BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC., Petitioner and Complainant, v. SPEEDISHUTTLE WASHINGTON, LLC, Respondent.	DOCKET NOS. TC-143691, TC-160516 & TC-161257
SPEEDISHUTTLE WASHINGTON LLC d/b/a SPEEDISHUTTLE SEATTLE, Complainant, v. SHUTTLE EXPRESS, INC., Respondent.	

POST-HEARING REPLY BRIEF OF

SPEEDISHUTTLE WASHINGTON, LLC

JULY 14, 2017

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

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1 Speedishuttle Washington, LLC ("Speedishuttle") files this brief in reply to the Initial Post-Hearing Brief of Shuttle Express, Inc. ("Initial Post-Hearing Brief").

I. INTRODUCTION AND SUMMARY

2 John Adams once offered a fundamental truth about legal proceedings: "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." In this proceeding, that truth could not be more relevant. Whatever Shuttle Express would like the facts to be, its mantra of "repeat it often enough and they will eventually believe it" cannot overcome what the facts truly show.

3 Beyond patently misleading, Shuttle Express' Initial Post-Hearing Brief offers precious little analysis based upon actual evidence or authority. What it does offer are empty conclusions in a factual vacuum. And while its Initial Post-Hearing Brief includes some citations to the administrative record, a careful examination of the support for its dramatic arguments about, i.e., the state of airport transportation service in King County, the conduct of Speedishuttle, and the remedies it seeks are largely supported by no more than its own hyperbole, bluster, surface-deep conclusory statements, a mix of misleading and/or incomplete information, and the "expertise" of Don J. Wood, an "economist" lacking a degree in economics and who has never before testified in a transportation case.[1] Shuttle Express also frequently attempts to shift the burden of proof to Speedishuttle altogether, unabashedly arguing that Speedishuttle's failure to fill in the sizeable gaps in Shuttle Express' case should be interpreted as evidence against it.[2]

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[1] The Commission should seriously consider whether Don J. Wood is even qualified to offer opinions about sustainability of service in an industry in which he has no experience, knowledge or training. ER 702.

[2] *See, e.g.*, Shuttle Express arguments about greeter staffing levels, (a wholly misplaced argument in the first place), which attempt to deflect the inaccuracy and immateriality of Shuttle Express' limited discussion of supposed inadequate staffing by pointing out that Speedishuttle only analyzed airport staffing a few hours out of a few days. *Initial Post-Hearing Brief*, ¶ 47 – 48. Which days did Speedishuttle analyze? Those days which Shuttle Express, who after all has the burden of proof here, inaccurately claimed Speedishuttle lacked adequate greeting staff.

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

4 Because of this wholly inadequate showing, the only logical conclusions which may be drawn from the evidence and arguments ultimately presented by Shuttle Express are that it believes it is entitled to both a service monopoly and the absolute right to appeal any of the Commission's findings through rehearing, despite the Commission firmly rejecting both premises in the past.

5 Contrary to Shuttle Express' sweeping rhetorical contention that "the acts and omissions of Speedishuttle and the consequent impact on Shuttle Express and implications for ongoing public interest are well-established by the updated record in this case and are mostly undisputed,"[3] as Speedishuttle demonstrated in the record and is discussed at great length in its own post-hearing brief, Speedishuttle is providing the service features that the Commission found differentiated it from Shuttle Express. On that basis alone, the Commission may and should reaffirm Order 04.

6 But the Commission's analysis rightfully should not end there. The goal of Shuttle Express' grand scheme here is for the Commission to restrict Speedishuttle's operating authority so that it can only serve those passengers who could not have used Shuttle Express' service, regardless of whether they would have used it.[4] If Shuttle Express achieves what it seeks, not only will due process be trampled, it will also affirm the premise that incumbent carriers may apparently violate its rules endlessly and with impunity, and refuse to improve their service without redress. Because that result is surely the antithesis of the Commission's charge to regulate in the public interest and is contrary to the desire of the legislature, the Commission should also enter findings in its order that Shuttle Express unquestionably failed to serve to the satisfaction of the

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Because Shuttle Express bears the burden of proof and made insufficient attempts to carry it, why then would it be Speedishuttle's obligation to analyze more than what was addressed by Shuttle Express?

[3] *Initial Post Hearing Brief,* ¶ 34.

[4] Even more likely, Shuttle Express' ultimate goal is the cancellation of Speedishuttle's certificate, as Shuttle Express must be fully aware that an auto transportation company is not permitted under state law to discriminate in the way Shuttle Express' proposed certificate restrictions would require.

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

Commission and penalize Shuttle Express appropriately for its ceaseless violations of Commission rules.

II. ARGUMENT IN OPPOSITION TO SHUTTLE EXPRESS' PETITION FOR REHEARING AND COMPLAINT AND IN SUPPORT OF SPEEDISHUTTLE'S COMPLAINT

A. Shuttle Express Failed to Establish any Misrepresentation by Speedishuttle

7 Speedishuttle has passionately denied all allegations that it made misrepresentations to the Commission at the application hearing stage since Shuttle Express first sought rehearing in this proceeding for good reason: it simply is not true. Those allegations, and how Shuttle Express utterly failed to establish that any misrepresentations were made, have already been discussed in detail in Speedishuttle's Post-Hearing Brief. Yet, that issue merits further discussion here on reply because Shuttle Express's halting efforts to establish the existence of any misrepresentation were startlingly illogical and those misrepresentations it claims to have established appear to have been made up out of whole cloth.[5]

i. Speedishuttle Never Claimed it would Serve Only the Unserved

8 While Shuttle Express never even bothered to discuss the majority of the misrepresentations it charged were made by Speedishuttle in its original Petition for Rehearing and Complaint, in order to make at least *some* effort to demonstrate that Speedishuttle must have made a misrepresentation to the Commission, Shuttle Express attempted in its Initial Post-Hearing Brief to spin or otherwise concoct a promise by Speedishuttle to "serve the unserved." Shuttle

