BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

**PETITION FOR ADMINISTRATIVE REVIEW OF SHUTTLE EXPRESS, INC.**

Dated: September 15, 2017

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*1* Shuttle Express, Inc. ("Shuttle Express" or "Petitioner") respectfully files this petition for administrative review of Order No. 19 ("Initial Order")[1] pursuant to WAC 480-07-825.

## I. INTRODUCTION AND SUMMARY

*2* It is hard to imagine a more one-sided and error-filled order than the Initial Order. The Initial Order grants nearly every factual inference in favor of the Speedishuttle ("Respondent" or "Speedishuttle"), based on vague, conclusory, and self-serving testimony, while at the same time rejecting, diminishing, or ignoring the large body of evidence submitted by Shuttle Express, even though it was detailed, specific, and verifiable. It almost appears that the administrative law judge ("ALJ") only read the testimony of Respondent and staff. Worse still, where Petitioner's evidence was competent and credible, while not as detailed and specific as it could have been, the shortcomings were solely caused by Respondent's failures and refusals to make discovery, ill-founded objections to discovery, and improper and undue (not to mention one-sided) narrowing of the proceeding by the ALJ.[2] To sustain objections to discovery and cross-examination and then fault Petitioner for not meeting its burden of proof is a serious and indefensible denial of procedural due process.

*3* The patent unfairness of the Initial Order does not stop with barring discovery and evidence and then using that same supposed lack of evidence to uphold a failure to meet the burden, however. Where the evidence adduced by Shuttle Express was so overwhelming as to be completely

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[1] Order 12 and Order 09 in consolidated Dockets TC-160516 and TC-161257. Except as may otherwise be noted, all citations to orders in these cases will be to the order numbers in lead Docket TC-143691.

[2] Although the relief sought is well-supported by the record, the re-hearing should not have been limited. Shuttle Express had a right under the statute to a full rehearing. If the Initial Order is reversed as advocated by this petition this issue will be moot, so it is not addressed herein. But, if not, it is not waived.

unassailable, the Initial Order simply "moved the goalposts"—revising prior Commission orders to make the unassailable facts no longer relevant. Oftentimes the goalposts were moved without any notice to Shuttle Express, based on inconsequential or ambiguous evidence. And to add insult to injury, whenever evidence could be found—or in some cases invented—that would support the Petitioners' or Staff's cases, the case was freely and liberally expanded to allow fines and retroactively find that Shuttle Express's will not provide its service to the satisfaction of the Commission.

*4* Finally, but most worrisome from a policy standpoint, the Initial Order completely ignores significant and serious public interest issues in this case. Indeed the term "public interest" cannot be found even once in the discussion, findings of fact, conclusions of law, or ordering sections of the Initial Order. The Initial Order completely ignores the undisputed evidence that both Shuttle Express and Speedishuttle are now losing large amounts of money and that ubiquitous share ride service to the suburban and rural parts of King County is likely to wither and die.[3] As with "public interest," the terms "sustain" and "sustainability" cannot be found anywhere in the discussion or analysis sections of the Initial Order.

*5* Such a one-sided and patently unfair proceeding is contrary to the Commission's laws and rules, the Administrative Procedure Act ("APA"), and constitutional due process rights. And ill-considered or bad regulatory decisions have consequences in the market. The challenges facing the share ride "airporter" market cannot all be remedied by regulation. But they can certainly be reduced if the Commission reverses the Initial Order and enters a final order that follows

[3] *E.g.* DJW-1T at 28-29. It is ironic, and sad, but the Initial Order seems to focus on providing better service to "tourists" coming to Seattle from out of state to hotels and cruise ships at the expense of King County residents. The consequences to service to the residents and workers in suburban and rural parts of King County—who are the taxpayers that support the state and this Commission—are completely ignored.

constitution, laws, and rules and appropriately considers the public interest. Failure to do so will be a failure to serve the public.

*6* This petition will start with the purported "violations" by Shuttle Express. Those are all unsupportable, for various reasons. And they form the foundation for a retroactive fining of not satisfactory service by Shuttle Express. Once the "violations" are properly reversed, then there is no longer any tenable basis for a finding that Shuttle Express "will not" service to the Commission's satisfaction. Next, the petitioner will discuss how the whole approach, tone, and tenor of the Initial Order effectively guts the statute that ultimately governed and governs this proceeding, RCW 81.68.040. This statute should have been (and presumably was) applied in Order 04. It also needed to be followed on rehearing in Order 19. But it was not. Third, the petition will show how and why the Initial Order's findings on Speedishuttle's below cost pricing are unsupportable and contrary to all credible evidence. This issue is a key one to the complaint and public interest issues in this case. Fourth, Petitioner will then briefly challenge and discuss some of the litany of other errors in the Initial Order.[4] As required by WAC 480-07-825(3), thereafter Petitioner details recommended corrections to the findings of fact and conclusions of law and provides a "remedies" section that will properly apply and enforce the law under the record in these cases.

[4] There are so many errors in the Initial Order, both big and small, that Shuttle Express will likely not be able to address them all, especially in depth. To avoid undue repetition, Shuttle Express hereby incorporates its arguments in its prior post-hearing briefs for further background as well as citations to the record. Shuttle Express does not intend to waive its position on any issue that is supported by the record.

## II. CONTENTIONS OF ERROR.

*7* Pursuant to WAC 480-07-825(3), Shuttle Express lists and numbers its contentions of error here.[5] In conformance with the rule, each contended error is supported by the discussion, legal analysis, and record citations in subsequent sections.[6] The errors include:

1. ***Use of Independent Contractors*** by Shuttle Express was not unlawful.
2. ***Unlawful Commissions*** were actually lawful.
3. ***Shuttle Express Petition for Rehearing and Complaint*** – Speedishuttle's Business Model differences were not real, were not meaningfully implemented, and did not constitute a different service under the law, including:
    a. Luxury Vehicles
    b. Multilingual Service
    c. Personal Greeters
    d. SpeediTV and Wi-Fi
    e. Wholesale Travel Contracts
    f. Walk-up Service
    g. Use of Company Vehicles and Employees
    h. Providing Service to Full Extent of Authority
    i. Combined Scheduled and Shared Ride Service
    j. Shuttle Express's Service Does not Reasonably Serve the Market
4. ***Service to the Commission's Satisfaction*** not supported by cognizable new evidence.

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[5] The error list tracks the subheadings of the Initial Order in the "Discussion and Decision" starting at page 15 of the order.

[6] It is difficult to strictly apply this rule to this petition, because essentially the entire discussion, analysis, and findings of the Initial Order are in error, rather than just a few key points as the rule likely contemplates. The list of contended errors is necessarily high level, but there are also dozens of numerous small errors throughout that are discussed below. Collectively they infect the Initial Order and render it wholly unsupportable. The Commission should liberally construe this pleading, if necessary. *See, e.g.*, Order 04, *Walla Walla Country Club v PP&L*, Dkt. UE-143932 (Feb. 22, 2016).

5. ***Shuttle Express Petition for Rehearing and Complaint – Predatory Pricing below Cost*** actually supported by overwhelming evidence and admitted by Speedishuttle.

**6**. ***Remedies*** fail to properly apply and enforce the public service laws.

## III. DISCUSSION OF CHALLENGES TO THE INITIAL ORDER, AND EVIDENCE, LAWS, RULES AND OTHER AUTHORITY UPON WHICH PETITIONER RELIES

### A. Shuttle Express has not violated any Commission statutes or rules.

1. *Referrals of Passengers to Limousine Carriers is Outside the Scope of the Commission's Authority and Jurisdiction*.

*8* The most salient and irremediable error of the Initial Order regarding its finding that "Shuttle Express used independent contractors to provide auto transportation service on 35,351 occasions." *E.g.*, Initial Order, ¶ 160. This finding, which appears implicitly and explicitly throughout out the Initial Order, is used as the foundation for numerous other findings and conclusions. But it is fundamentally flawed because it represents an ultra vires attempt to assert jurisdiction over transportation services operated by limousines. Limousine operations are wholly outside the Commission's jurisdiction. By law, the exclusive jurisdiction to regulate all things "pertaining" to limousine carriers has been given to the Washington Department of Licensing ("DOL"). Thus, this finding and all other findings that are based on it must be reversed.

