidence" with respect to the subject matter of the investigation.

We will deny the petition, as it fails to include claims of material changes of fact or of law alleged to have occurred since the conclusion of the hearing. Even if North Shuttle had achieved compliance with governing laws and regulations as of April 16, 1998, such a fact would not be material to the Commission's consideration of violations by North Shuttle during the period reviewed in this investigation.

#### **4.5. Appellate Review**

Judicial review of Commission decisions is governed by Division 1, Part 1, Chapter 9, Article 3 of the Public Utilities Code. The appropriate court for judicial review is dependent on the nature of the proceeding. I.97-01-028 is an enforcement proceeding brought by the Commission against North Shuttle and Smith, and so this decision is issued in an "adjudicatory proceeding" as defined in Section 1757.1.

#### **Findings of Fact**

1. The respondents in I.97-01-028 are North Shuttle and Martin B. Smith.
2. References in the "License History" section of the OII to "Martin B. Smith, President and General Manager" in connection with the OII's discussion of D.93-04-016 and D.95-11-046 were neither erroneous nor indicative of any attempt by the drafters of the OII to mislead the Commission.
3. There was no impropriety on the part of CSD and predecessor staff organizations or investigator Jackman in the conduct of this investigation, and there was no impropriety on the part of CSD staff and attorney in the prosecution of this case before the Commission.
4. Smith was substantially and continuously involved in and dominated the operations of Southbound since its inception.
5. Smith was substantially and continuously involved in and dominated the operations of North Shuttle since its inception.
6. After June 15, 1994, Smith owned 100% of the shares outstanding of North Shuttle, and in the subsequent years he never owned less than 50%.
7. In dealings with SFO and with this Commission, Smith represented North Shuttle as its President and Manager.
8. North Shuttle is the continuation of Southbound without substantive change of ownership.



9. Southbound and North Shuttle repeatedly and frequently operated without evidence of PL&PD insurance on file with the Commission, and respondents have not shown that Southbound or North Shuttle provided adequate liability protection during these periods as required by statute and by general order of this Commission.

10. Respondents failed to enroll all drivers in the pull notice program.

11. In 1995 and 1996, respondents employed drivers whose licenses were suspended or revoked by DMV.

12. Respondents violated Section 3.01 of GO 158 and/or Section 3.02 of GO 157 by failing to comply with airport authority rules.

13. Southbound and North Shuttle violated Sections 460.7 and 5378.1 by failing to maintain proof of workers' compensation insurance on file with the Commission while using employees to provide service, and respondents made no showing that Southbound was in compliance with Sections 460.7 and 5378.1 for the extended periods when no evidence of coverage was on file with the Commission.

14. North Shuttle operated for a total of 35 days while suspended, from March 12, 1996 to April 9, 1996 and from May 9, 1996 to May 16, 1996.

15. Respondents failed to timely respond to some complaints, and Smith was known to simply throw a written complaint in the trash.

16. North Shuttle issued and accepted coupons in violation of its filed tariffs.

17. North Shuttle issued advertising material lacking the required carrier identification.

18. Respondents failed to produce all records requested by staff.

19. North Shuttle was not in compliance with Ordering Paragraph 4 of the OII prior to April 17, 1997.

20. Respondents have shown a lack of concern for the public interest and a disregard for public safety; have failed repeatedly to exercise reasonable control over the hiring and supervision of their drivers and other employees; have disregarded public policy governing worker welfare embodied in Sections 460.7 and 5378.1; have disregarded the safety of the traveling public at the region's airports; have failed to observe consumer protection requirements of the Commission; and have shown a disdainful attitude for regulations which are designed to protect the public.

21. Respondents lack the requisite moral and technical fitness to conduct regulated passenger operations.

22. Revocation of North Shuttle's operating authority will result in the loss of its permits to provide service at SFO, which will reduce the total number of such permits that were in force at the time of the hearings by 10% to 12%.