[5] Conversely, Speedishuttle can readily demonstrate numerous misstatements made by Shuttle Express just in its Initial Post-Hearing Brief. Some of those are discussed herein, but others are so numerous that responding to each would require an enormous effort and corresponding expense. Take, for instance, Shuttle Express' claim that Speedishuttle has costs incurred in Hawaii but has not included them on its books in Washington which would need to be accounted for in order to break even. *Initial Post Hearing Brief*, ¶ 75. The costs duly addressed by Mr. Roemer, the termination of a comptroller in Washington and shifting of some accounting to Hawaii, occurred after the end of the period covered by the financial statement produced by Speedishuttle under a confidentiality agreement. Roemer, TR. 792: 22 – 793: 23. More importantly, this actually reduced the cost of operating in Washington and was first raised in response to the question posed: "has Speedishuttle done anything to trim expenses in the Washington market?" Exh. HJR-28X. 58: 15 – 21.

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601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

Express's illogical argument on this point can be briefly summarized as follows: Shuttle Express' own self-serving interpretation of RCW 81.68.040 (unsupported by any authority) means that the Commission could only have granted Speedishuttle's application if Speedishuttle proposed to serve the unserved; the Commission granted a certificate to Speedishuttle; and Speedishuttle failed to increase the total number of auto transportation passengers in King County; therefore Speedishuttle must have misrepresented it would serve the unserved.[6]

9 In order to validate this circuitous argument, the Commission would have to first accept that all parties agreed with Shuttle Express' interpretation of RCW 81.68.040 at the application hearing (the time the supposed misrepresentation was first made). As noted however, Shuttle Express' interpretation of RCW 81.68.040 is made without authority,[7] and, as Speedishuttle addressed and cited in its Post-Hearing Brief, there exists authority directly contrary to Shuttle Express' position. Moreover, Shuttle Express would also have to have proven factually that Speedishuttle was not actually serving the unserved. Here, Shuttle Express offers merely conclusory statements that Speedishuttle is not serving any unserved passengers, without actual probative evidence to support that position. These omissions of proof alone demonstrate that there is no logic to Shuttle Express' core argument.

10 Moreover, in this case, the absurdity of the argument also suggests an examination of the word "misrepresentation" may be pertinent at this point. Black's Law Dictionary defines that term as "[t]he act or an instance of making a false or misleading assertion about something, usually with the intent to deceive."[8] Shuttle Express's Initial Brief is simply devoid of any citations to

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[6] *Initial Post-Hearing Brief*, ¶¶ 10 – 13.

[7] (Where an argument is made without authority the courts of appeals assumes that means that after diligent search by counsel, no authority was found) *Burke v. Hill*, 190 Wn. App. 897, 916, 361 P.3d 195, 204 (2015).

[8] MISREPRESENTATION, Black's Law Dictionary (10th ed. 2014)

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

assertions by Speedishuttle that it would "serve the unserved." Indeed, as the Administrative Law Judge noted on the record at the hearing in these consolidated proceedings with respect to the allegation of a "niche" target market, (and again addressed in Speedishuttle's Post-Hearing Brief): "that's not anywhere in the record up until this point. Speedishuttle never said it was going to just stick to serving a specific subset. It was the Commission that brought that up in the orders."[9] Even Shuttle Express' own expert, Don J. Wood, admitted he had no basis to allege that Speedishuttle intended to deceive the Commission at the application hearing, testifying:

> 15 Q I'm going to ask my question one more time. Do you
> 16 allege that SpeediShuttle lied to the Commission at the
> 17 application hearing or during the application process?
> 18 A Again, I can't -- that suggests intent. I don't know
> 19 intent. I know what they said and what they did are two
> 20 different things.
> 21 Q I'm going to suggest to you that you are answering my
> 22 question, no, you are not making that allegation,
> 23 correct?
> 24 A If we agree that lying means intending to deceive, then
> 25 I have no basis to make that allegation.[10]

11 Despite this utter lack of evidentiary support, Shuttle Express, in typical overdramatic tone, claims, without support, that because Speedishuttle is serving all passengers who reserve service,[11] (exactly what both parties said Speedishuttle would do during the application case), "the entire share ride model in King County is threatened."[12]

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[9] Wood, TR. 303: 19 – 25.
[10] Wood, TR. 360: 15 – 25.
[11] Never one timid to the use of irony, Shuttle Express alternatively claims that Speedishuttle is cream-skimming by refusing to serve passengers in the rural or suburban parts of the county. *Initial Post-Hearing Brief*, ¶ 21. Yet Shuttle Express once again offers literally zero evidence that Speedishuttle ever refused to serve a passenger or turned one away.
[12] *Initial Post-Hearing Brief*, ¶ 69.

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601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

ii. Even Assuming Such a Promise was Made, Shuttle Express Failed to Demonstrate that Speedishuttle did not Serve Previously Unserved Passengers

12 Besides being illogical, Shuttle Express' claim that Speedishuttle did not in fact serve previously unserved passengers rests on a foundation that is nothing more than a mirage. For example, in order to reach its own self-interested conclusions about Speedishuttle's service, Shuttle Express focuses almost entirely on whether Speedishuttle oriented its operations to transporting non-English speaking passengers, ignoring nearly altogether the question of whether Speedishuttle has increased access or services for tourists or the tech-savvy, who were also highlighted in Order 04 by the Commission as likely Speedishuttle customers.

13 Where Shuttle Express does not ignore tourists, it instead now surprisingly collaterally attacks the Commission's basis for issuing Order 04 by claiming that marketing to wholesalers and serving tourists constitutes cream-skimming. It also claims, quite disingenuously, that the Commission had somehow previously ruled in this proceeding that tech-savvy passengers and tourists were to be non-English speaking, not separate categories of passengers.[13] Yet the very language relied upon here by Shuttle Express in Order 04 is plainly disjunctive: "those who are tourists, tech-savvy or non-English speaking."[14] Thus, those who are tourists, those who are tech-savvy and those who are non-English speaking are each separate prospective customer categories, not multiple facets of a single category.[15]

14 Because Shuttle Express failed to demonstrate Speedishuttle is not serving tech-savvy passengers or tourists, on that basis alone, it simply has not made its case that Speedishuttle is not serving the passengers ("business model") identified in Order 04.

