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July 14, 2017

VIA WUTC WEB PORTAL

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

Re: PETITIONER/ COMPLAINANT SHUTTLE EXPRESS INC.
DOCKET NOS. TC-143691, TC-160516, TC-161257 (CONSOLIDATED)

Dear Mr. King:

On behalf of Shuttle Express, Inc., please find enclosed for electronic filing in the above-referenced dockets, the "Post-Hearing Reply Brief of Shuttle Express, Inc".

If you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully submitted,

/s/
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Cc: Ms. Rayne Pearson, Administrative Law Judge (via email)
Mr. Dave Wiley (via email)
Mr. Blair Fassburg (via email)
Mr. Julian Beattie (via email)

Enclosures

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC., Petitioner and Complainant, v. SPEEDISHUTTLE WASHINGTON, LLC, Respondent.	DOCKET NOS. TC-143691, TC-160516, and TC-161257 (consolidated)

POST-HEARING REPLY BRIEF OF PETITIONER SHUTTLE EXPRESS, INC.

Dated: July 14, 2017

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I. INTRODUCTION

1 Shuttle Express, Inc. ("Shuttle Express" or "Petitioner") files this reply brief in response to the briefs of Staff and Speedishuttle Washington, LLC ("Speedishuttle" or "Respondent") filed on June 19, 2017. Both Staff and Speedishuttle largely ignore the broader public policy and public interest issues that are implicated in these dockets. Indeed, the term "public interest" cannot even be found in the Staff brief and is barely mentioned in Speedishuttle's Brief. But if the Commission puts form over substance and fails to finally address fundamental public interest issues, as Staff and Respondent urge, the public will suffer harm that may be irreparable.

2 The Commission embarked on an experiment beginning with the adoption of WAC 480-30-140 and culminating with the grant of a nearly identical certificate to Speedishuttle as was already held and served by Shuttle Express in 2015. The premise of the rule and the order was the same; *i.e.*, that Speedishuttle would be allowed to offer a service that was not the "same" as that offered by Shuttle Express, thereby "serving the unserved" and growing the overall auto transportation market without materially harming the existing service. In reality, Speedishuttle has made a mockery of the "different" service premise. Instead—as it now admits—it offers the same service, to the same passengers. It has thereby threatened the sustainability of the airport share ride service model altogether.

3 In its initial brief Speedishuttle proffers a model that—in hindsight—is clearly a distinction without a difference. Such a model cannot succeed in the Sea-Tac market, as Mr. Wood explained in detailed economic and policy terms.[1] Moreover, if a distinction without a difference is allowed to continue, the Commission will have inadvertently permitted

[1] DJW-1T, DJW-3T

Speedishuttle to violate RCW 81.68.040. The service differences that enabled the Commission lawfully to grant "a certificate to operate in a territory already served by a certificate holder" must be real to comply with the statute. The evidence shows they are not. Indeed, faced with overwhelming evidence, Speedishuttle now admits that it is serving "the general public"[2]—rather than the "niche" it proposed[3]—and even asserts that the Commission "must have understood" that that was the plan all along.[4]

4 The Speedishuttle admissions are startling, because the entire premise of the Commission's grant of overlapping authority as articulated in numerous orders was that the new service would be different and thereby serve passengers that Shuttle Express was not serving. To correct the unintended consequence that Speedishuttle is now admittedly serving the general public, which was not "considered, anticipated, or contemplated" by the Commission, Shuttle Express seeks the addition of three simple conditions to Speedishuttle's authority. They will help to ensure that the public service laws have real meaning and that the Commission's 2015 approval of a "different" service becomes real, not illusory. The proposed conditions are nothing more than what Speedishuttle promised and what the Commission expected based on those promises. And, most importantly, they will better serve the public interest.

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[2] Post-Hearing Brief of Speedishuttle, ¶ 53 (hereafter "Speedishuttle Brief").

[3] *E.g.*, TR. at 142-43 ("This company … proposes innovative and unique services in filling a niche…" and the "pie" will be "increased….").

[4] Speedishuttle Brief, ¶ 53.

II. SPEEDISHUTTLE'S COMPLAINT AND STAFF'S FINES ARE UNSUPPORTABLE.

5 First, as a threshold matter, Shuttle Express will address the Speedishuttle complaint, which Staff relies on in part to seek massive fines against Shuttle Express. None of the complaint has any merit. Not only are fines inappropriate and unconstitutional, the actions complained of are fully lawful and should have no bearing on the Shuttle Express Petition and Complaint.

A. The Speedishuttle complaint and Staff recommended fines ignore the DOL's[5] exclusive jurisdiction over limousines.

6 The Staff's case and brief fails to consider, let alone discuss, the 1996 act that completely divested the Commission of jurisdiction over the operations of limousine carriers.[6] The law could not have been more clear: "**All** powers, duties, and functions of the utilities and transportation commission pertaining to the regulation of limousines and limousine charter party carriers are transferred to the department of licensing." Washington Laws, 1996, Ch. 87, § 22 (emphasis added). If the operation at issue is limousine, it is under the jurisdiction of the DOL, not the UTC. For the reasons discussed in the Shuttle Express initial brief, the transportation of single persons or parties, by licensed limousine operators, in licensed limousines, is unquestionably a limousine operation.[7]

7 The DOL's jurisdiction does not depend on the fictional constructs the Staff and Speedishuttle attempt to create out of whole cloth. Shuttle Express has offered and arranged limousine

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[5] Department of Licensing, or "DOL."

[6] It is also very questionable that the Commission can issue fines based on the complaint of a private party. The Commission's rule clearly contemplates that it is the Commission that is empowered to commence enforcement actions seeking penalties, not private parties. *See* WAC 480-30-241(4).

[7] Initial Brief, ¶¶ 96-98, 100.

transportation regulated by the DOL for years. Speedishuttle and Staff cite no law or regulation that prohibits Shuttle Express from making an offer of limousine service to a person who originally requested auto transportation service.[8] Nor does any law or regulation create artificial barriers or "hoops" the passenger must jump through to accept a form of service that falls under the jurisdiction of the DOL instead of the UTC. To attempt to impose massive and destructive fines based on unwritten and heretofore secret technical rules would be a gross deprivation of due process.