*9* Shuttle Express operates three principal lines of business: auto transportation, charter, and limousine referral. They are operated within the same corporation, but are distinct and different businesses and are subject to different regulatory regimes under Washington law.

*10* It is admitted that Shuttle Express occasionally asks individual passengers[7] if they would like to change from their auto transportation (share ride) service to a limousine.[8] These offers to upgrade from a share ride van to an individual town car are done at times when there are not sufficient unrelated parties going to or from an area in King County.[9] If the passenger were not referred to a limousine carrier they might have to wait much longer for a share ride service. Or, Shuttle Express could transport a single passenger in a van, which is more costly, less efficient, [10] and tending to exacerbate the ongoing decline of the share ride market.[11].

*11* When Shuttle Express is transporting passengers in the buses and vans that it owns and operates under its auto transportation permit, it is an "auto transportation" company subject to regulation as such by the Commission. This is made clear by RCW 81.68.010(3), which states: "'Auto transportation company' means every corporation … owning, controlling, operating, or managing any motor-propelled vehicle used in the business of transporting persons and their baggage <u>on the vehicles of auto transportation companies</u> carrying passengers…." (Emphasis

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[7] Sometimes it is a related group or party, like a family or business associates traveling together on the same reservation. But in all cases the transportation is one person—or perhaps more persons—going between the airport and a single non-airport location, under a single booking for service. Thus, these trips have come to be referred to as "single-stop" trips. Mr. Pratt called them "single party" trips. DP-1T at 4.

[8] WAM-3T at 29-30, 33-34. Passengers will be transported in a company van with a company driver if they decline the upgrade offer. WAM-3T at 33-34.

[9] Or other areas in Shuttle Express's certificate. *Id.*

[10] WAM-3T at 30-31.

[11] *Id.* at 30.

added). This statute, like other statutes relevant to this case, plainly limits Commission regulation to the transporting of persons on the vehicles of the regulated company.[12]

*12* As Shuttle Express discussed with Commission staff several years ago,[13] it also arranges for transportation of persons by limousine carriers throughout the Seattle region, including but not limited to, to and from SeaTac Airport. The limousines are owned and operated by independent contractors, each of which holds a valid and current limousine license from the Washington Department of Licensing ("DOL") covering the transportation to be provided.

*13* By statute, the legislature has defined a "[l]imousine" to "mean[] a category of for hire, chauffeur-driven, unmetered, unmarked luxury motor vehicles." RCW 46.04.274 (emphasis added). And, a "'[l]imousine carrier" means a person engaged in the transportation of a person or group of persons, who, under a single contract, acquires, on a prearranged basis, the use of a limousine to travel to a specified destination or for a particular itinerary. The term 'prearranged basis' refers to the manner in which the carrier dispatches vehicles." RCW 46.04.276 (emphasis added). Thus, the law and DOL's regulations apply to "vehicles" that fall under the legislature's definitions as supplemented and detailed in the DOL's regulations. It does not matter who made the arrangements or how.

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[12] For example, the Commission could not regulate company that arranges for people to take taxicabs owned by another company to and from the airport, and has never attempted to do so.

[13] The record shows and it was not disputed that Shuttle Express meet with staff and staff agreed that "single stop trips were legal." *See* PK-2T at 23-24. The staff's position at that time was, of course, completely consistent with their sworn testimony in TC-120323, their investigation report and recommendations, and the Commission's orders. The Initial Order dismisses this meeting as of "no legal force or effect." Initial Order ¶ 77. That is wrong, as discussed below. But initially, it guts the Initial Order's finding that Shuttle Express "actively concealed" the single-stop trips. Initial Order ¶ 123. And of course Speedishuttle also justified its provision of "walk-up" service based on discussions with staff. *E.g.*, Initial Order ¶ 48.

*14* As with RCW 81.68.010(3), the legislature has in the limousine law declared that the regulatory status of the transportation depends on the vehicles used and the actual transportation provided, not on how the transportation is reserved or arranged—nor by whom. *See* RCW 46.04.274, 276. Accordingly, when a vehicle operated by an independent contractor—with a limousine license, in a vehicle that is a limousine under DOL regulations, and regulated by the DOL—carries passengers it falls under the exclusive jurisdiction of the DOL. The Commission is barred by law (Washington Laws, 1996, Ch. 87) from regulating anything "pertaining" to those operations.[14] That would be true whether the transportation was referred or arranged by a hotel, travel agent, or Shuttle Express.

*15* In its limousine operations, Shuttle Express solicits passengers for the limousine carriers, refers them, and assists with the booking with independent limousine carriers who accept the proposed transportation.[15] Shuttle Express may, in some cases, assist with the billing and collection of the limousine fares.[16] Importantly, there is no evidence that Shuttle Express operates, manages, or controls the transportation provided by the limousines.[17] Nor does it own the limousine vehicles. Even putting aside, for now, the issue of the state's limousine laws, these two facts put the

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[14] Moreover, although not an issue in these cases, it should not matter whether the transportation is single-stop or multi-stop, so long as the transportation is performed in a limousine, driven by a chauffeur, under and pursuant to the limousine laws and regulations of the DOL.

[15] *See* WAM-3T at 34.

[16] *See id*. at 34-35.

[17] Staff provided absolutely no evidence to show whether, and if so how, Shuttle Express supposedly "managed" or "controlled" the transportation by the limousine carriers. Apparently they just assume that the referral at an agreed price is sufficient to rise to the level of operation, management and control. But if so, why do travel agents, hotels, tour companies, cruise lines, and other entities who refer passengers to travel to or from the airport on limousines (or taxis for that matter) not come under the jurisdiction of the Commission? Even were if better developed, the logic is flawed.

referrals outside of the scope of the Commission's jurisdiction over auto transportation on two grounds.[18]

*16* For the most part, the Commission does not attempt to regulate limousine operations, even those of Shuttle Express. As provided in RCW Chapter 46.72A, limousine carriers are now regulated by the DOL pursuant to Washington Laws, 1996, Ch. 87, § 22. However, the Commission has continued to exercise some limited regulation the Shuttle Express limousine operations in contravention of state law. The Initial Order is an extreme example of such an attempted regulatory overreach.[19]

*17* Prior to 1996, the Commission regulated limousine carriers pursuant to RCW Chapter 81.90. In Washington Laws, 1996, Ch. 87, the legislature repealed RCW Chapter 81.90 and expressly transferred all regulation of limousines from the Commission to the DOL. The 1996 law stated: "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).

*18* Despite the express and complete transfer of regulation of limousine carriers from the Commission to the DOL over 20 years ago, the Commission has continued to assert jurisdiction

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[18] The Commission held otherwise in Docket TC-120323. Shuttle Express does not agree with that holding, but decided not to appeal it out of a desire to try to work with the Commission cooperatively and move forward with business. But the Initial Order simply goes too far over the line and would extend the Commission's regulations over limousines even further than the 2012 case. To preserve its arguments for possible judicial review, Shuttle Express notes them again.

[19] The share-ride business has been under assault from all sides and declining for years now. *E.g.* WAM-2T at 11. If Speedishuttle is allowed to continue providing the same service as Shuttle Express, county-wide share-ride service will likely become a forgotten relic, sorely missed by the hundreds of thousands of residents who use it. *E.g.* PK-3T at 9; DJW-1T at 28-29, 32. In an effort to help share ride by reducing costs and giving some regulatory flexibility, the Commission recently made some welcome and much-needed rule changes. General Order R-590, Dkt. TC-161262 (July 31, 2017). Unfortunately, the holding of the Initial Order on independent contractors is completely inconsistent with the spirit of the new rules.

over Shuttle Express's limousine referral business, such as in Docket TC-120323.[20] Then, in this Docket (TC-161257) the staff recommended extending the principles of TC-120323 -- for the first time ever -- to referrals of passengers to limousines for "single-stop" transportation.