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[13] *Initial Post-Hearing Brief*, ¶ 79.
[14] Order 04, ¶ 21.
[15] And Shuttle Express' new arguments that it already satisfactorily served tourists are plainly hypothesized upon evidence not relied upon by the Commission when it entered Order 04, since the testimony of Wesley Marks upon which it relies was first submitted in this rehearing in late 2016.

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601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

15 Moreover, as with nearly every other argument advanced by Shuttle Express, Shuttle Express' conclusions that Speedishuttle is not serving non-English speaking passengers rely upon erroneous, misleading or false analysis, and assumptions rather than documented evidence. Its desired conclusions are also based on information which ultimately lack a relationship to the conclusion urged (e.g., trip counts cannot provide passenger demographics), and rely upon peripheral analysis which is incomplete and therefore demonstrates at most coincidence or correlation, rather than causation. This, for instance, is the antithesis of a reliable expert opinion.[16] As with many coincidences, where alternate explanations exist, they must be ruled out before reaching a conclusion about the causation of a trend or event.[17] Because Shuttle Express makes no effort to eliminate those possible explanations in reaching its desired conclusion, no rational fact finder could reach the same result as Shuttle Express without the provision of additional information which is plainly not available from either party and which information is required from Shuttle Express to meet a proponent's burden of proof.[18]

iii. Trip Data Does Not Support a Conclusion about Passengers' Demographics

16 As touched upon above, the most glaring example of Shuttle Express' flawed arguments is that its witnesses used trip count data to demonstrate a supposed decline in passengers in Sea-Tac

[16] Here Shuttle Express essentially offers expert opinions through its various witnesses regarding the cause of a statistical trend without first establishing the qualification of its witnesses in accordance with ER 702. Additionally, it has done nothing to establish that its opinions were based upon any methodology, much less sound analysis, which is required of the expert opinion testimony offered here. *See, e.g., LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 69 (Fed. Cir. 2012)(holding in patent infringement case that complete lack of economic analysis to support conclusions about market value would alone justify exclusion of expert opinion.).

[17] *See, e.g., Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 610, 260 P.3d 857, 866 (2011)("A physician or other qualified expert may base a conclusion about causation through a process of ruling out potential causes with due consideration to temporal factors, such as events and the onset of symptoms").

[18] Moreover, the Administrative Law Judge would have been more than justified in refusing to admit the *ipse dixit* ("because I say so") conclusions of the so-called expert opinions offered in this proceeding. *Henricksen v. Conoco Phillips Co.*, 605 F. Supp. 2d 1142, 1153 (E.D. Wash. 2009)("The court need not admit an expert opinion that is connected to the underlying data "only by the *ipse dixit* of the expert").

Airport/King County (the shared ride market), which is somehow supposed to demonstrate that no new passengers were being served by Speedishuttle. These data are woefully unhelpful for a number of reasons.

17 First, Shuttle Express' witnesses acknowledge and admit that the number of trips made can actually decrease while passenger volumes increase.[19] Shuttle Express has done nothing to explain this basic flaw in its data presentation to the Commission.

18 Second, Shuttle Express further admits that it does not include in these totals the trips made by Shuttle Express-contracted limousine drivers but which were reserved as shared ride auto transportation service in its data to the Port of Seattle.[20] Thus, Shuttle Express excludes a significant portion of those trips it would have made but for its own selective offset from the data presented to the Commission.

19 Additionally, Shuttle Express' witnesses admitted upon cross-examination that Shuttle Express could be experiencing an enormous loss of its passenger base to other modes of transportation which simply outweigh any increase in new passengers using Speedishuttle.[21] This defect in Shuttle Express' conclusion should prove insurmountable, as it has done nothing to logically demonstrate that even an overall decline in passengers would mean Speedishuttle is not serving new, previously-unserved passengers.

20 Finally, Shuttle Express admits that the data it presented lack information about the demographics of the passengers being transported.[22] Because Shuttle Express argues that Speedishuttle was primarily supposed to be serving non-English speaking passengers (a position

[19] Wood, TR. 327: 3 – 7.
[20] Marks, TR. 447: 13 – 16.
[21] Marks, TR. 594: 16 – 596: 10.
[22] Kajanoff, TR. 406: 12 – 408: 19.

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601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

unsupported by the record, as the Commission again also found that Speedishuttle's business model included serving tourists and tech-savvy passengers), it would follow that the data relied upon by Shuttle Express must explain and support what demographics of passengers are actually being served. Yet, Shuttle Express admitted the available data includes no passenger demographics information whatsoever. Thus, irrespective of all other flaws in its evidentiary showing, it could never actually definitively answer the pivotal question of whether new demographics of passengers are being served by Speedishuttle's service.

iv. No Further Support Exists for Shuttle Express Argument in Speedishuttle's use of Wholesalers, Either

21 Shuttle Express also apparently attempts to establish that Speedishuttle is not now serving the unserved through its use of and work with travel wholesalers.[23] However, this rather bizarre argument again relies upon "alternative facts" rather than actual evidence.

22 Here, Shuttle Express attempts to prove which percentage of Speedishuttle's passengers are wholesale bookings through its past bookings from Go Group, and then literally guesses, without any citation to the record (of course), that the same percentage might apply to another wholesaler, Expedia.[24] By taking these two numbers, one estimated and the other fabricated together, Shuttle Express asserts: "the significance of the near 50% wholesale origination of passengers to the 'multilingual distinction' cannot be understated. The language of the wholesale bookings is controlled by the wholesaler, not by Speedishuttle."[25]

23 This contention is flat wrong. The language of those bookings is <u>not</u> controlled by the wholesaler, it is controlled by the passengers. Even with its extra-record citation to a website not

[23] *Initial Post-Hearing Brief,* ¶ 51.
[24] *Id.* ¶ 54.
[25] *Id.* ¶ 55.