8 The Commission cannot claw back jurisdiction that the legislature has taken away simply because an entity it regulates referred passengers who are then transported by a limousine operator, as this Commission has recognized.[9] Nothing in the limousine statutes makes any exception for the DOL's exclusive jurisdiction based on the source of a referral. The underlying issue in the prior Commission enforcement case against Shuttle Express involving independent contractors was whether there was a "single contract" if Shuttle Express contracted for transportation of previously unrelated parties that it had aggregated.[10] But there cannot possibly be more than a single contract when there is but a single party. There is no dispute that the

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[8] Staff characterizes the offer as a "unilateral" action by Shuttle Express. Staff Brief, ¶ 21. But the undisputed evidence in the record is that each and every passenger is offered the choice of using the limousine service or not. WAM-3T at 29-30, 33-34. If the passenger declines to change the form of service, they will be transported by a Shuttle Express van using an employee driver, under Shuttle Express's auto transportation certificate. WAM-3T at 33-34.

[9] "[W]e recognize that we have no authority to usurp the functions of DOL…." Docket TC-160819, Order 01, ¶ 12 (Sept. 30, 2016).

[10] Based on more recent proceedings and informal feedback from the DOL it appears that the DOL in fact considers the aggregation of multiple parties by a transportation arranger to be a "single contract" that falls under the limousine laws and regulations. Although that issue is not before the Commission in this docket, it is possible that the Commission erred in docket TC-120323, and that the DOL would accept jurisdiction over multi-stop limousine service.

evidence in this case is that all 40,727 operations involved a single party.[11] Thus, the DOL had and has exclusive jurisdiction over the transportation at issue.

9 Ironically, in the past the Commission has noted that, "[a] prudent company would have consulted with Staff, on the permissibility of the 'rescue service' before initiating it…." Docket TC-120323, Order 04, Final Order, ¶ 30 (Mar. 19, 2014). Here, it is undisputed that that is exactly what the company did. [12] *See* PK-2T at 23-24. The Staff agreed that "single stop trips were legal,"[13] which was completely consistent with their sworn testimony in TC-120323, their investigation report and recommendations, and the Commission's orders. All four actions communicated consistently and precisely that single stop trips are legally different from trips involving multiple parties and multiple stops. And again, that is completely consistent with the DOL's clear jurisdiction over single contracts in limousines.

B. <u>All other Speedishuttle complaints and issues also lack any merit.</u>

10 Speedishuttle raises several other supposed violations by Shuttle Express that Staff does not support, for good reason. First, the commission payments to hotel concierges is not a rebate of a fare, as Staff recognized. It is a sales and marketing expense, just like advertising and painting the company's name on the side of its vans. The passenger pays the same fare as if there were

[11] *E.g.*, WAM-3T at 29-30; DP-1T at 4.

[12] Mr. Pratt criticized Mr. Kajanoff's testimony, but admitted that he had no personal knowledge of the conversation. DP-6T at 4. Moreover, Mr. Pratt admitted that the he did not attempt to contact either of the Staff who were in the meeting with Mr. Kajanoff. Nor did Staff attempt to subpoena them. *See* TR at 848-49. Thus, apart from being fully consistent with the extensive record in TC-120323, the meeting and approval of single stop service is not disputed with any evidence. Indeed, Mr. Pratt admitted that he himself has a different view of single stop versus multi-stop service today than in 2012. TR at 850.

[13] PK-3T at 23-24.

no commission and books and pays for their own reservation.[14] Promotion of share ride services reduces use of fossil fuels and the number of vehicles on crowded roads. It is a benefit to the public and should be rewarded, not penalized. Even if the commissions were somehow misconstrued as rebates they would not be unlawful because the net fare received by Shuttle Express is always still within the range of its new flexible fares.[15]

11 Likewise, combining scheduled and door-to-door share ride passengers on the same vehicles at times is a huge public interest benefit that should be commended. The scheduled passengers leave and arrive according to the applicable published schedule.[16] By adhering to a schedule, they get the benefit of a significantly lower fare compared to the share ride fares.[17] In contrast, the share ride passengers do not depart on a set schedule, but as soon as there are enough passengers in the van.[18] By grouping with scheduled passengers, the van fills faster and the share ride passengers may be able to depart sooner than they otherwise would. Plus, in exchange for a higher fare, they can be picked up or dropped off at any location within Shuttle Express's territory, which is nearly all of King County.[19] When scheduled and share ride are going to similar locations or along the same route, once again there are fewer vehicles on the road and less fuel is needed to carry the same number of passengers.

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[14] BR-5; WAM-3T at 26-27.

[15] WAM-3T at 26.

[16] *See generally* WAM-3T at 4-8.

[17] *See* WAM-3T at 6.

[18] *See* WAM-3T at 12-13.

[19] *See* WAM-3T at 6-8.

12 As Mr. Marks testified, the combination of scheduled with share ride is allowed by the Commission's rules and specifically provided for in Shuttle Express's approved tariff.[20] Speedishuttle's argument that "all stops on a scheduled route are flag-stops"—citing Mr. Roemer's scheduled service experience—is a red herring and contrary to the record. The evidence was clear that the stop Mr. Roemer complained of was **not** an unlisted flag stop. It was a share ride stop.[21] So there was no violation of the flag stop listing rule applicable to scheduled service. And Mr. Roemer departed and arrived well within the times provided by Shuttle Express's scheduled tariff.[22]

13 Finally, citing no authority whatsoever, Speedishuttle asserts that charging customers different prices violates "the State's price anti-discrimination laws." Speedishuttle Brief at 42. This argument is fundamentally flawed on a factual basis, as the two customers receive different services. One passenger has to live with a schedule and a list of fixed stops. The other is not scheduled and can go anywhere the passenger chooses. That they are transported in the same vehicle is a happenstance that demonstrably serves the public interest and does not change the other essential attributes of the service. The argument is also grossly legally flawed. Carriers not only can but must charge their legally filed and approved tariffed rates or risk being fined by

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[20] WAM-3T at 3-6.

[21] TR. at 663.