23. It has not been shown that a 12% reduction in the number of permitted shuttle vehicles at SFO will lead to a significant cut in service to the traveling public.

24. Mekbib's claims regarding ownership of North Shuttle shares are not at issue before the Commission.

25. Whether or not North Shuttle was in compliance with governing laws and regulations on April 16, 1998 is not material to this investigation.

#### **Conclusions of Law**

1. North Shuttle's motion for correction of the OII should be denied.

2. By giving the hearsay statements in Exhibit 1 less weight than if there were nonhearsay statements, respondents' substantial rights are preserved.

3. For purposes of evaluating Smith's fitness to conduct regulated passenger operations, any failings on the part of Southbound can reasonably and properly be attributed to his management and operation of Southbound, and any failings

on the part of North Shuttle can reasonably and properly be attributed to his ownership, management, control, and operation of North Shuttle.

4. North Shuttle and Smith are each accountable for violations by Southbound and North Shuttle that are found to have occurred on and after February 22, 1994.

5. Public convenience and necessity require the removal of North Shuttle's authorized services.

6. Revocation of North Shuttle's operating authorities is the appropriate remedy for the extensive and repeated violations of statutes and Commission orders that have been proven by staff.

7. Smith should be prohibited from participating substantively, by ownership, management, or control, in regulated passenger operations for a period of one year from the effective date of this order.

8. The possibility of reduced levels of service to SFO does not constitute a valid reason to refrain from revoking North Shuttle's CPCN.

9. Concern for the interests of employees and their families does not outweigh our public interest obligations.

10. The *Royya's* case is not an aberration, and respondents' and applicants' recommendation to allow transfer of control of North Shuttle by transfer of its stock to Yen in lieu of revocation should be denied. A purchaser may buy all the assets of North Shuttle, except its CPCNs, and may apply for its own CPCN authority to operate.

11. North Shuttle failed to show cause why its authorities should not be revoked.

12. The application for authority to transfer control of North Shuttle to Eugene Yen should be dismissed as moot.

13. The Commission declines to make findings on the issue of Yen's fitness to conduct regulated passenger operations in light of dismissal of A.97-01-002.

14. Respondents' and applicants' motion to strike or disregard factual information which was not included in the record and the arguments based thereon should be granted as provided in the foregoing discussion.

15. CSD's motion to amend its reply brief should be granted.

16. I.97-01-028 is an enforcement proceeding, and so this decision is issued in an "adjudicatory proceeding" as defined in Section 1757.1.

17. Respondents' and applicants' petition to set aside submission should be denied.

#### **O R D E R**

##### **IT IS ORDERED that:**

1. The certificate of public convenience and necessity and the charter-party carrier certificate issued to North Shuttle Service, Inc. (North Shuttle), a passenger stage corporation and charter-party carrier doing business as Yellow Airport Express, are each hereby revoked for good cause shown.

2. Martin B. Smith is prohibited from participating substantively, by ownership, management, or control, in any regulated passenger stage corporation or charter-party carrier for a period of one year from the date of this order.

3. The application of Eugene Yen and North Shuttle for authority to transfer control of North Shuttle by transfer of stock to Eugene Yen is dismissed as moot.

4. North Shuttle's motion for correction of the OII is denied.

5. Respondents' and applicants' August 7, 1997 motion to strike or disregard factual information which was not included in the record and the arguments based thereon is granted.

6. Consumer Services Division's motion to amend its reply brief is granted.

7. The petition of North Shuttle, Eugene Yen, and Martin B. Smith to set aside submission and reopen the proceeding is denied.

8. The Executive Director of the Commission is directed to cause personal service of this order to be made upon Martin B. Smith and North Shuttle.

9. These consolidated proceedings are closed.

This order becomes effective 30 days from today.

Dated May 7, 1998, at San Francisco, California.

RICHARD A. BILAS  
President  
P. GREGORY CONLON  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
Commissioners

Commissioner Jessie J. Knight, Jr., being necessarily absent, did not participate.