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Seattle, Washington 98101-2380
(206) 628-6600

in evidence (and for which official notice is not by rule permitted),[26] it has not established that Speedishuttle passengers must book in English.[27] Shuttle Express once again substitutes rhetoric and speculation for evidence. Shuttle Express literally extracts a percentage of wholesale passengers from thin air.

24 Similarly strange are Shuttle Express' persistent arguments throughout this entire proceeding about Speedishuttle's affiliations with the Go Group. First, in a strained attempt to claim, incorrectly, that Speedishuttle was underpaying its employees, Paul Kajanoff swore under oath that Speedishuttle was a franchisee of Go Group.[28] However, when Jack Roemer insisted in response that Speedishuttle is not a member or a franchisee of Go Group and that Jimy Sherrell, as a board member of Go Group, would have had access to proof of Go Group's true relationship with Speedishuttle,[29] Kajanoff backed off, claiming at hearing that he meant "licensee,"[30] (admittedly a broad legal conclusion).

25 While this shift in testimony may or may not have been innocent, what is certainly not innocent is Shuttle Express' subsequent attack on Jack Roemer's veracity when he denied that Speedishuttle is a licensee of Go Group.[31] This pointed attack is perplexing and troubling not only for the fact that the classification/characterization of Speedishuttle's relationship to the Go Group lacks relevance to any of the issues of the present proceeding, but because this so-called "rebuttal" was based not on any evidence, but on Paul Kajanoff's subsequent contradictory and inconsistent testimony without any corroborating documentary proof, and a citation on brief to a

[26] WAC 480-07-495.
[27] *Id.* ¶ 55.
[28] Kajanoff, Exh. PK-1T. 11: 7.
[29] Roemer, Exh. HJR-1T. 48: 9 – 15.
[30] Kajanoff, TR. 421: 1 – 9.
[31] *Initial Post-Hearing Brief*, ¶ 62.

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601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

Lanham Act case which did not involve licensing and in which the word "licensee" never appears.[32]

v. Shuttle Express is not Entitled to its own Facts: Speedishuttle Never Stated an Intent to Serve Identically to Shuttle Express as Shuttle Express Outrageously Claims

26 In yet another mind-boggling claim, Shuttle Express asserts on brief that emails between Speedishuttle and the Port of Seattle prove that Speedishuttle lied to the Commission about the different nature of its service.[33] Shuttle Express characterizes this evidence as establishing that Speedishuttle intended to "mimic as closely as possible the operations of Shuttle Express at the airport."[34] When Shuttle Express makes this claim, perhaps it hopes that nobody will actually read the evidence in the record to which Shuttle Express cites and will simply accept its allegation-laced argument as a truism. Any such actual review of that exhibit, however, readily demonstrates that Speedishuttle did nothing more than seek equity (a level playing field) from the Port of Seattle with respect to kiosk space and signage in the airport, neither of which was of course a factor considered by the UTC in issuing Speedishuttle's certificate, and neither of which has any bearing on the nature of Speedishuttle's regulated transportation business.

27 Because Speedishuttle made no such misrepresentations, Shuttle Express flounders and obfuscates in attempting to identify claims to support its position on rehearing. Because of this persistent pattern, the Commission ought to tread very cautiously in relying upon any contention by Shuttle Express in this proceeding.

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[32] *Id.* ¶ 62, n. 101; *Bellsouth Corporation v. Datanational Corporation*, 60 F. 3d 1565 (Fed. Cir. 1995).
[33] *Id.* ¶ 32.
[34] *Id.*

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601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

B. Similarly, There is no Evidence of Economic Harm to Shuttle Express

28 Shuttle Express also makes a number of arguments about the supposed harm to the public interest caused by Speedishuttle's market entry. However, once again, Shuttle Express cites no authority to support its position that competition itself is harmful to the public interest. By stark contrast, the Washington Court of Appeals, in *Pacific N.W. Transp. v. Utils. & Transp.* 91 Wn. App. 589 (1998), recognized that limiting market entry in a way similar to that proposed by Shuttle Express, (that is, allowing a new and previously unoffered service only if the incumbent refused to offer it), "militates against the public interest" because it would leave the incumbent carrier with little incentive to improve and competitors little incentive to challenge a carrier who is providing poor or mediocre service.[35] Thus, the Court of Appeals already recognized almost two decades ago before the 2013 Rulemaking that competition in the auto transportation industry would drive improvements in service and that this result is very much in the public interest.

29 While the Commission has also recognized that conduct of competitors may result in injury for which a formal complaint may be brought under RCW 81.04.110, the evidence relied upon by Shuttle Express to demonstrate that supposed harm here has been so manipulated and spun to such a degree that it not only lacks probative value, but again calls into question the credibility of the moving party who offered it as evidence.

i. For Instance, Shuttle Express has Long Cried Wolf About its Impending Doom to Obtain Regulatory Advantage and Maintain its Market Position, but it Offers no Probative Evidence Here

30 Ignoring the absence of a demonstrable link between Shuttle Express' fate and the public interest, its recurring arguments about market sustainability and loss of profits[36] are yet another

[35] *Pacific N.W. Transp.*, 91 Wn. App. at 597, 602.
[36] Albeit, arguments largely and expressly legally excluded from consideration here by Orders 08, 16, 17 and 18.

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

version of "crying wolf" about the failing market and its own supposed inevitable failure. Indeed, Shuttle Express made those very same claims when it applied for an exemption from WAC 480-30-216 in 2013,[37] during Speedishuttle's application hearing in January 2015, when it applied for a conditional exemption in 2016,[38] and again here. But, the Commission expressly rejected these recurring false alarms in Order 04, when it stated that the evidence Shuttle Express sought to submit by its Motion to Reopen, evidence of a declining customer base, offered nothing of probative value on any issue.[39] Despite its continued melodramatic claims that competition from Speedishuttle risks "the very existence of share ride auto transportation service in King County," Shuttle Express' only apparent support for this now-familiar position is its own flagrantly manipulated data which this Commission should thus reject as alleged support once again.