[22] WAM-3T at 6-7.

the Commission.[23] Under the filed tariff doctrine, tariffs have the force and effect of law.[24] No action can be maintained against a carrier for charging the filed rate.[25]

C. The lack of any colorable claims of statue or rule violations precludes a penalty, including a retroactive finding of "unsatisfactory" service.

14 The Commission thoroughly investigated Shuttle Express's uses of independent limousine operators in 2012 and 2013. It cited and fined Shuttle Express for **every** multi-stop trip.[26] It did not cite or fine Shuttle Express for even **one** single stop trip.[27] That juxtaposition of facts alone sends a clear signal of what the Commission and its staff considered was lawful and unlawful in 2012-13.[28] But on top of that there was testimony that single stop was legal while multi-stop

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[23] *E.g.*, RCW 81.28.080 ("A common carrier subject to regulation by the commission as to rates and service shall not charge, demand, collect, or receive a greater or less or different compensation for transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges applicable to such transportation as specified in its schedules filed and in effect at the time….").

[24] *General Telephone Co. of Northwest, Inc. v. City of Bothell*, 105 Wash.2d 579, 585 (1986).

[25] *E.g., Tenore v. AT & T Wireless Services*, 136 Wash.2d 322, 331 (1998)("any "filed rate … is per se reasonable and cannot be the subject of legal action against the private entity that filed it."); *see also, Hardy v. Claircom Communications Group, Inc.*, 86 Wash.App. 488, 492 (1997)("filed rate doctrine embodies the principle that a [subscriber] cannot avoid payment of the tariff rate by invoking common-law claims and defenses ….")

[26] *See, e.g.*, Docket TC-120323, Order 04, Final Order, ¶ 45 (Mar. 19, 2014); see also, Docket TC-120323, Order 03, Initial Order, ¶ 15 ("Any driver servicing the Company's regulated multi-stop routes thus must be a Shuttle Express employee." (emphasis added)).

[27] *See generally, id.* Not only did the Commission know about thousands of single-stop trips and not discuss or fine them, it also took no action to stop them, as it did the multi-stop trips: "Shuttle Express, Inc., shall immediately cease and desist its use of independent contractors to provide multi-stop service along its regulated routes." …." Docket TC-120323, Order 03, Initial Order, ¶ 73 (emphasis added). And the Commission even acknowledged in its final order—without question, quarrel, challenge, or disagreement—the company's understanding that "Staff concedes that 'rescue service' provided on a single-stop basis complies with Commission regulations…." Docket TC-120323, Order 04, Final Order, ¶ 36 (emphasis added).

[28] Given the extensive record and Commission actions, no reasonable person could conclude anything but that the Commission and its Staff in 2012-13 considered single stop service to be lawful, while multi-stop was unlawful. Staff is now trying to change those clear rules, retroactively.

was illegal.[29] Further, the Commission's orders showed a clear understanding and dividing line as well.[30] And the issue was expressly discussed by Shuttle Express and Staff and the practices that are now cited were approved four years ago.[31]

15 The Commission made the right decision in 2014 on single stops. To hold otherwise today would constitute an unwise encroachment on the exclusive jurisdiction of the DOL. But even if the Commission could find grounds to assert jurisdiction—for the first time ever—over limousine transportation of single persons and parties, it could not impose a penalty. Both the U.S. and state constitutions require some notice that a long-standing practice will be prohibited going forward: "[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct." *State v. Bahl*, 164 Wash.2d 739, 752 (2008). Only then can they be penalized if they fail to follow the new regulations.[32] Here all the evidence, including Staff testimony and Commission orders, could only have led any observer to conclude that single stop limousine trips were considered lawful—not "proscribed." There was no "warning" whatsoever, as was required in *State v. Bahl* and *F.C.C. v. Fox*.

16 Since the Commission cannot constitutionally penalize Shuttle Express for the actions Speedishuttle complains of, those actions likewise cannot support a belated finding that Shuttle

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[29] TC-120323, Staff Answer to Petition for Administrative Review, at 7 (filed Jan. 13, 2014).

[30] *See generally*, TC-120323, Orders 03 and 04.

[31] PK-3T at 23-24.

[32] *Id.* at 752–53 ("A statute is unconstitutionally vague if it '(1) ... does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'"). The U.S. Supreme Court has, logically, extended the vagueness doctrine to agency fines and penalties. *F.C.C. v. Fox Television Stations*, 567 U.S. 239, 132 S.Ct. 2307 (2012); *see also, Grant County v. Bohne*, 89 Wash.2d 953, 955 (1978) and cases cited therein.

Express will not provide service to the satisfaction of the Commission. The Commission's Order 17 seems to be saying that it has no intention to do so, although that is not entirely clear. *See id.*, ¶ 15. And the Speedishuttle initial brief focuses the bulk of its argument on "satisfaction" on the alleged violations by Shuttle Express. Speedishuttle Brief at 37-43. Regardless, the only new facts that might be construed as supporting a retroactive finding that Shuttle Express would not serve the territory in its certificate are those related to the alleged—but unsupportable—violations of laws and rules. All the other facts in the record indicate that it is **Speedishuttle** that is not satisfactorily providing the new and supposedly different services that it promised.

17 Nor can the use of independent contractors generally—whether lawful or unlawful[33]—support a finding that Shuttle Express is not fully serving the territory, as Speedishuttle argues. The logical extension of their argument is that when Shuttle Express has one passenger going to Duvall or North Bend they either have to use a regulated van and employee at a huge loss, or wait hours (or even overnight) until another passenger shows up.[34] Such an interpretation is not logical and would harm the public interest. The other interpretation would allow or encourage Shuttle Express to find a lawful alternative, such as single stop limousine service, that is agreed

[33] The last time that Shuttle Express provided service using independent contractors in a way that has ever been held unlawful (*i.e.* multi-stop service) was January 13, 2014. HJR-19. This is well more than a year prior to Speedishuttle's application, making it generally irrelevant to determination of satisfactory service under WAC 480-30-140(3)(b). Speedishuttle also accuses Shuttle Express of not "truthfully and completely" answering its data request on limousine services. Speedishuttle Brief, ¶ 77. But Speedishuttle used the term "rescue service" (HJR-19) which Shuttle Express has always understood to refer to multi-stop service. See TR. at 870. And the data request went to services "subject to WUTC jurisdiction." HJR-19. Single stop service provided by licensed limousine carrier is under the exclusive jurisdiction of the DOL. And single stop has been known to the Commission, was discussed in orders in TC-120323 extensively, and was never fined or enjoyed in any way.