*19* As recommended by staff, the Initial Order would fine Shuttle Express for referring passengers to limousine carriers licensed and regulated by the DOL. Moreover, the Initial Order relies on past orders and investigations of the Commission that improperly asserted jurisdiction over the Shuttle Express limousine referrals to increase the fines against Shuttle Express and take away valuable property rights of the Shuttle Express auto transportation business that it should otherwise be afforded Shuttle Express under RCW Chapter 81.68. In so doing, the Commission has unconstitutionally taken valuable property rights of Shuttle Express without just compensation.[21]

*20* Apart from limousine referrals not constituting "auto transportation" to begin with, it abundantly clear that even if they did the single-stop referrals fall under the exclusive jurisdiction of the DOL. The Initial Order errs in trying to get around the lack of jurisdiction by asserting that Shuttle Express has "unilaterally delegate[d]" its obligation to serve to another entity.[22] Initial Order, ¶ 73. The record does not support this. In fact, Mr. Marks testified that passengers are

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[20] There the Commission took action for referrals that involved more than one person or group and transportation of those persons or groups between the Airport and more than one other location ("multi-stop" service). But although the Commission's investigation revealed over 5,000 referrals to a single person or party between the Airport and just one location ("single-stop" service), the Commission took no enforcement action at that time.

[21] The Shuttle Express permit and the qualified exclusivity it affords, is a property right that cannot be taken arbitrarily or based on ultra vires regulation outside the Commission's jurisdiction.

[22] Of course the Initial Order faults Shuttle Express repeatedly for supposed failures to meet its obligation to serve, but ignores undisputed evidence that Speedishuttle is not serving much of suburban and rural King County at all. *E.g.*, PK-3T at 9, DJW-1T at 28-29. This is one of many examples of the unfairly one-sided nature of the entire order.

offered a choice and will be carried by a regulated vehicle if they so choose. WAM-3T at 33-34. It is not a delegation at all. And it is not unilateral. Naturally, most passengers choose the upgrade rather than wait around indefinitely for a van to fill up.

*21* Next the Initial Order erroneously asserts that Shuttle Express "controls or directs the function of [the limousine] to provide regulated service." Initial Order, ¶ 73. Again, the record does not support this. The transportation is offered to a limousine, which may accept or decline it. If it is accepted, the operation and function is controlled by the limousine carrier.[23] Indeed, if Shuttle Express truly "managed, operated, or controlled" the limousine, relationship would be a *de facto* employee/employer relationship and would comply with the rule. The Initial Order cannot have it both ways. If Shuttle Express were truly "using independent contractors" then they would not be being controlled by Shuttle Express, precisely because they are independent contractors, not employees.[24]

*22* Even assuming, for the sake of argument, that Shuttle Express did "use" limousines to provide what might be considered auto transportation under RCW Title 81, that does not end the inquiry. As discussed above, the DOL's jurisdiction is not based on management or control. It is based on the nature of the vehicle and the contract with the limousine carrier. If the Commission were to find here that the single contract between a passenger and limousine carrier for transportation in a "limousine" somehow also fits the definition of "auto transportation," the Commission must nevertheless defer to the DOL. Regulation of the single-stop carriage by a limousine carrier

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[23] *See, e.g,* DP-1T at 6. The whole premise of staff's case and concern is based on Shuttle Express's lack of control. *Id*. at 6, 10.

[24] *See, e.g., Anifinson v FedEx,* 174, Wash 2d 851 (2012).

clearly "pertains to regulation of limousines and limousine charter party carriers" and thus has been "transferred to the department of licensing." *See* Washington Laws, 1996, Ch. 87, § 22.[25]

*23* Apart from the legislature's preemption of Commission regulation pertaining to limousines, there are several additional reasons the Initial Order is in err. First, unlike past investigations of Shuttle Express's use of limousine carriers, each and every one of the 40,727 trips cited by staff was a single party and a "**single-stop**."[26] The issue that led to previous investigations and penalties, dealt solely with ***multi-stop*** trips for limousine purposes. Thus, in the prior case there was a potential issue of whether there was a "single contract" which is a prerequisite to offering transportation in a limousine. RCW 46-04-274. That issue does not and cannot exist here because there are only single-stop trips of individuals—or of companions traveling together as a single party. Moreover, as Mr. Pratt agreed, "No trips involved a 'shared ride' service."[27] Of course, "shared ride" is what the Commission regulates. *See, e.g.*, WAC 480-30-016(2)(h).

*24* Both the Commission and its staff have long been aware of and explicitly and implicitly approved referral of single-stop passengers to limousines.[28] In the staff report in TC-120320 at page 11, the single-stop and multi-stop distinction is clearly understood, reported to the Commission and not part of the enforcement action.[29] The term "multi" appears over 20 times in

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[25] The idea that somehow passengers must be forced to cancel and rebook their service, as well as be refunded their fare and charged again for the same amount for the limousine, as urged by Mr. Pratt, is unsupported in the law. See DP-1T. Moreover, it completely ignores the public interest and inconvenience and harm that would result to passengers if they had to engage in such meaningless make-work transactions. WAM-3T at 34-35.

[26] *E.g.*, DP-1T. Mr. Pratt actually referred to the trips as "single party." The intent is the same

[27] DP-1T at 4.

[28] For more complete background and details, *see e.g.* Shuttle Express Initial Brief at 48-51. Reply Brief at 8-11, incorporated herein.

[29] Staff Investigation Report by Betty Young (March, 2013).

the report and was the sole focus of the investigation and enforcement action. The Shuttle Express Petition for Review discussed "single stop" and said staff conceded that was lawful.[30] The staff's response brief did not argue with that assertion.[31]

*25* The final order in TC-120323 (Order 04, ¶ 37) specifically discusses the Shuttle Express "single-stop" argument and assertion that service "provided on a single-stop basis complies with Commission regulations." The order thereafter completely ignores that assertion (implicitly validating it) and proceeds to levy fines base on each and every multi-stop trip, but not one single-stop trip. The ordering clause stated that "Shuttle Express, Inc., shall not use independent contractors to provide … any … automobile transportation service the Commission regulates." But the order does not say that the "Commission regulates" single-stop referrals to limousine carriers. Given that the Commission knew about and discussed thousands of single-stop trips and regulated exactly zero of them, the only rational interpretation of the Commission's rules and orders is that single-stop trips are not "regulated" by the Commission. This is what the staff said in its testimony.[32] This is what the staff said in its meeting with Shuttle Express.[33] This is what Mr. Pratt thought the law was until this year.[34]

*26* State law requires that, "any rule proposed or adopted by an agency should be clearly and simply stated, so that it can be understood by those required to comply." RCW 34.05.220(5). If the

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[30] Petition for Review at 29-30, Dkt. TC-120323 (January 3, 2014).

[31] Answer of Commission Staff, Dkt. TC-120323 (January 13, 2014).

[32] TR at 36. Dkt. TC-120323.

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

[34] TR at 850.

staff interpretations are in a state of flux, staff is giving inconsistent advice, and the Commission is ignoring a known practice, how is it supposed to be "understood by those required to comply"? Moreover, 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.[35]

*27* The Commission can, within its jurisdictional limits, change its interpretation of the laws and rules. But it cannot do so retroactively without violating due process of law, as the Initial Order proposes to do here in numerous ways. 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*.

*2. Hotel Concierges Receiving Commission Payments Were Not Agents.*

*28* The Initial Order's finding that Shuttle Express's payment of commissions to hotel employees pursuant to agreements that are not filed with the Commission WAC 480-30-391(1) yet again relies on factual findings that are not only not supported by, but directly contrary to, the record. In its first error, the Initial Order cites cross testimony by Mr. Marks[36] to support a finding that

[35] *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.

[36] TR at 662: 9-13.

"the hotel employee makes the reservation for the consumers." But all Mr. Marks did there was agree with a very leading question that was framed in the passive voice about "reservations made for Shuttle Express service on behalf of passengers." Because the question was in the passive voice, the identity of the actor—whether passenger or hotel employee—is not revealed.[37]

*29* In the remainder of the record on this issue the true nature of the transactions are much more clearly spelled out. For example, Bench Request No. 5 reveals:

> However, the hotel staff are not selling tickets or acting as ticket agents. Instead, they are simply referring customers to Shuttle Express. … Here, in contrast, the hotel staff at issue are neither selling tickets nor acting as a ticket agents for Shuttle Express. Rather, they merely refer hotel guests who ultimately pay the full fare directly to Shuttle Express.