31 For example, Shuttle Express increasingly claims it has recently lost money on shared ride service,[40] and that the market for shared ride service is declining. However, neither of these alleged trends establish any relevant evidentiary point and the presentation of this so-called "data" once again calls into question the veracity of the sponsoring witnesses.

32 For one thing, Speedishuttle does not offer "shared ride service" generically. It only offers door-to-door service. By Commission rule, that service is different from scheduled service.[41] Thus, in

[37] Exh. WAM-41X, *Petition for Exemption*, ¶ 14 ("Earlier this year the Commission issued a complaint on the request of its Staff that threatens rescue service and indeed the very viability of Shuttle Express' share ride door-to-door model").
[38] Exh. WAM-47X, *Petition for Limited and Conditional Exemption*, ¶ 9, Docket TC-160819 ("It has always been a challenge to provide a regulated share ride service in the Seattle area as an auto transportation company on a sustainable basis. The spread between the costs of a door-to-door service and the competing rates of taxis is small. And airline passengers have a number of other options for ground transportation to and from the airport, such as taxi, limousine, or private auto").
[39] Order 04, n. 7 ¶ 16
[40] Kajanoff, Exh. PK-2T. 18: 16 – 17.
[41] WAC 480-30-140(2)(g).

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601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

determining whether Speedishuttle's service affected Shuttle Express' service, the question should be whether Shuttle Express has lost money on its door-to-door service, not whether it lost money in general. Yet that key information was simply never presented to the Commission.

33 And, more importantly, Shuttle Express again excluded its own shared ride trips which were farmed out to limousine drivers, as well as the positive revenue therefrom in its revenue totals it reported to claim it lost money in 2016.[42] Additionally, it waited to disclose those material facts to the Commission until being asked during cross-examination and it never felt compelled to provide corrected or supplemental data before making its familiar financial loss argument once again in its Initial Post-Hearing Brief. Shuttle Express simply failed to confront, evaluate or explain whether those statistical anomalies would have made a net difference to profit and loss in 2016, leaving yet another gaping hole in its proof presentation.

34 These manipulations may well seem unintentional, but they appear to coincidentally occur with every new data point offered. Speedishuttle, the Staff and the Commission are left to draw their own conclusions as to whether this ellipsis of proof is intentional. Considering the numerous other challenges to the plausibility of its arguments and the credibility of its witnesses, the Commission must ask itself here whether Shuttle Express truly did lose money, or is instead simply rearranging data to further its attempt to drive Speedishuttle from the market.

35 Shuttle Express also persistently, (and in blatant disregard of Commission procedural orders earlier in this proceeding), makes argument about whether the King County territorial market can sustain two providers. Its so-called expert's only model also flatly states that two providers can never be sustained in a single market.[43] No support has been provided for this bold opinion and

[42] Kajanoff, TR. 432: 1 – 433: 19.
[43] Wood, TR. 339: 5 – 340: 23.

numerous anecdotal examples offered by the testimony of Jack Roemer demonstrate that this is simply incorrect. The market sustainability arguments should be once again soundly rejected by the Commission here.

36 Indeed, ground traffic to and from the airport is unquestionably increasing at relatively exponential rates.[44] Thus, there is ample business opportunity for a company providing quality service at a competitive price. Ignoring this, Shuttle Express proffers so-called data which look only at trips of auto transportation companies going to and from the airport, which its own chart demonstrates largely consists of Shuttle Express' trips (perhaps 70% of all airporter trips based upon the chart offered by Wesley Marks).[45] These data simply cannot be characterized in support of the notion that the market cannot sustain multiple providers. Reaching that conclusion would also appear to require an assumption that airporters cannot compete with other modes of transportation. Yet, Shuttle Express admitted that competing with other transportation modes could increase passenger counts[46] and that it, in fact, engages in such competition.[47]

37 In yet another misstep, because Shuttle Express, in its data and testimony, compares all airport ground trips to Shuttle Express trips and Speedishuttle trips, but then never bothers to isolate the other providers from Shuttle Express' trips, it appears at least plausible that all airporters are increasing their business except for Shuttle Express. If this is true, it would mean that the problem lies not with the market, but with something unique about the way Shuttle Express operates (undoubtedly including its diversion of passengers to independent contractors). However, because Shuttle Express has not provided the information by which the Commission

[44] Roemer, Exh. HJR-1T. 47: 6 – 13.
[45] Marks, Exh. WAM-3T. 23.
[46] Kajanoff, TR. 396: 23 – 25.
[47] Marks, TR. 509: 15 – 18.

can discern whether it is merely Shuttle Express's trips or all airporter trips which are declining, no solid conclusions may once again be drawn from these data.

ii. Shuttle Express' Arguments and Complaint about Predatory Pricing Similarly Rely Upon Manipulations of Evidence

38 Much like nearly every other allegation it has made, Shuttle Express's allegations of predatory pricing in its subjoined complaint appear to rely on evidentiary "reinterpretations" by Shuttle Express. In this instance, it proclaims in brief that the Commission should take action against Speedishuttle based on the evidence submitted and Speedishuttle's admission that its "fares are below cost" without any further analysis.