[34] *See generally*, WAM-3T at 29-31.

to by the passenger, fast, and not nearly as financially harmful, due to the lower cost structure.[35] The Commission could either interpret this as "serving" the territory, as the Shuttle Express tariff provides,[36] or that the service was *de facto* cancelled when the passenger agreed to the offer of limousine service.[37] In either of these more rational interpretations, there would not have been a failure or refusal of service.

III. THE REHEARING SUPPORTS A RESTRICTION OR CANCELLATION OF THE SPEEDISHUTTLE CERTIFICATE.

18 The Commission has repeatedly stated, in Orders 02, 04, 08, and 09, that the Speedishuttle application was granted based on a proposal to provide a "different service than the service Shuttle Express provides." *E.g.*, Order 08, ¶ 24. Indeed, in Order 09, the Commission noted (correctly) that under RCW 81.68.040 the Commission, "cannot authorize any other carrier to offer the same service in that [Shuttle Express] area …." Order 09, ¶ 11. Further, it emphatically stated that "Nothing in Order 04 provides any authority for Speedishuttle to offer the same service Shuttle Express provides. … [W]e can only act within the parameters the legislature has established, and we cannot authorize competition beyond our statutory limitations." *Id.*, ¶¶ 12, 14 (emphasis added). The Commission concluded by stating:

> The Commission approved the company's business plan as describing a new service. If Speedishuttle has not determined how to implement that plan consistent with its regulatory obligations, this proceeding will provide the company with an opportunity to do so.

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[35] *E.g.* WAM-3T at 30. Forcing higher costs on a carrier that is already losing money further threatens the sustainability of the service or higher fares. Rural passengers are particularly at risk.

[36] *See, e.g.*, WAC 480-30-036 "Alternate arrangements for passengers" and WAC 480-30-356 (h); WAM-3T at 32.

[37] *See, e.g.*, WAM-3T at 33-34.

Id., ¶ 16.

19 Now is the time in this docket for the Commission to "provide the company with an opportunity" to implement the business plan that enabled the Commission to certify a "different" service. Shuttle Express has suggested three simple and direct conditions that would require Speedishuttle to implement what it promised. If those are objectionable to Speedishuttle or the Commission deems them an inadequate or infeasible remedy, then Speedishuttle's certificate should be cancelled.

A. Speedishuttle unquestionably pursued its certificate by proposing a "different" service that would expand the number of share ride passengers for all carriers.

20 Speedishuttle's application sought to "operate in a territory already served by a certificate holder," *i.e.*, Shuttle Express, which is generally prohibited by RCW 81.68.040. To get around that statutory bar, the Commission—upon invitation and urging of Speedishuttle—granted service in the same territory served by Shuttle Express by finding that, "Speedishuttle does not propose to offer the same service Shuttle Express provides…." *E.g.*, Order No. 04, ¶ 17 (emphasis added). Speedishuttle's assertion now that the Commission always understood it was proposing to serve the general public the same as Shuttle Express thus runs counter to every single prior order in the dockets.

21 Speedishuttle urged the "different" finding and grant, going so far as to state that Shuttle Express was not "providing and could [not] provide the same service as that proposed by the applicant…." TR. at 142 (emphasis added). The Commission accepted this premise and the underlying promises of a unique service not currently offered. *See, e.g.* Order 04, ¶ 20 ("there is an entire demographic of travelers whose needs cannot be met by Shuttle Express[]…." (Emphasis added). But today, faced with overwhelming and largely undisputed evidence that Speedishuttle is serving exactly the demographic that Shuttle Express not only "could" serve, but

in fact was serving, Speedishuttle changes its tune dramatically. Now it asserts that the Commission can authorize an overlapping certificate and intended to do so: "[T]he Commission must have understood that Speedishuttle would serve the general public and made its finding that Speedishuttle did not propose to provide the same service without regard to whether that service would be limited to a particular subset of the general population." Speedishuttle Brief, ¶ 53.

22 The entire record in this case belies Speedishuttle's latest arguments that it always proposed to serve the same passengers as Shuttle Express was already serving. Rather, the record is replete with indications that the Commission tried to follow the statute and thought it was doing so. *See, e.g.,* Order No. 08, ¶ 23 ("While some competition at the margins of the respective customer groups may be inevitable, the Commission did not contemplate that Speedishuttle would offer to serve any and all customers seeking door-to-door service to or from the airport." (emphasis added)).

23 There can be no serious question that the Commission had good reason to understand that Speedishuttle was basing its application on being "different," not the same. As just one example: "Your Honor, the reason we're laying foundation on this is to be able to differentiate service to show that we are not the same service as is being offered by the objectors…." TR at 26 (applicant's counsel)(emphasis added). And following up on that persistent theme, the ALJ attempted to get applicant's witness to support the "different" meme: "But they also offer door-to-door service, which is the same as what you're proposing to provide …. How are they different?" TR. at 43.[38]

[38] In response, Mr. Morton only cited the 20 minute departure "guarantee" which was never even offered and has never been provided. TR. at 44-45. At other points in the hearing additional differences were touted, but those have all been shown to be either not really provided or not of required by any member of the public in order to have a reasonable opportunity to be transported.

24 Speedishuttle also explicitly led the Commission to believe that by providing "different" service to the unserved niche, the total number of share ride passengers would increase, "to the benefit of all providers."[39] It was a key theme of the case and essential that Speedishuttle not appear to be merely serving the "general public," which would violate RCW 81.68.040. For example, Mr. Morton's support statement sums up the theme very well:

> We have thus committed to attempting to open our unique form of operations … to the Washington marketplace which we believe may have the ultimate effect of enhancing recognition of the availability, viability, convenience and value of door-to-door airport shuttle service in this marketplace. We ultimately believe that our entrance into this arena may well have the effect of improving the financial and operational status of most existing providers in the marketplace.
>
> [O]ur experience generally in the Hawaiian marketplace is that it has been a positive when an experienced provider enters the marketplace and we subsequently compete for existing and expanding customer bases in the airport ground passenger transportation business.