*30* Next, the Initial Order puts form over substance, citing three instances where Shuttle Express uses the term "book" when it describes its commission "guidelines" to hotel concierges. No witness was ever asked what that term "booked" intended, in that context. Thus, to support a legal conclusion that the hotel concierges were acting as "agents" of Shuttle Express within the meaning of WAC 480-30-391 based on a single term taken out of context is not supportable, especially given a significant amount of explicit evidence to the contrary. The true nature of the transactions was discussed in Mr. Marks' testimony and the staff bench request response.

*31* Next, the Initial Order errs on the law pertaining to ticket agent agreements. The current WAC 480-30-391(1) states that, "An auto transportation company may enter into contracts or agreements with a second party <u>for the sale of tickets or fares on behalf of the company</u>" only if the form of such contracts or agreements has been filed with and approved by the commission. (Emphasis added). In contrast to the old rule, the current rule expressly states that the agent must sell the ticket "<u>on behalf of</u>" the carrier. Lest there be any doubt as to this intent, the form of

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[37] *Id.*

agreement "must contain … [a] statement as to how and when payment will be made to the company for tickets, less commission." WAC 480-30-391(1)(f). Only if the "agent" actually sells the ticket and collects the payment can such a clause be material. Neither of those two events occur with the current Shuttle Express commission program.[38] Only by ignoring express evidence to the contrary and relying instead on contrary inferences and innuendo can the Initial Order conclude otherwise.

*32* As with so much else in the Initial Order, it seems to be straining to find a violation even when all the evidence and law are to the contrary. The record does not support the finding of a single violation.[39] If the Commission were to rule that the agreements should be filed, such a ruling should be prospective only. *See, e.g.*, RCW 34.05.220(5). When the company and the Commission's staff ***both*** interpreted a rule in good faith not to apply to a particular practice, the company should not be penalized without some prior notice. Here, the supposed violation is being used to retroactively find that Shuttle Express was not, prior to 2015, serving to the Commission's satisfaction. That retroactive finding based on a rule whose application here is ambiguous at best, would be extremely punitive, and would effectively deprive Shuttle Express of due process and property rights.

3. *The Record Does Not Show Even a Single Unlisted Flag Stop for a Scheduled Passenger*.

*27* The finding that, "Shuttle Express makes stops on its scheduled routes that are not listed as flag stops in the company's tariff" disregards, or at least confuses and misinterprets, the record. *See*

[38] When it does, the agreements are filed per the rule.

[39] *See also*, Shuttle Express Initial Brief at 46-47 and Reply Brief at 5-6, which are incorporated herein by this reference.

Initial Order ¶ 172. The Initial Order completely fails to distinguish between scheduled and door-to-door stops. The flag stop rule, WAC 480-30-391, only applies to the scheduled service. Thus, a passenger that contracts for scheduled service, at the scheduled fare,[40] can only be picked up or dropped off at a flag stop that is listed in the scheduled service tariff. But Shuttle Express has found it necessary (and more efficient) to sometimes combine scheduled and door-to-door passengers on the same trip.[41] This has been done pursuant to a tariff filed with and accepted by the Commission.[42] If the van drops a door-to-door passenger before all the scheduled passengers have reached their destination, then necessarily they will be stopping at a location that is not listed in the scheduled tariff. That is what happened to Mr. Roemer. But in a combined operation, that does **not** make the stop a "flag stop." It is a **door-to-door** stop, and no rule requires all stops to be listed in a door-to-door tariff.

*28* As has been noted, the "flag stop" issue came up because Mr. Roemer took a scheduled ride in a van that had a combination of scheduled and share ride passengers on the same trip.[43] His van made a stop to drop a door-to-door share ride passenger at a location that was not a scheduled service flag stop location.[44] Mr. Marks admitted that since Shuttle Express often combines scheduled and share ride passengers for efficiency and faster service, vans will often make door-

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[40] WAM-3T at 5-6. The scheduled fare is generally much lower than the door-to-door fare, but offered a a per person rate. *See id*. at 6 and Shuttle Express tariff.

[41] WAM-3T at 5-7.

[42] *E.g.,* WAM-3T at 5.

[43] The Roemer trip is discussed in detail at WAM-3T, pages 3-8.

[44] TR at 650.

to-door stops at locations that are not listed as flag stops in the scheduled service tariff.[45] Staff opined in the bench request response that ***if*** scheduled service passengers were dropped at unlisted scheduled service locations that would be unlawful.[46] But staff's bench request response admitted it did not have evidence that that had occurred because it had not done in investigation.[47] Indeed, there is no evidence in the record that that has ever happened. To the contrary, the context of the entire discussion at the hearing was solely about door-to-door stops made when providing combined service.[48]

*29* Again, in the context of combined operations, the only single-stop in the record was a lawful door-to-door stop. And again, the Commission could change the law prospectively to bar combined operations. *See, e.g.*, RCW 34.05.220(5). But doing so here would be very bad for the public interest, a factor which the Initial Order failed to even consider. The overall share ride market is steadily declining, even when the combined passengers of both Shuttle Express and Speedishuttle are considered.[49] If share ride is to survive and continue to serve the public, every possible efficiency is needed. Combining scheduled and share ride on the same trip when

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[45] TR at 662-663. He did not say that vans make scheduled stops at unlisted locations.

[46] BR-4.

[47] *Id.*

[48] *E.g.*, TR at 651 ("had Mr. Roemer not waited for a door-to-door passenger to be taken to a location not listed on [*sic*] the flag stop…"); 663 ("It was not a scheduled service stop prior to him…."), 666 (trip … was a combined door-to-door and scheduled service"), and 667 ("Our intention is to provide advanced notice through the tariff that we may combine door-to-door and schedule service passengers on a flag stop route").

[49] *E.g.*, PK-1T at 5.

appropriate is just such an efficiency.[50] Only if the Commission truly wants to hasten the demise of share ride should it even consider barring combined operations going forward.[51]

### B. The Initial Order Essentially Fails to Consider, and Therefore Repeatedly Violates, RCW 81.68.040.

*30* Moving beyond the improper findings of violations of rules that were never articulated in the WACs, Commission orders, or staff advice, the Initial Order fails to respect or apply the fundamental precepts of RCW 81.68.040, which provides, in pertinent part:

> An auto transportation company shall not operate for the transportation of persons and their baggage for compensation between fixed termini or over a regular route in this state, without first having obtained from the commission under this chapter a certificate declaring that public convenience and necessity require such operation. … The commission may, after notice and an opportunity for a hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the commission, or when the existing auto transportation company does not object, and in all other cases with or without hearing, issue the certificate as prayed for; or for good cause shown, may refuse to issue same, or issue it for the partial exercise only of the privilege sought, and may 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.

*Id.* (emphasis added).

*31* Accordingly, the statute which governs grants of overlapping auto transportation authority gives qualified exclusivity to an incumbent certificate holder.[52] Specifically, RCW 80.68.040 restricts

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[50] *E.g.*, WAM-3T at 5-6.

[51] *See e.g.*, DJW-1T at 28-29.

[52] The legislature did this for a very important reason, which is it recognized that auto transportation service is a natural monopoly. *See* DJW-1T at 28-29. Because the Commission's Orders 02, 04, and 19 fail to recognize this and failed to follow the statute, the market is now in danger of collapse, which will greatly harm the public interest. *E.g.*, PK-1T at 12-14, PK-3T at 8-9, DJW-1T at 29-31.

an overlapping grant "to operate in a territory already served." Notably, the key provisions of the statute are "operate" and "territory." The legislature did not allow another operation in the same territory based on the "service" being different. Such a distinction based on rules and case law is nuanced. Those distinctions can and were abused by Speedishuttle here as applicant and to the same effect on rehearing. And the Initial Order erroneously created even more distinctions in Speedishuttle's service that are not true differences in the operations or territories. Anywhere some scrap of evidence could be found of some minor difference, the Initial Order seized upon it. But—in a totally one-sided approach that manifests the entire order—where distinctions that had been relied on in Order 04 were shown conclusively to not exist on rehearing, the Initial Order instead found that those distinctions were no longer important.