39 What evidence already submitted should the Commission here rely upon? Shuttle Express never succinctly says. And what did Speedishuttle admit? Yes, it admitted that its fares for individual passengers are below the cost of a trip.[48] But Speedishuttle also submitted evidence that demonstrates this is how the industry operates, and that profits are made in shared ride transportation by transporting multiple passengers, not single passengers.[49] Speedishuttle also noted that Shuttle Express operates on the very same model, which Shuttle Express has repeatedly admitted.[50]

40 Yet, rather than acknowledge the reality that in shared ride transportation the fares for an individual traveler are acceptably lower than the cost of the trip, that a company can become profitable by increasing passenger counts, and that Speedishuttle's fares are therefore perfectly reasonable,[51] Shuttle Express instead makes conclusory statements and arguments[52] that seek to

[48] Roemer, Exh. HJR-1T. 51: 10 – 52: 12.
[49] *Id.*
[50] *See, e.g.*, Kajanoff, TR. 350: 1 – 21.
[51] Which Commission Staff found based upon the use of flexible fares. Young, TR. 844: 13-19.
[52] Conclusory statements are not considered competent evidence. *See Grimwood v. Univ. of Puget Sound*, 110 Wn. 2d 355, 360, 753 P.2d 517, 519 (1988).

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divert attention from the issue by asserting that Speedishuttle cannot increase its passenger count without taking passengers from Shuttle Express and that one of the two providers must therefore fail if the Commission does not take action to cancel Speedishuttle's certificate. The Commission should reject these empty allegations and arguments and instead find that Speedishuttle's fares are just and reasonable.

41 Moreover, even if the Commission were not to so find, as previously noted by Shuttle Express, the remedies permitted under RCW 81.04.110 are to "establish such uniform rates, charges, rules, regulations or practices in lieu of those complained of," not cancel a carrier's certificate as Shuttle Express demands. Thus, even if the Commission took issue with Speedishuttle operating on an approved rate design on the "public transportation model" a/k/a the "airline model" (which requires multiple passengers for a given trip to be profitable), the remedies available would necessarily be limited to creating a uniform practice which would ironically be broadly applicable to Shuttle Express as well. Because this result would likely force all auto transportation companies to increase their prices during a time when competition with other modes of transportation is intense, surely this is not a result even Shuttle Express desires.

iii. The Commission Never Included a "Cream-Skimming" Complaint in this Proceeding, and Shuttle Express Never Proved it has Occurred

42 Just as puzzling as its complaints about Speedishuttle following a pricing structure largely comparable to Shuttle Express is Shuttle Express' insertion of "cream skimming" (mentioned above) into this proceeding. This was hardly an issue included or otherwise implicated in this matter by Order 08.

43 Nonetheless, if Shuttle Express now alleges cream-skimming by Speedishuttle's Commission-approved rate structure, it should once again be held to the task of proving it occurred. Instead, it unsurprisingly offers "disinformation" on this topic and little else.

44 As an initial defect in its argument, Shuttle Express offers no explanation or analysis of what "cream skimming" is and how it can possibly be identified, particularly in the flexible fare rate structure environment of WAC 480-30-421. For example, when it asserts emails between Speedishuttle and wholesalers demonstrate "a better documented case of cream-skimming [than] could hardly be found,"[53] it provides no analysis whatsoever as to why competition for a particular customer base is tantamount to cream-skimming.

45 Likewise, Shuttle Express distorts the record in its argument that Speedishuttle's intent to "cream-skim" can be found in the "hundreds of pages of solicitations to wholesale travel agents," of which Go Group is just the "tip of the iceberg."[54] These very same pages were described by the Administrative Law Judge as "a lot of duplication,"[55] and counsel for Shuttle Express stated that the duplication was "…unavoidable. You'd have to redact, you know, stuff out of long e-mail strings. Some of these strings go on for 10, 20 pages." So then what precisely is Shuttle Express asserting these repetitive emails establish regarding cream-skimming?

46 It ostensibly argues that these solicitations and contracts establish intent to cream-skim by "target[ing] wholesale ticketing agents like Go Group, which used to ticket all their passengers to Shuttle Express."[56] This contention is misleading at best. To begin with, Shuttle Express strongly implies that all of the "hundreds of pages of contracts and solicitations" in the record all

[53] *Initial Post-Hearing Brief*, ¶ 65.
[54] *Initial Post-Hearing Brief*, ¶ 63 (Ironically, Go Group is not even discussed in the hundreds of duplicative pages of emails).
[55] Roemer, TR. 694: 4 – 6.
[56] *Initial Post-Hearing Brief*, ¶ 62.

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relate to wholesale customers of Shuttle Express.[57] However, it never even attempted to make any showing that all of the wholesale customers in the record were once customers of Shuttle Express. It could not have done so had it tried because very few of them were. Second, there is absolutely zero credible evidence that any wholesale client has an exclusive agreement with Speedishuttle.[58] Thus, the fact that there may be any wholesale client which no longer books passengers with Shuttle Express (as Shuttle Express alleges) merely establishes that Shuttle Express failed to provide a reason for those wholesale customers to continue their relationship. Finally, Shuttle Express knows it misrepresents that Speedishuttle "targeted" Go Group. As the application case record reflects, it was Go Group that invited Speedishuttle to commence regulated service for it in Washington, not the other way around.[59]

47 Yet another hollow argument may be found in Shuttle Express' misplaced claim that cream-skimming is implicated by Speedishuttle's alleged focus on trips to the downtown area.[60] Beyond simply once again disregarding the Commission's findings in Order 04 which suggests Speedishuttle's service proposal is focused on tourism (and tourists to the Seattle area are undeniably more likely to head to downtown),[61] Shuttle Express simply fails to establish evidentiary linkage that having greater numbers of passengers going to downtown is the result of anything other than trends in the natural marketplace. While Speedishuttle would be expected to have more passengers going downtown based on its business model, it seems obvious that, in general, more passengers travel from the airport to Seattle, where the population density is

[57] *Id*. ¶ 63.
[58] A simple review of those in the record establishes they are expressly not exclusive.
[59] Exh. CM-1, *Statement on Behalf of Applicant by Cecil S. Morton, CEO of Speedishuttle*, ¶ 4 ("Our interest in the Washington marketplace has evolved over a number of years, but particularly in the past year when we were contacted by a wholesale network provider, Go Airport Shuttle, who indicated to us in the late summer 2014 that Shuttle Express had determined to sever their long-standing relationship").
[60] *Initial Post-Hearing Brief*, ¶¶ 78-81.
[61] *Accord*, Marks, TR. 434: 23 – 435: 13.