Ex. HJR-72X, ¶¶ 5-6 (emphasis added).

25 The Speedishuttle Brief deals with this inconvenient truth of its past representations by arguing that Speedishuttle never "promised" to increase the total number of passengers. *Id.,* ¶ 37. That is literally true, but immaterial. The statements, testimony, and arguments of counsel were accepted by the Commission in its final order, which granted authority for what it thought was "[a]n entirely different business model that appeals to and serves a certain subset of the market – like Speedishuttle proposes to offer…." Order 04, ¶ 32. Had Speedishuttle lived up to its hype, it would be serving a "subset" that was not being served by Shuttle Express and thereby "expand[ed] the customer bases" as Mr. Morton said. The expectations that Speedishuttle created and cultivated have not been performed or borne out.

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[39] HJR-72X, ¶ 6.

B. To grant a proposed overlapping service as "different" from the service of the incumbent, the differences must be material—real and not illusory.

26 As Mr. Wood detailed in his testimony airport share ride model at Sea-Tac is a natural monopoly.[40] Unrestricted entry and unregulated competition in a market with such characteristics can be harmful to the public interest, if not ruinous.[41] The legislature enacted RCW 81.68.040 to ensure that such destructive competition could not occur. And the Commission's attempt to follow that law by approving what was represented to be a "different" service to an "unserved demographic." As Mr. Wood explained, if the statute and Commission's intentions are to be carried out, the differences must be real. Otherwise it would be too easy to propose non-material distinctions that make no difference in the actual transportation of passengers within a territory, which is what the statute addresses.

27 The Commission appears to agree that an applicant cannot merely "offer" a different service, but must actually "provide" it: "Speedishuttle, therefore, may provide only the auto transportation service that the Commission found was different than Shuttle Express' service." Order 08, ¶ 23 (emphasis added). Were this not the case, applicants could "offer" all sorts of features or frills, like free candy canes or "extra courteous service." But offers that are never provided because they are never actually used fail the other fundamental statutory prerequisite, which is that the "public convenience and necessity require[s]" the new certificate. RCW 81.68.040. And "public convenience and necessity" is unambiguously defined by rule to "mean[] that every member of the public should be reasonably afforded the opportunity to receive auto transportation service from a person or company certificated by the commission." WAC 480-30-140(1)(a).

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[40] DJW-1T at 3-6, DJW-3T at 26-28.

[41] *See, e.g.*, DJW-1T at 4-6, 28-29; DJW-3T at 11-17, 25-26; PK-3T at 9.

28 Candy canes and extra courteous service obviously are not "necessary" to afford the public a reasonable opportunity for transportation. But what about multilingual service, TV, and the other features the Commission relied on collectively? Again, they must be judged under the standard of "public convenience and necessity" as defined by the Commission. There is no competent evidence that a single passenger that Speedishuttle has actually carried would not have had the opportunity to receive service from Shuttle Express. In fact, all the evidence points the other way. Speedishuttle has not had a single booking in a language other than English on its website.[42] It does not even know if and when the TV sets are turned on or watched in its vans, let alone whether they have attracted a single passenger.[43] Nor does it bother to track who, if anyone, uses its wi-fi or its mobile apps.[44] Thus, the "offer" of multi-lingual websites and other features without actual usage is meaningless. Because it is not being provided to any passengers,[45] the public convenience and necessity clearly did not "require" the feature.

C. The Petition and Complaint seek to *enforce*, not "collaterally attack" Order 04 or WAC 480-30-140.

29 Contrary to Speedishuttle's arguments, the Shuttle Express Petition and Complaint are not a "collateral attack" on the Commission's Order 04. Rather, they are an attempt to enforce Order 04.[46] The Commission accepted that in providing multilingual booking and greeters, TV, and

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[42] *E.g.*, HJR-63X.

[43] *See* HJR-1T at 15-16; WAM-1T at 6-8; WAM-3T at 9-10.

[44] *See id.*

[45] Indeed, (based on the record) Shuttle Express is providing exactly the same number of non-English bookings as Speedishuttle provides, that is to say, none.

[46] For this reason, the cases Speedishuttle cites are also of no avail. *Pacific NW Transp. V. Utils. & Transp. Comm'n*, 91 Wn.App. 589 (1998) merely stands for the unremarkable proposition that the Commission may make fact findings that are consistent with some rational support in the record. The case did not deal with the "same service" or "public convenience and necessity issues that are central here. And Order 10, *In re Waste Management*

other features, "there [was] an entire demographic of travelers whose needs cannot be met by Shuttle Express[]…." Order 04, ¶ 20. Based on the evidence today, either that demographic does not exist or Speedishuttle is failing to serve it. Some of the features likely are not as essential as was thought and have not been used by the public. And some of them, like greeters and multilingual greeters and call center agents are not being offered or provided to all passengers, as promised.

30 As was discussed in the Initial Brief and below, Shuttle Express suggests three conditions be added to Speedishuttle's authority. Those conditions would further the goals of Order 04 by ensuring that Speedishuttle not only "offers", but actually **provides** the "different" services that were the basis for the original grant of authority to the substantial majority of the passengers it carries and that are not offered by Shuttle Express. Briefly, those services offerings that should be enforced are: 1) transportation by prior reservation only, to be made by phone, website, or mobile application; 2) meeting every arriving airline passenger at baggage claim or other secured area exit, with a greeter holding a sign or tablet bearing each passenger's name clearly displayed; and 3) providing greeter service in the language requested by a customer or if the customer reserved service in a language other than English.[47]

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of Washington, Inc. d/b/a WM Healthcare Solutions of Washington, TG-120033 (July 2013), supports Shuttle Express's case. There, the Commission based its decision to grant service in the same territory as an existing certificate holder on language in the solid waste statute that it found evidenced a legislative intent to allow multiple carriers ("existing … *company or companies*). Here, the solid waste language on which the Commission relied is lacking in the auto transportation statute. RCW 81.68.040. The auto transportation exclusivity language is more like the parallel ferry statute, which the Commission held in *Waste Management* unquestionably did limit entry. *Cf.* RCW 81.84.020, *Waste Management, supra*, ¶ 8, Note 11.