*32* Perhaps the meaningless "different" service attribute is best exemplified in the repeated reliance on the "newer" "luxury" or "upscale" Mercedes vans compared to the "older Ford vans" of Shuttle Express.[53] And at least once, the Initial Order relies on the Speedishuttle vans being "black" and having "no markings."[54] Here, and elsewhere, Initial Order effectively makes a mockery of the statute. It literally relies, at least in part, on the ***vans being a different color*** than the vans of Shuttle Express. It also relies on the "luxury" nature of the Speedishuttle vans. These findings are erroneous for a number of reasons, starting with the fact that the Commission seems to be of the view that it cannot enforce or require that a carrier—once certificated—must

[53] Initial Order ¶ 84.

[54] The "no markings" findings is not true, as can plainly be seen from Exhibits HJR-34x. WAC 480-30-231(1) requires at least some markings on regulated vehicles. Perhaps the Initial Order meant no advertisements. But the Speedishuttle vans all carry the GO Group logo as well as other non-regulatory marks. HJR-34X.

maintain or perpetuate such promised distinctions.[55] Nothing in the Speedishuttle certificate prevents it from repainting its vans a different color, adding markings or advertisements, or switching from Mercedes to Chevrolets, just like the Initial Order did not prevent Speedishuttle from serving walk-up passengers.[56] And, the record shows no commitment or obligations by Speedishuttle to replace its vans when they are 2-3 years old.[57] The only reason they are just 2-3 years old now is simply because the company did not start operating here until 2-3 years ago.

*33* But an even more compelling reason that such superficial distinctions cannot form the basis for allowing a new entrant—either on initial hearing or on rehearing—is that they do not come close to overcoming the high bar set by the statute. "[W]hen the applicant requests a certificate to operate in a territory already served by a certificate" it cannot be granted unless the existing holder "will not provide the same to the satisfaction of the commission…." RCW 81.68.040.[58] The Initial Order apparently tries to get around this problem by finding fault with operations that are outside the scope of the Commission's jurisdiction and finding violations of rules that have never been articulated or enforced before. But when those are stripped away, as they must be,

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[55] *See, e.g.,* Notice of Determination Not to Amend Order 04. Shuttle Express does not agree fully, but the Commission cannot have it both ways, as the Initial Order would do. If a carrier cannot lawfully be award a certificate except conditioned on providing a meaningfully different service, then it must actually offer and provide only the different service. Otherwise, the prerequisites and conditions of RCW 81.68.040 are not being applied and enforced effectively.

[56] The distinction of no walk-up service was even stated under oath. TR at 48. The make, model, color, and markings on the van was never promised at all.

[57] The Initial Order cited pictures of the vans, but those don't support any conclusion on their age. *See* Initial Order ¶ 84 and Note 34.

[58] The statute uses the future tense, which suggest that existing certificate holders should have some notice of what the Commission expects of them before it can abrogate their right of exclusivity. This point of law is not clear, but to the extent a certificate constitutes a property right, basic principles of due process suggest that notice and an opportunity to meet a new expectation is essential. *See, e.g., Nguyen v. State, Dept .of Health Med. Quality Assurance Comm.,* 144 Wash.2d 516, 523 (2001)(license can be a property right).

there is no new evidence that supports a finding that Shuttle Express "will not provide" service to the Commission's satisfaction. In order to accomplish that, the Commission would have to decide that auto transportation companies must use luxury vans, must not let them get older than 2-3 years, must paint them black, and must not have markings.

*34* Further, whether an application is protested or not, the Commission must find "that public convenience and necessity require[s the proposed] operation."[59] In an irregularity that has never been explained, the Commission has never expressly stated "that public convenience and necessity requires" or ever required Speedishuttle's service. *See, e.g.,* Orders 02 and 04. And even though this missing statutory prerequisite was brought to the Commission's attention,[60] the Initial Order also failed to make the required finding. This is yet another of the many errors in the Initial Order. It may have been merely an oversight. More likely it was a recognition that record in these cases simply cannot support the existence of public convenience and necessity. Indeed the evidence and admissions on rehearing effectively eliminated any straight-faced claim that a duplicate service was required. To the contrary, the duplicate service is financially ruinous to both companies.[61]

*35* Because under 80.68.040 there must be a declaration that "public convenience and necessity require[s]" the proposed service, the Commission's "same service" rule must be also be read in together with the definition of "public convenience and necessity." That definition is in WAC

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[59] RCW 81.68.040. *See also* WAC 480-30-140(1)(a).

[60] Shuttle Express Reply Brief, ¶ 33.

[61] *E.g.*, PK-3T at 18, DJW-3T at 11-13, 17, 25-30. Much more evidence was offered on the overall trends in the market, causes, and ongoing and the likely harmful impact to the public. Unfortunately, was stricken on motions in limine. Orders 16 and 18. Those orders were erroneous and further compounded the erroneous finding in the Initial Order.

480-30-140(1)(a), and states that, "'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." There is nothing in the definition of "public convenience and necessity" that mentions accoutrements to transportation, such as the nameplate on the vehicle, its age, the color it is painted, or the presence of a TV set.

*36* Thus, assuming the Commission followed RCW 81.68.040 in granting Speedishuttle's certificate, it had to have found that some member of the public was **not** being "reasonably afforded the opportunity to receive auto transportation service" from Shuttle Express. Findings to this effect were implicitly and explicitly made in both Orders 02 and 04 based on the presentation and representations of Speedishuttle. According to the Commission, Speedishuttle proposed to offer a different service, serve the unserved, and thereby grow the overall share ride market in King County. To comply with the statute, Speedishuttle was not expected to simply carry the same passengers that Shuttle Express previously carried,[62] thereby splitting a still shrinking market. Such a result would have been (and is) antithetical to RCW 81.68.040, as the Commission has held in this docket.[63] Had the Commission not been misled by Speedishuttle, the application should lawfully have been denied.[64] Instead, the Initial Order gerrymanders Orders 02 and 04 around the new facts, finding new (but meaningless) distinctions and, where the proffered distinctions relied upon in Orders 02 and 04 could not be found to exist, finding

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[62] *See, e.g.*, Order 08, ¶ 23.

[63] *See, id.*, ¶ 26.

[64] *E.g., id.*

those were not really important after all.[65] The Initial Order abandons all pretext of protecting the natural monopoly as required by the legislature.

*37* Only the Commission knows what its subjective intent was in granting the Speedishuttle certificate.[66] But it is known that the record in the application case is replete with representations by Speedishuttle's testimony and exhibits and the arguments of counsel that it was seeking to offer a "different service." Thus, objectively and considering the requirements of RCW 81.68.040, the Commission had to have relied on Speedishuttle's claims to "target" a currently unserved "demographic of travelers." The record on rehearing established that the claims by Speedishuttle either: 1) were false and may have been known to be false at the time they were made; or 2) were not borne out in the actual operation, implementation, or impact of the new service – for whatever reason.

*38* In sum, the Initial Order did not find, and had no evidence with which it could find, that any member or material number of "member[s] of the public" were not "reasonably afforded the opportunity to receive auto transportation service" from Shuttle Express. Speedishuttle's duplicative service was not and is not "required" by the public interest. At a minimum, Speedishuttle should be required to provide only a service of the type that the Commission initially found was different than Shuttle Express's, *i.e.* by reservation only and with multi-lingual and greeter service provided to all passengers.

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[65] This kind of results-oriented approach is almost the definition of "arbitrary and capricious." It seems no matter what the evidence was, the result was pre-ordained.

[66] Of course, one of the three commissioners on that decision has since retired. Accordingly, the intent and import of the Commission's rulings must be ascertained from the totality of orders, ruling, and other actions on the record.

### C. The Initial Order's Findings on Speedishuttle's Ongoing Massive Financial Losses Are Based on the Misapplication of Incomplete, Self-Serving, and Conclusory Evidence From Speedishuttle, as well as Ignoring Detailed and Probative Evidence From Shuttle Express.