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higher, hotels, sightseeing sites and commercial businesses abound and most tourists are destined, than to the suburbs. So to establish such a concentration in passengers constitutes cream-skimming rather than natural market orientation, some actual statistical and testimonial analysis (and a careful one at that) would seem to be required. Once again, Shuttle Express fails to support a material allegation with any nexus of proof.

C. Shuttle Express' Arguments for the Type of Certificate Restrictions it Seeks were Soundly Rejected in the Past

i. The Commission has Historically Refused to Impose Restrictions of the Nature Requested

48 As noted above, Shuttle Express, near the end of its Initial Brief, seeks yet again, long after its original Petition for Administrative Review was denied, to have Speedishuttle's certificate restricted. It first seeks to have Speedishuttle restricted from providing "walk-up" service.[62] It further seeks to have Speedishuttle required to have a greeter available at all hours of its operation (24/7/365) in every language that exists (a simple internet search would reveal that could be as many as 6,000 languages).[63] But one greeter for each language is not enough for Shuttle Express. It would also like those greeters stationed at both the baggage claim and security entrance to avoid missing someone with no checked bag.[64] Next, Shuttle Express would like Speedishuttle to be required to refund all passengers not greeted.[65] And, if Speedishuttle can't perform those service restriction feats, Shuttle Express wants Speedishuttle's certificate cancelled outright.[66]

[62] *Initial Post-Hearing Brief*, ¶¶ 84 – 85.
[63] *Id.* at 86.
[64] *Id.*
[65] *Id.* at ¶ 87 – 88.
[66] *Id.* at 89 – 90.

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49 This wish-list of intentionally-impossible-to-fulfill requirements also demonstrates once more Shuttle Express' unfettered desire to eliminate all regulated competition so it apparently can go back to doing what it does best – violating Commission rules by diverting its passengers to independent contractors to maximize earnings instead of improving its service.

50 Despite Shuttle Express' desire to attach these daunting, unprecedented and unenforceable restrictions to Speedishuttle's certificate, the Commission has long disfavored both restrictions which it cannot enforce[67] and those which merely interfere in how a certificate holder conducts the day-to-day operations of its business, which the Commission has assiduously avoided so as to not micromanage the operations of a regulated business.[68] Shuttle Express again cites no authority whatsoever to the contrary. Moreover, the Commission expressly previously refused to issue certificate restrictions expressly requested by Shuttle Express at the application phase and Shuttle Express failed to appeal Order 04. Resuscitation of Shuttle Express' persistently-sought remedy here is unquestionably another collateral attack on Order 04.

ii. The Restrictions on Walk-Up Service Shuttle Express Seeks have no Basis in Order 04

51 While Shuttle Express now claims that Speedishuttle was supposed to be restricted from providing walk-up service, what Shuttle Express seems to intentionally ignore here is that Speedishuttle did not apply for "by-reservation-only service" and was granted a certificate to provide door-to-door service without such a restriction by a Final Order which never mentioned

[67] Order M.V. No. 141737, *In re Application of Bullet, Inc*., Application E-19967 (Jul. 1990)(restrictive amendments or permit restrictions which involve vague descriptions and/or timing requirements which are not readily susceptible to or capable of enforcement should be rejected).

[68] *In re Application of Sean McNamara d/b/a/ Bellingham Water Taxi, et al.*, Dockets TS-121253 and TS-121395 (July 2013).

walk-up service.[69] When Speedishuttle found out that the Port of Seattle would permit walk-up by someone other than the previous exclusive provider, Shuttle Express, it checked with the Commission Staff first and was told that its authority was sufficient, in contrast to Shuttle Express' *modus operandi*, historic repeated violations of certificate restrictions.[70] This was thus not a violation of an operating authority certificate restriction by Speedishuttle: it was an above-board service enhancement made in consultation with the Commission Staff and envisioned by Commission rule. Moreover, the Commission has already expressly found that its rules do not preclude the provision of walk-up service by a door-to-door service provider,[71] and that it expects existing auto transportation companies to continually expand and improve service within their territories.[72]

52 And, unlike the circumstances which led to Shuttle Express losing part of its previous certificate due to repeatedly and willfully violating its operating authority by poaching passengers at Grayline's scheduled stops,[73] Shuttle Express has no service exclusivity for unreserved passengers at Sea-Tac Airport. Passengers without reservations with a provider may currently hail a taxi, receive a ride from a TNC operator, take light-rail, or utilize several other transportation options. Therefore, they should be equally free to use Speedishuttle's service.

[69] And by Order 04, which specifically held that the specific service features offered, not the limitation proposed on walk-up service, distinguished its service from that of Shuttle Express.
[70] *See, e.g.*, Order M.V.C. 1893, *In re Evergreen Trails, Inc. v. San Juan Airlines* (Nov. 1990).
[71] Notice of Determination Not to Amend Order 04, of December 14, 2015.
[72] WAC 480-30-140(3)(iii) also provides that service to the satisfaction of the Commission will be assessed in part based upon the reasonable efforts of a company to expand and improve service. Thus, when a company is not otherwise restricted from doing so, it is expected by the Commission to expand its service. Ironically, increasing service to offer walk-up service is precisely such an expansion of service.
[73] *Id.*

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D. Shuttle Express' Numerous Excuses for Continued Violations of Commission Regulations Have no Basis in Rule or Law and it Failed to Serve to the Satisfaction of the Commission

i. Evidence in the Record Fully Supports that Shuttle Express Violates Time-Schedule Rules

53 Speedishuttle previously briefed the rules applicable to its now-established allegation that Shuttle Express violates the time-schedule rules for scheduled service when it combines scheduled service and door-to-door service and will not do so again here. However, Shuttle Express now erroneously asserts on brief that there is no evidence in the record that this ever occurred. That assertion is yet one more example of Shuttle Express distorting facts for its own purposes.