[47] Indeed, Speedishuttle's online and mobile booking forms should ask the passenger's preferred language , if it were truly using its best efforts to serve non-English speakers. Likewise, wholesale contracts should require the ticket agent to obtain flight information so that those passengers can be greeted. *See* TR. at 757.

31 The service conditions that Shuttle Express urges are: 1) nothing more than what Speedishuttle promised to do,[48] 2) nothing more than what the Commission said repeatedly that it expected the company to do, [49] 3) nothing more than the public service laws and rules require in order to grant overlapping authority,[50] and 4) essential to ensure the sustainability of airport share ride service and protect the long term public interest.[51] Speedishuttle has now admitted that it is serving the exact same passengers as Shuttle Express has long served. It does not deny that the overall market is still shrinking and not growing, as would have been expected by serving the unserved. And it does not deny that both it and Shuttle Express are losing money, as the market clearly cannot support two carriers serving "any and all customers" who walk up. Thus, the residents of King County are at risk of losing ubiquitous share ride airport shuttle service currently provided by Shuttle Express[52] because Speedishuttle is not providing the unique services it promised and is instead cream skimming the lucrative and low-cost market for tourists.[53]

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[48] *E.g.* TR. at 23-24. (multilingual greeters), 48 (reservation only).

[49] *E.g.*, Order 02, ¶¶6 (greeters), 15 (multilingual); Order 04, ¶¶ 19 (greeters), 20 (multilingual); Notice of Intent to Amend Order 04 at 2 (prearranged only).

[50] *E.g.*, RCW 81.68.040; WAC 480-30-140.

[51] *E.g.* PK-3T at 9; DJW-3T at 11-13.

[52] The Commission at one point stated that it would not "broaden" the issues to include "sustainability." Order 17, ¶ 18. This statement is puzzling, and seemingly inconsistent with prior and subsequent orders, which allowed extensive testimony on sustainability. *Cf.* Order 16, ¶ 12; Order 18, ¶ 12. The distinction appears to be between sustainability of two carriers providing the same service (allowed) and two carriers serving the same territory (partially disallowed). But given the Commission's expressed uncertainty about just what "same service" means (Order 17, ¶ 14), exclusion of testimony and argument on sustainability is fraught with peril. The Commission's rule says sustainability will be considered. WAC 480-30-140(1)(b). And the overarching public interest is to have county-wide share ride service at a reasonable price survive. Hundreds of thousands of residents use the service every year and would not want to lose it. "Sustainability" in whatever context is critically important to the public.

[53] *E.g.* DJW-3T at 11-17; PK-3T at 9.

32 Shuttle Express is also not collaterally attacking WAC 480-30-140, either. Speedishuttle focuses its brief on subsection (2), listing the "same service" factors, already discussed extensively in Shuttle Express's testimony and briefing. But both Speedishuttle and Staff completely ignore the equally important WAC 480-30-140(1), which states:

> (1) Public convenience and necessity.
>
> (a) In the context of auto transportation services, "public convenience and necessity" means that every member of the public should be reasonably afforded the opportunity to receive auto transportation service from a person or company certificated by the commission.
>
> (b) In reviewing applications under this chapter, the commission may, among other things, consider differences in operation, price, market features, and other essential characteristics of a proposed auto transportation service, tailoring its review to the individual circumstances of the application in evaluating whether the public convenience and necessity requires the commission to grant the request for the proposed service and whether an existing company is providing the same service to the satisfaction of the commission. The commission will also consider whether increased competition will benefit the traveling public, including its possible impact on sustainability of service.

33 Neither Order 02 nor Order 04 ever expressly found that the public convenience and necessity "required" the Speedishuttle service. The Commission may have considered that to have been implied. But, since RCW 81.68.040 requires a finding of public convenience and necessity, on rehearing the Commission must likewise consider it. And since Speedishuttle now admits that it always intended to and does serve the general public in the same manner as Shuttle Express,[54] it is impossible today to conclude that Speedishuttle's service is or was necessary to ensure that "every member of the public [would] be reasonably afforded the opportunity to receive auto transportation service." The recent record contains no evidence that even a single member of the

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[54] *E.g.*, Speedishuttle Brief, ¶ 53 ("Shuttle Express always understood Speedishuttle would serve the general public … the Commission must have understood that Speedishuttle would serve the general public…."); *see also*, Staff Brief, ¶ 37 ("Staff 'assumed that Speedishuttle would compete directly with Shuttle Express.'"). It is unfortunate that neither of these parties were so candid with the Commission in 2015.

public was not—or is not—afforded the opportunity to be served by Shuttle Express. If Speedishuttle does not "afford a reasonable opportunity" for service to some member of the public that is lacking, the Commission cannot find that public convenience and necessity "require" its service under the laws and rules.

34 Finally, Speedishuttle attempts to characterize its application case as having been presented honestly and in good faith. The Commission made a number of specific findings in Orders 02 and 04 that have not been proved out in practice. Those findings had to stem from something in the record, and that "something" was the application, supporting statements, testimony, and arguments of Speedishuttle. Was it all just a big misunderstanding by the Commission or misrepresentation by the applicant? The Commission could find some of both. But it does not matter. The rehearing statute allows the Commission to modify or revise Order 04 based on "changed conditions … a result … which was not considered or anticipated at the former hearing, or that the effect of such order has been such as was not contemplated by the commission…."[55] Prevarication or malicious intent, while helpful, are not required. Here, the only rational reading of the Commission's orders is to the effect that the Commission "contemplated" that Speedishuttle would offer a different service, to the then unserved. The record and Speedishuttle's admissions establish that that is not what happened.

D. <u>While Speedishuttle now admits it is serving the "general public," it continues the unsupportable pretense it offers a "different" service.</u>

35 Despite admitting it is serving the entire general public, Speedishuttle continues to cling to the fiction that its service is somehow different. But the record on most attributes provides no support whatsoever for its factual claims. And, in few cases where the facts are as it asserts (*i.e.*,

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[55] RCW 81.04.200.

the use of Mercedes instead of Fords), the facts support only a distinction without a difference. The law says that Speedishuttle could not have been granted a certificate for the same territory unless Shuttle Express was not providing the same satisfactory service. But nothing in the law or Commission rules says that a share ride carrier must use luxury vehicles to be satisfactory.[56] Nor did the Commission find that Mercedes vans are "required" so "that every member of the public [is] reasonably afforded the opportunity" for service.