*39* One of the most frustrating—and unfair—aspects of this case is how severely Speedishuttle limited access to its revenues and cost data through its refusals and failures to make discovery, plus objections to cross examination—all with the cooperation and assistance of the ALJ.[67] The Complaint alleged that Speedishuttle was operating below cost and all the evidence submitted by Shuttle Express established that that would continue indefinitely due to the market being a "natural monopoly." In essence, that aspect of the case was a rate case. But trying a rate case without reasonable (if not full) access to up to date cost and revenue data of the regulated entity ranges from difficult to impossible. To add insult to injury, the Initial Order then held that, "Shuttle Express failed to establish that Speedishuttle prices its service below cost…." Initial Order, ¶ 125. The failure, if there was one, was caused by the withholding and concealment of the data by Speedishuttle. But even taken at face value, that statement is false, because Speedishuttle admitted that it had never made a profit. And Shuttle Express presented extensive, objective, and numeric evidence that shows just how huge the losses are.

*40* The errors in the Initial Order on pricing below cost start with the simple statement that "Speedishuttle's passenger count nearly doubled in 2016 … even adjusting … for nine months [of operation]". Initial Order ¶ 126. To start, Speedishuttle operated from May to December in 2015—eight months, not nine. Year over year total counts doubled (more than 100%

[67] *See, e.g.,* Orders 16 and 18; PK-3T at 19-21. Indeed, even Shuttle Express's attempts to show Respondent's discovery failures and abuses were excluded. *E.g.,* TR at 383, 808-09; PK-7 (offered). After shutting out probative evidence repeatedly, in error, the Commission cannot properly hold against Petitioner on the grounds it failed to meet its burden of proof.

increase). But if you compare monthly passenger counts for the 8 months of 2015 versus 12 months, passengers did not come close to doubling. To the contrary, they did not even increase by 50 percent, as this table shows:

| | **YTD 2016** | **Monthly[68]** |
|---|---|---|
| PAX 2015 | 41,037 | ***5,130*** |
| PAX 2016 | 87,743 | ***7,312*** |
| Change | 46,706 | ***2,182*** |
| % Change | 113.81% | ***42.54%*** |

Thus, viewed properly, it cannot be disputed that the increase was barely over 40%, not 100%, as the Initial Order concluded. Considering that 2015 was a start-up partial year and 2016 was a full year, the increase should have been greater and would have to be to overcome the huge losses that Speedishuttle is facing. As discussed below, their early increases did not get them close to a break-even point and the increases switched to declines starting in August 2016.

*41* The efforts of the Initial Order to create evidence of financial solvency where none exists is best exemplified by the holding that Shuttle Express "earns an average of $69 per trip, while Speedishuttle earns an average of $67.60." Initial Order, ¶ 128. It unfairly and falsely implies that Speedishuttle is nearly as ***profitable*** as Shuttle Express, because in both ordinary and accounting parlance "earnings" are understood to be "profit" or "loss."[69] In fact, consistent with

[68] This table is based on Respondent's annual reports.

[69] *E.g.*, Financial Standards Accounting Board (FASB), Statement of Financial Accounting Concepts No. 5 at CON5–2 (1984)("The concept of earnings set forth in this Statement is similar to net income for a period in present practice…. Earnings is a measure of entity performance during a period. It measures the extent to which asset

that apparent implication, the Initial Order states in the preceding sentence, contrary to all probative evidence, that it does not "appear that Speedishuttle's trips are substantially less profitable that Shuttle Express's." But the figures in the Initial Order have absolutely nothing to do with profit or net income. Rather, they are simply immaterial calculations of **gross revenue** per trip based on the two carriers' annual reports. Indeed, because the annual reports don't include any costs, it is impossible to use them to show earnings, net income, or profit and loss. A proper analysis of "earnings" takes into account both revenues and costs. Speedishuttle refused to provide current or full year income statements, though it did give a partial one to Shuttle Express under a non-disclosure agreement ("NDA"). The record—taken from Speedishuttle's own income statement—shows Speed Shuttle's overall financial results very conclusively.[70]

*42* Amazingly, the Initial Order also holds that "there is no evidence in the record to suggest that Speedishuttle incurs substantially more expenses than Shuttle Express does." Initial Order ¶ 127. One must ignore many pages of the record to reach this conclusion. Because of the NDA, Shuttle Express cannot show all of Speedishuttle's costs here and could not get them into the record. But we know the bottom line and it is in the record. If one extrapolates the admitted loss of $0.66 per dollar of revenue for 17 months,[71] that means that based on 2016 reported gross

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inflows (revenues and gains) associated with cash-to-cash cycles substantially completed during the period exceed asset outflows (expenses and losses) associated, directly or indirectly, with the same cycles.")

[70] PK-1T at 7; PK-3T at 22. The confidential income statement is not consistent with GAAP, as Mr. Kajanoff testified. But the huge losses cannot be denied and shown conclusively.

[71] PK-3T at 22.

revenues of about $1.55 million, Speedishuttle lost about $721,000[72] or $8.20 per passenger. This compares to a 2016 share-ride loss by Shuttle Express of $362,000, or not more than $1.31 per passenger.[73] This means Speedshuttle's total passenger losses are likely at least six times greater than Shuttle Express's even though Shuttle Express's revenues are less than twice Speedishuttle's. Expenses must be higher.

*43* What are some of the undeniable and significantly higher expenses? The record shows that Speedishuttle's vans cost $12,000 more per year to operate than Shuttle Express's Fords.[74] The implication of the Initial Order (¶ 84) is that Speedishuttle will retire them in 2-3 years, rather than 5 years so that they will always be "newer." That would greatly increase the costs were it true. But it is not. Both carriers use a five-year life,[75] making the vehicle cost for Speedishuttle is about double, due to greater depreciation and fuel costs.[76] A proper income statement comparison would not just look at top line gross revenues as the Initial Order. Rather, it would look something like this:

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[72]Based on average monthly loss for 17 months.

[73] *See* PK-2T at 18. The phrase "not more than" is used because the Shuttle Express loss is on share-ride only. Scheduled is still profitable, which means the overall loss per passenger is actually something less than $1.31.

[74] PK-3T at 7.

[75] *Compare* TR at 518 with Application Section 5 (showing monthly depreciation per van of $1,100, which equates to the total cost of $66,000 over a 60 month period). The Initial Order, at ¶84, erroneously used an unknown quantity (two are suggested) of old Shuttle Express vehicles which may or may not be in service in share-ride to conclude that they are materially older than five years. The record actually shows that the replacement plan is five years, the same as Speedishuttle. TR at 518. There is no evidence that Speedishuttle's vans will be any newer on average after they have been operating for more than five years.

[76] The Speedishuttle vans run on diesel, which is more expensive than the propane and gasoline that Shuttle Express uses. *See* PK-3T at 7.

| | SS | SE | SS vs SE |
|---|---|---|---|
| Vehicle Cost | $66,000 | $32,500 | $33,500 |
| **Annual Dep** | **$13,200** | **$6,500** | **$6,700** |
| Trips per Vehicle | 1,273 | 1,206 | 67 |
| Miles per Trip | 32.20 | 35.38 | (3.19) |
| Annual Miles | 40,992 | 42,673 | (1,681) |
| MPG | 10 | 10 | 0 |
| Gallons | 4,099 | 4,267 | (168) |
| Price per Gallon | $2.50 | $1.25 | $1.25 |
| **Fuel Expense** | **$10,248** | **$5,334** | **$4,914** |
| **Total Cost** | **$23,448** | **$11,834** | **$11,614** |
| **Cost per Trip** | **$18.42** | **$9.81** | **$8.60** |
| **Revenue per Trip** | **$67.57** | **$69.02** | **($1.45)** |
| **Percentage of Revenue** | **27.26%** | **14.22%** | ***13.04%*** |

Much of this data comes from the two company's 2016 annual reports to the Commission.[77] Thus, the statement that "there is no evidence" that Speedishuttle's costs are higher[78] is flatly contrary to the record. What the undisputed record shows is that vehicle operating costs alone are more than 13% greater as a percentage of revenue.

*44* Then, Speedishuttle is supposed to greet every arriving passenger at one of 16 baggage carousels and escort them to their van. Like every other piece or set of data that would enable the Commission to get to the truth, Speedishuttle refused to provide or claimed not to know key

[77] Note that this data does not purport to show all costs, only vehicle and fuel costs, because much of this data is public, while the rest of Speedishuttle's costs are subject to an NDA. But the bottom line cost difference of $12,000 (close to $11,614 as shown in the illustrative statement) is in the record. PK-3T at 7. And the trip data is in the annual report. Thus the record conclusively shows that Speedishuttle has about 13% more operating costs on vehicles alone. The details in the table are offered for illustrative purposes, to help with understanding of the components of the bottom line cost differences.