54 In reality, Mr. Roemer was a passenger who reserved scheduled service,[74] and the flag-stop rules apply only to scheduled service. When Shuttle Express made stops at places not listed on the time schedule before arriving at Mr. Roemer's stop, those were unscheduled, unrelated stops and that activity violates the Commission's rules. No other conclusion is possible despite Shuttle Express' contentions otherwise.[75]

ii. Shuttle Express' Use of Independent Contractors is Prohibited by the Rules Which Make no Exception for "Single-Stop" Trips

55 Shuttle Express continues in its attempts to distort the record relating to its unrelenting illegal use of independent contractors. In its Initial Post-Hearing Brief, Shuttle Express argues UTC Staff member Betty Young previously testified that single-stop trips were permissible and do not constitute shared ride.[76] However, the language seized upon and quoted by Shuttle Express patently stops short of what Shuttle Express imputes or ascribes to Ms. Young. Ms. Young testified in 2013: "… the independent contractor can provide other service, which is completely

[74] Roemer Exh. HJR-1T. 9: 9 – 19.
[75] *See Initial Post-Hearing Brief*, ¶ 94, n. 152.
[76] *Initial Post-Hearing Brief*, ¶ 99.

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fine under their limo license or under their for-hire authority." But what other service did she exactly intend? She was never subpoenaed by Shuttle Express to offer testimony in this proceeding and has thus not testified in this proceeding to explain, but she could easily have meant that limo drivers are authorized to provide limo service when reserved as such by Shuttle Express. This is hardly a staff opinion (informal or otherwise) that use of independent contractors under WAC 480-30-213 by an auto transportation company is lawful. No one has challenged Shuttle Express' authority to continue operating as a booking agent for limo drivers as it has long done, and there is nothing about Ms. Young's statement which suggests she meant anything more by that ambiguous reference.

56 This abject lack of evidence that Staff had previously represented to Shuttle Express that passengers who reserve shared ride auto transportation service could be legally transported by independent contractors provided the service was limited to single-stop, should prove insurmountable. Here, Shuttle Express relies solely on its own interpretation of an isolated statement which it never establishes was spoken in the context at issue here. Shuttle Express therefore utterly fails to sustain its burden of proof on this pivotal point.

57 More importantly, Shuttle Express cites absolutely no Commission Orders finding that Shuttle Express was permitted to provide independent contractor limousine service to its passengers who reserved auto transportation service in single-stop scenarios. Its lone authority even alleged to be related to this subject is an opinion of the United States Supreme Court on due process which simply held that laws regulating persons or entities must give fair notice of what conduct is required or proscribed.[77] On that point, Shuttle Express is correct that the Commission rules must be clear, but glaringly incorrect here that they are not. WAC 480-30-213(1) unequivocally

[77] *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 239, 132 S. Ct. 2307, 2309, 183 L.Ed.2d 234, 237 (2012).

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(206) 628-6600

states "[t]he vehicles operated by a passenger transportation company must be owned by or leased to the certificate holder." In the more than 40,000[78] incidents from January 16, 2014 to September 29, 2016 where Shuttle Express relied upon independent contractors rather than improving and offering customers its own shared ride service, it operated a vehicle owned not by it, but by an independent contractor. WAC 480-30-213(2) unequivocally provides "the driver of a vehicle operated by a passenger transportation company must be the certificate holder or an employee of the certificate holder." In the more than 40,000 instances found by the Commission Staff's investigation in which Shuttle Express failed to serve its own passengers through its own vehicles, the driver was not an employee of Shuttle Express. Thus, the rules are clear and this conduct is a clear violation thereof. Such egregious and repeat rule violations can hardly be found to have been without notice, and most certainly are not service to the satisfaction of the Commission.

III. CONCLUSION

58 Because the record developed by Shuttle Express in these consolidated proceedings does not demonstrate that Speedishuttle has failed to comply with the expectations it set by its actual testimony at the initial application phase, further fails to demonstrate that Speedishuttle made any of the misrepresentations ascribed to it by Shuttle Express, and because Shuttle Express never proves through objective and reliable evidence that it has suffered any legally cognizable harm as a direct result of Speedishuttle's operations, the Commission should fully reaffirm Order 04. And because Shuttle Express has shown (and the Commission has repeatedly found) that the Commission cannot trust it to comply with its rules, the Commission should finally take Order 04 the one long-requested step further and find that Shuttle Express failed to serve to its

[78] Not all of which are subject to penalty, due to the statute of limitations.

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Seattle, Washington 98101-2380
(206) 628-6600

satisfaction both before and after Speedishuttle sought and was issued the operating authority which is the subject of this protracted omnibus rehearing and complaint proceeding.

DATED this 14th day of July, 2017.

RESPECTFULLY SUBMITTED,

By /s/ Blair I. Fassburg

Blair I. Fassburg, WSBA #41207
bfassburg@williamskastner.com
David W. Wiley, WSBA #08614
dwiley@williamskastner.com
WILLIAMS KASTNER & GIBBS PLLC
601 Union St, Suite 4100
Seattle, WA 98101
206-628-6600

Attorneys for Speedishuttle Washington, LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2017, I provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document(s) via the web portal and provided an electronic copy to:

Julian Beattie Office of the Attorney General Utilities and Transportation Division 1400 S. Evergreen Park Dr. SW PO Box 40128 Olympia, WA 98504-0128 (360) 664-1192 Email: jbeattie@utc.wa.gov	Rayne Pearson Administrative Law Judge 1300 S. Evergreen Park Drive S.W. P.O. Box 47250 Olympia, WA 98504-7250 (360) 664-1160 rpearson@utc.wa.gov
Brooks Harlow Lukas, Nace, Gutierrez & Sachs, LLP 8300 Greensboro Dr. Suite 1200 McLean, VA 22102 (703) 584-8680 Email: bharlow@fcclaw.com	

Signed at Seattle, Washington the 14th day of July, 2017.

Maggi Gruber

Maggi Gruber
Legal Assistant
mgruber@williamskastner.com