36 First Speedishuttle challenges Shuttle Express's demographic data. Admittedly, the data is not as complete as Shuttle Express would have liked to present. But the reason the data is not complete is because Speedishuttle repeatedly and persistently refused to provide or update its passenger count data, claiming it was "proprietary," even though much of it is filed annually with the Commission.[57] But what is known and undisputed is that the overall number of passengers and trips of Shuttle Express and Speedishuttle combined continued to decline at a similar rate to the decline prior to Speedishuttle's entry.[58] Furthermore, it is also known and undisputed that as Speedishuttle's trips/passengers volumes increased (initially), Shuttle Express's counts declined in rough inverse proportion.[59] Absent some other explanation, the only rational conclusion is that there was a massive shift in passengers from the incumbent to the new entrant. Speedishuttle offered no explanation or evidence to suggest that its gain was not Shuttle Express's loss.

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[56] If the Commission were to make such a finding one day, it would also have to consider whether the public and the market can support the extra cost of luxury vehicles.

[57] *E.g.* TR. at 477-79, 784-86.

[58] *E.g.* WAM-1T at 11-12.

[59] *See, e.g.*, WAM-3T at 22-23.

37 But there is more evidence than just the undisputed raw numbers. There is also the fact that 50% or more of Speedishuttle's passengers were derived from wholesale ticket agents.[60] And they are the very same ticket agents that previously booked their passengers with Shuttle Express, most notably GO Group and Expedia. Moreover, the primary demographic of the passengers that Shuttle Express supposedly "could not serve" was Chinese, Japanese, and Korean passengers. Speedishuttle had zero bookings in this demographic.[61] And it had zero data that it carried any measurable or meaningful number of such non-English speakers.[62]

38 As for the "tech-savvy" passenger, Speedishuttle was likely unable or unwilling to offer even a single example—let alone statistical data—to evidence any usage of its mobile app to attract, record, or manage reservations or ticketing, nor the operation or use of its TV and wi-fi.[63] In short, Speedishuttle takes weak potshots against the strong statistical and anecdotal evidence presented by Shuttle Express, and offers no true rebuttal data to counter the inescapable conclusion that Speedishuttle is serving the passengers that would otherwise have been served by Shuttle Express.

39 Next, Speedishuttle continues to argue that it really "does offer" personal greeters. But "offering" a greeter and "providing" a greeter are very different facts, especially when it comes to Speedishuttle. Shuttle Express introduced specific and detail personal observations of two witnesses, who found on numerous occasions that Speedishuttle's greeters were either non-

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[60] *E.g.* WAM-1T at 14-15; *see also* Shuttle Express Initial Brief, ¶54, and citations therein.

[61] *See*, HJR-28-X at 66-68.

[62] WAM-3T at 15, 17.

[63] *See* HJR-1T at 15-16; WAM-1T at 6-8; WAM-3T at 9-10.

existent or inadequate to greet "all passengers." One of those witnesses was a non-party to the case, whose company found the situation to be so bad that it re-signed with Shuttle Express and went out and hired its own greeters.[64] Again, Speedishuttle takes minor potshots at the testimony, but offers only self-serving and conclusory testimony that it "typically" greets 80% of its arriving passengers.[65] And that self-serving testimony runs counter to his admission that they cannot greet all of their wholesale passengers.[66]

40 But beyond the vague "typical" claim, Speedishuttle once again repeatedly refused to provide any hard data on the numbers of greeters on various shifts and the numbers of passengers to be greeted during those shifts.[67] The sole empirical data Mr. Roemer provided was limited to the single three-hour period he tied to Mr. DeLeo's unbiased observations. Indeed, Mr. Roemer didn't even know how long it takes a greeter to meet and escort a passenger nor how many greeters the company employs today or generally.[68] His lack of knowledge and supervision over greeters establishes that his "typical" testimony is meaningless and without foundation. Either hard data is available and was withheld because it would not counter the independent observations that the greeters are understaffed, or the entire company is just as clueless as Mr. Roemer was about how effectively the greeters are assigned and managed. Either scenario indicates the company is not effectively <u>providing</u> greeters to all passengers, as promised.

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[64] JD-1T at 3-5; JD-2T at 2-3.

[65] HJR-1T at 35.

[66] TR. at 757.

[67] *E.g.* HJR-80-X. This exhibit was not expressly ruled on. It is offered here only as one illustration of Speedishuttle's persistent refusals to provide empirical data on greeters. The objection to the exhibit provides a similar illustration.

[68] *E.g.* TR. at 757-60.

41 Speedishuttle's "multi-lingual" websites and "efforts" to hire multi-lingual greeters are likewise distinctions (barely) without a difference. Speedishuttle argues that it has a Craigslist ad seeking Chinese/Mandarin, German, Portuguese, and French speakers. Speedishuttle Brief, ¶ 31. But, as was discussed in the Shuttle Express Initial Brief, their employment application form does not even ask that question.[69] And their performance on actually providing those languages has been worse than abysmal. Not one of their greeters or call center employees speaks any of those four languages. BR-3. The premise in the application phase was that due to Seattle's extensive service to China, Japan, and Korea, travelers from those areas "could not" be served by Shuttle Express, but would be served by Speedishuttle.[70] But Speedishuttle does not have a single employee that speaks any of those languages and has never had a booking on its websites in those languages.

42 The results do not show best efforts or anything close to it on serving non-English speakers. The most prevalent languages of Speedishuttle employees are Somali and Spanish. BR-3. Shuttle Express similarly hires foreign language speakers in the available labor pool and Shuttle Express has not promised any special effort to find such speakers.[71] It simply reflects what the labor pool is in Seattle for relatively unskilled and low-wage workers.