[78] Initial Order at 127.

data.[79] What might the costs look like if the ALJ had ordered Speedishuttle to provide full responses to discovery? Something like this:

| | |
|---|---|
| **Est Outbound Reservations** | 32,548 |
| **Est Greeting Minutes per Res** | **15** |
| **Est Annual Greeting Hours** | 8,137 |
| | |
| **Hourly Rate** | **$15.24** |
| **Benefits / PR Tax Load** | **20%** |
| **Loaded Hourly Rate** | **$18.29** |
| | |
| **Est Annual Greeting Cost** | $148,807 |
| **Reported Revenue** | $1,548,559 |
| **Est Annual Greeting % of Revenue** | **9.61%** |

Because Speedishuttle refused to provide or did not have any empirical data on its greeters, some of these numbers are just estimated.[80] Again, Speedishuttle's failure to maintain and provide detailed data on its costs in the record will not enable the Commission to put an exact number on the incremental costs of greeters compared to Shuttle Express's costs. But it is a real number and could well be about 10% of Speedishuttle's gross revenue. Add the known and quantified 13% greater vehicle costs and Speedishuttle's expenses are over 20% greater than Speed Express's. Again, the table is offered to further illustrate just how wrong and unsupportable the Initial Order's findings on costs are.

*45* Importantly, Speedishuttle also lacks economies of scale. It must cover its fixed overhead costs on less than a fourth of the gross revenues of Shuttle Express.[81] As long as both companies split the market, it will always lack economies of scale—just as it has reduced Shuttle Express's

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[79] *E.g.*, PK-3T at 7-8. Again, attempts to show how Respondent made it impossible to submit empirical data were improperly rejected at the hearing. TR at 382; PK-4 (offered).

[80] Out bound reservations are based on total passengers and time to greet considers the need to assemble passenger from multiple flights awaiting bags.

[81] Initial Order, Note 85 (based on annual reports).

economies of scale as well. And this is on top of less efficient operating costs for both carriers because its entry has divided a natural monopoly that is not big enough to support two carriers.[82]

*46* Unfortunately, the ALJ did not allow or request more current data that would be sufficient to show the financial results of a second full year of operations for Speedishuttle or a year-over-year comparison for an entire year to show trends. But all the evidence that was introduced or proffered showed that—like Shuttle Express—Speedishuttle's business started to decline in August 2016, just like Shuttle Express's has been doing for several years.[83] Thus, it is almost impossible to conclude that Speedishuttle's losses have declined materially in recent months.

*47* Next, the Initial Order improperly concluded that Speedishuttle can become profitable at just 4.0 passengers per trip, compared to 3.5 for Shuttle Express. The Shuttle Express Reply Brief warned the Commission that 4.0 passenger break-even was a lie and could not be relied on.[84] To start with it was based on the barest of evidence, an unsupported statement by Mr. Roemer on cross.[85] TR at 820. As with nearly every other self-serving statement by Speedishuttle, it was not supported by any underlying data whatsoever. What does the available data in the record really show? Something like this:

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[82] DJW-1T at 27-29.

[83] WAM-1T, Graph 1 at 12. PK-3T at 21. Again, much more detailed data was offered, but was improperly excluded. PK-3T at 11-12, Table 2.

[84] Shuttle Express Reply Brief, Note 76.

[85] 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, as it is demonstrably false.

| | 2016 |
|---|---|
| **Reported Revenue** | $1,548,559 |
| **Trips** | 22,917 |
| **PAX** | 87,743 |
| **Load Factor** | 3.83 |
| **Rev per PAX** | **$17.65** |
| **Best 5 months % of Rev Lost** | **26%** |
| **Revenue Need to Breakeven** | $1,951,184 |
| **Load Factor Needed to Breakeven** | **4.82** |

*48* This table shows that even when it is assumed the trips stay the same so that costs do not go up, the revenue needed would be $1.95 million at the current average revenue per passenger.[86] From this the breakeven load factor can be readily calculated and it is actually at least 4.82 passengers, or close to five. The above calculation is based on Speedishuttle's most profitable five summer months. Accordingly, the likelihood of this best-case scenario is small and the true break-even passenger number is likely much higher.[87] As shown above the record conclusively shows the number is much larger than four per trip and probably closer to six.

*49* Rates of regulated carriers must be "just, fair, reasonable, and sufficient." RCW 81.28.010. The Commission is well within its powers to find some or all of the rates of Speedishuttle are not "sufficient" based on the evidence submitted to date and Speedishuttle's admissions it is priced below cost.[88] Further, RCW 81.04.110 allows the Commission to take action upon complaint if,

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[86] Here, all the data needed to make the calculations is found in the record. Revenue, trips, and passengers are based on the 2016 annual report. The 26% lost per dollar of revenue is based on Speedishuttle's admitted loss. *E.g.* PK-3T at 22.

[87] As Shuttle Express urged previously, 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.

[88] *E.g.*, HJR-1T at 55.

"the rates, charges, rules, regulations, or practices of [a carrier] are unreasonable, unremunerative, discriminatory, illegal, unfair, intending or tending to oppress the complainant." There is no dispute that Speedishuttle is losing money[89] and has also pushed Shuttle Express into a loss position,[90] those facts provide strong support for other remedies, like restricting or cancelling the Speedishuttle certificate.

*50* Mr. Roemer claimed the company is "close" to break even.[91] But that assertion was based on cherry-picking financial data from the five busiest months of the travel season in 2016 and even then Speedishuttle showed a loss of $0.26 per dollar of revenue.[92] And Speedishuttle refused to provide data that would either back up his testimony or allow Shuttle Express witnesses to rebut it.[93] There is nothing in the record that shows how the higher-cost carrier even can or will get to break even. And there is plenty in the record that says they will not.[94] And of course any break-even analysis would need to include those costs absorbed in the Hawaiian operations on behalf of Speedishuttle as acknowledged by Mr. Roemer.[95]

*51* Finally, the Initial Order's discussion of the Commission's 93 percent operating ratio completely ignores the record. Initial Order ¶ 129. Speedishuttle's service has been demonstrated conclusively to be below cost, which no plan or prospects (in the record, at least) to ever be

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[89] *E.g.* PK-1T at 6-9; PK-2; HJR-1T at 48-52.

[90] *E.g.* PK-3T at 18.

[91] HJR-1T at 52.

[92] PK-3T at 22.

[93] *E.g.* PK-3T at 19-21.

[94] E.g., PK-1T at 6-11; PK-3T 14-16, 21-23.

[95] HJR-28-X at 59-60.

above costs. And the statement that a carrier cannot price its service below cost because it "may not lawfully price its services below the base fare" inexplicable. If Speedishuttle's services were not priced below cost, it would not be losing money, it would be making money. The law does provide a remedy (*e.g.* RCW 81.04.110), but the Initial Order eschews any remedy and instead pretends there are no losses.

*52* Shuttle Express provided expert testimony of a CPA on the magnitude of Speedishuttle's losses that the Initial Order discards for unsupported supposition and imagination that is directly contrary to the data that is in the record. The Commission must not adopt these errors. Nor should the Commission ignore the key public interest issues raise by Speedishuttle's below-cost pricing as the Initial Order did. It is not consistent with RCW 81.68.040, 81.28.010, other statutes, or the public interest to permit Speedishuttle to try to drive Shuttle Express out of the market—and to do so using below-cost pricing to capture 24-31% of the passengers that Shuttle Express used to carry,[96] despite having asserted that it would offer a "different" service that would grow the overall market by serving the un-served.[97] The Commission should focus on the public service laws it is bound to enforce, in particular its duty to promote the long-term public interest. When it comes to Speedishuttle fares that means restricting Speedishuttle to the different services it proposed, so that its losses do not harm Shuttle Express or the long term public interest.

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[96] PK-1T at 13.