43 Incredibly, the Speedishuttle Brief even continues to try to cling to the 20 minute "guarantee," now downgraded to a "commitment." *Id.*, ¶ 38. It tries to blame the Port for not allowing it to

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[69] *E.g.* HJR-44-X.

[70] And, indeed, 13.8% of SeaTac international destinations are to Asia (Seoul 4.7 percent, Tokyo 3.71 percent, Beijing 3.3 percent), according to Port records. https://www.portseattle.org/Newsroom/Fast-Facts/Pages/Airport-Basics.aspx . About 10% of Sea-Tac passengers are international, suggesting that about 1.3% of its arriving and departing passengers are Asian. *See id.*

[71] WAM-3T at 18.

"stage" vehicles in the airport garage where Shuttle Express does. But it omits the fact that Speedishuttle's taller vans are too tall for the garage.[72] Thus, its "impediment" is self-created.[73] The brief also omits the fact that the only data Speedishuttle has on its actual departure delays is for its "walk-up" passengers.[74] For up to 80% of its passengers, Speedishuttle claims it does not even bother to record or track the wait times.[75] Again, either it is clueless on a key service metric that it supposedly "guaranteed" or it really does know how long people wait and does not want that number in the record. Regardless, the evidence is that 20 minutes is **not** met for 20% or more of passengers, and there is **no** information supporting the 20 minute guarantee for the other 80%.

IV. THE COMMISSION SHOULD RESTRICT THE CERTIFICATE TO AUTHORIZE ONLY THE "DIFFERENT" SERVICE APPROVED IN ORDER 04 OR CANCEL THE CERTIFICATE.

44 As discussed in detail in the Shuttle Express Initial Brief, at the very least, the Commission should amend the certificate to require that service only be provided that is consistent with the express promises and representations of Speedishuttle as understood and accepted by the Commission in its Order 02 and Order 04. This relief is supported not just by the Petition, but also by the Complaint. While requiring Speedishuttle to actually provide the services it promised in a material way will not eliminate its admitted below cost pricing, it would as least go

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[72] TR. at 717-18.

[73] It is also a good indication of a poor understanding of the Sea-Tac market and a good illustration that trying to offer a viable, quality, service involves inherent trade-offs. Yes, the Shuttle Express Ford vans are too short to stand up in, but in exchange passengers can wait in the comfort of the van rather than on the curb of the outer drive for more than 20 minutes. And they can depart more quickly, because the Fords can be staged in the garage.

[74] HJR-65-X.

[75] *See id.*

a long way toward mitigating the harm that the below cost pricing has caused to Shuttle Express. By serving less of the "general public"—and more of the multilingual passengers needing greeters—the overlap with Shuttle Express will be less, just as the Commission contemplated. *See, e.g.,* Order 09, ¶¶ 12-16.

45 While it is questionable that a service provider whose business model has no articulable prospects of breaking even[76] offers significant long-term public interest benefits, at least if the financial harm to the incumbent carrier is diminished there is less **harm** to the public interest. The incumbent provider will then have a chance to be able to sustain a valuable public service that is currently at great risk because the new entrant is offering the same service in a market that is truly a natural monopoly.

46 Briefly recapping the three proposed restrictions, first, service should be limited to "by reservation only" as contemplated by WAC 480-30-096. To ensure that the restriction is met in letter and in spirit, it should be further spelled out as detailed in the Shuttle Express Initial Brief, ¶¶ 85. Second, Speedishuttle should be required to greet each and every passenger being transported from the airport. Again, to ensure this service is actually and regularly provided this time around—not just "offered" in theory—further provisions are needed, as detailed in the

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[76] Speedishuttle argues, without support, that it can achieve profitability at 4 passengers per trip. Speedishuttle Brief, ¶ 97. But the 4 passenger breakeven point itself is based on the barest of evidence, an unsupported statement by Mr. Roemer on cross. TR. at 820. And there is no data in the record to indicate what the current passenger counts or trends are. As with nearly every other self-serving statement by Speedishuttle, it has not presented (indeed has refused) any underlying data whatsoever that would support its argument that it can become profitable. Accordingly, if the Commission feels the actual breakeven number is important, it is essential that it first issue a bench request seeking: current financial statements, passenger counts, trip counts, and any other data that would tend to support or rebut the breakeven point and status of progress toward that point. Shuttle Express was denied key data (and could not put other key data into the record due to a non-disclosure agreement) that would be needed to rebut Mr. Roemer's testimony near the conclusion of the case. Internal calculations indicate the true breakeven passenger count is as much as 50% higher than just 4. But because that assertion came at the end of the hearing, Shuttle Express had no opportunity to present alternative calculations. The Commission should not blindly accept that number nor the argument based on it.

Shuttle Express Initial Brief, ¶¶ 86-88. And third, greeters and call centers must offer service in the native language of the passenger as requested or as may be indicated, such as by a booking on a non-English website or based on the country of origin of the passenger's incoming flight.

47 If one assumes that Speedishuttle meant to actually provide the "different" and "unique" services that it promised, then these restrictions should not cause any undue burden. Indeed, these services should already be in place. Moreover, the Commission has been expressly empowered by the legislature to, "attach to the exercise of the rights granted by the certificate to such terms and conditions as, in its judgment, the public convenience and necessity may require." RCW 81.68.040.

48 In the alternative, if the Commission does not see restricting and conditioning Speedishuttle's authority as being feasible or a sufficient remedy to fully protect the public interest, it should cancel the Speedishuttle certificate for cause.

V. CONCLUSION

49 Speedishuttle now admits it is serving "the general public" and that it always intended to do so. It is not actually providing a service that is materially different from what Shuttle Express has always provided. The Commission finally has an opportunity to hold Speedishuttle accountable, by restricting their certificate more closely to the services originally represented. At a minimum that would include: 1) prearranged reservations; 2) to meet all customers with a greeter or issue full refunds; and 3) to offer and provide multilingual greeter and reservation call service when indicated. These are not services that Shuttle Express provides in its door to door service and thus could be clearly construed as being "different."

50 The Speedishuttle Complaint should be dismissed and Staff's proposed fines should be denied based on lack of jurisdiction over the service at issue.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2017, I electronically served via email the foregoing Post-Hearing Reply Brief on behalf of Shuttle Express, Inc. to:

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