[97] See, *e.g.*, Order 04, ¶ 20 ("an entire demographic of travelers whose needs cannot be met by Shuttle Express's existing service" that applicant could meet because its "proposed service is not the same service"); *see also,* Transcript at 140-44.

### D. The Initial Order is Riddled With Numerous Other Errors, Both Large and Small.

*53* As discussed here, the Initial Order took such a consistently one-sided approach that it repeatedly disregarded the record and the law or stretched them beyond the breaking point. The more important and significant errors are discussed above. But there are many more, including the following.

1. *Speedishuttle's failure to provide multi-lingual service is material*.

*54* The Initial Order actually found that Shuttle Express proved one element of its case on the failure to offer multi-lingual service. But then, in an amazing sleight of hand and without explanation why, it reverses the prior Commission holding that that was a critical distinction. Initial Order, ¶ 89. But contrary to the Initial Order, multi-lingual was almost the centerpiece of Order 04, which found that without "multilingual customer service, there is an entire demographic of travelers whose needs cannot be met by Shuttle Express's existing service. On that basis alone, Speedishuttle's proposed service is not the same." *Id*. ¶ 20.

*55* Given Order 04, the multi-lingual distinction cannot be just cavalierly dismissed. It was essential to support the finding in Order 04 that not "every member of the public [was being] reasonably afforded the opportunity to receive auto transportation service" from Shuttle Express. Such a finding is required to support the "public convenience and necessity" requirement (as defined in WAC 480-30-140) of RCW 81.68.040. Order 04 was already very weak on that score and multi-lingual service was one of the few supposed differences that might have led to service to the previously unserved. Now it is gone. But the Initial Order essentially says, "never mind" and instead starts relying on the make and color of the vans, which unquestionably do not meet the requirements of the rule, let alone the statute.

2. *Greeters are not being provided to about half of passengers.*

*56* Similar to the holding on the failure to offer multi-lingual service, the Initial Order decides to "afford … less weight" to the supposed distinction provided by personal greeters. Initial Order ¶ 90. But in the ongoing effort to find some support for allowing Speedishuttle to continue to serve the exact same passengers that used to be served by Shuttle Express, the Initial Order continues to cling to greeters being a "different 'type' of service". *Id.* But even assuming that offering greeters would "afford the opportunity" for service to someone that would not otherwise have been served,[98] the evidence is that Speedishuttle is not offering greeters to anywhere close to all passengers. The Initial Order's finding that "Shuttle Express failed to prove" insufficient greeters (*See* Initial Order ¶91) is contrary to the record.[99] Of course, if Speedishuttle were already greeting every passenger then the relief Shuttle Express seeks to enforce provision would not have any impact anyway.

*57* As discussed at some length in the Shuttle Express post-hearing briefs,[100] there was ample statistical data showing that at least 20% of passengers—and more likely greater than 50%—are not in fact greeted. The following types of passengers are never greeted and cannot be greeted: carry-on luggage only, not pre-reserved (walk up), and wholesale bookings where passengers not

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[98] Note that this assumption is contrary to all evidence in the record. The premise of the accoutrements like greeters and TV was that they would attractive new riders who were not being served by Shuttle Express. Instead all the empirical data shows that all they did was shift a massive percentage of the existing passenger base from Shuttle Express to Speedishuttle. There was never an overall increase in the number of share ride passengers. And after the initial shift from Shuttle Express, the number of Speedishuttle passengers also began to decline, following the same trend as Shuttle Express has experienced for years now. *E.g.* WAM-3T at 23.

[99] To the extent specific numerical data is not in the record it is because Speedishuttle refused to provide it in discovery and the ALJ refused to require sufficiently detailed discovery responses. *E.g.* PK-3Tat 7-8.

[100] Shuttle Express Initial Brief at 22-26. A reply at 22-23.

required to provide flight number.[101] Thus, collectively the statistical evidence is that over half of passengers may not be greeted. And this would be fully consistent with the numerous sampling observations of two witnesses and the admission of a Speedishuttle employee who worked at the airport.[102]

*58* In sum, all credible evidence supports a finding that not all passengers are being greeted, which undercuts any finding of service to an unserved demographic that needs a greeter—if there was such a thing. On top of that shortcoming, as with all the other meaningless distinctions without a difference, the numbers of people transported before Speedishuttle entered the market and after are known and they do not lie. The overall numbers did not go up as Speedishuttle promised and the Commission found in Orders 02 and 04. They continued to go down at a steady rate.[103]

3. *SpeediTV and WiFi do not meet the statutory requirements*.

*59* Speedishuttle did succeed in showing that it has in fact installed TV and WiFi in its vans.[104] But what does that mean in terms of ensuring that every member of the public is "reasonably afforded the opportunity to receive auto transportation service" as required by statute and rule? The answer is absolutely nothing. Speedishuttle does not know if the TV is ever turned on.[105] It does not know if the WiFi is ever used by a passenger or how much.[106] And most importantly,

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[101] *See e.g.*, TR at 756-57. Yet again, improper exclusion of evidence at the hearing contributed to less evidence on greeters than there should have been. *E.g.* transcript at 725-30.

[102] JD-1T, JD-2T. WAM-1T at 17-19.

[103] *E.g.* WAM-3T at 23.

[104] Initial Order ¶ 93.

[105] WAM-1Tat 8.

[106] WAM-1T at 6-8.

neither it nor the Commission know if either feature has attracted a single new passenger that otherwise would not have received transportation service.[107]

*60* From the undisputed statistical evidence on overall ridership trends in the market, the only possible inference that can be drawn is that TV, WiFi, and the new smart phone app have not attracted any material numbers of passengers that could not or would not have used Shuttle Express previously. The "unserved tech-savvy traveler" is not just elusive, but totally non-existent as far as any record proof. That makes it impossible to conclude that the "public convenience and necessity requires" a second carrier, no matter what is on TV or what color the van is painted.

4. *Wholesale bookings do not meet the statutory requirements*.

*62* Wholesale bookings constitute 50% or more of Speedishuttle's passengers and serve mostly tourists. The Initial Order found that these undisputed facts were "consistent with the business model approved by the Commission" even if the tourists: 1) were not tech-savvy, 2) were not non-English speaking, and, 3) were all previously served by Shuttle Express through bookings through the same wholesale agents. Initial Order ¶ 95-96. It did so by parsing the language of one phrase of Order 04, ignoring the overall substance of that Order and the requirements of the statute.

*63* RCW 81.68.040 precludes the approval of a certificate to serve the same territory unless the public convenience and necessity "requires" the new entrant or the incumbent is not providing the service in a satisfactory manner. The Commission arguably satisfied these requirements in

[107] *E.g.,* DJW-1Tat 14-27.

Order 04 by finding that one or more **subsets** of tourists were not being served.[108] And it took great pains in Order 04 to rule in such a way that it could uphold the order as consistent with the statute. The Initial Order's holding would discard all such distinctions, finding that Speedishuttle is and was entitled to serve any tourist without regard to whether they would have been served by Shuttle Express or not.

*64* Again, the Initial Order is "moving the goalposts." But this new approach is not consistent with the statute nor the record. All evidence in the record is to the effect that Shuttle Express has always served tourists and continues to do so today.[109] Once the subsets go away, so does the "different service" justification which is essential to meet the requirements of the statute and rules.[110]

5. *Carriage of walk-up passengers can and should be restricted.*

*65* The Initial Order waives off the carriage of "walk-up" passengers, which supposedly would never occur, asserting that the Commission "did not rely" on that testimony. Initial Order 97-99. But walk up service is over 20% of Speedishuttle's business and it all came from Shuttle Express. Contrary to the Initial Order's assertion, the Commission had to have relied on the Speedishuttle not providing walk-up service to comply with the law, for several reasons. First, there is no dispute that Shuttle Express served and is serving walk-up passengers.[111] Second,

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[108] The goal and intent to meet the statute was well articulated here: "Shuttle Express does not offer multilingual customer service …; there is an entire demographic of travelers whose needs cannot be met by Shuttle Express's existing service. On that basis alone, Speedishuttle's proposed service is not the same service Shuttle Express currently provides." Order 04 ¶ 20 (emphasis added).

[109] *E.g.,* WAM-1T at 20.

[110] *See, e.g.,* Order 04 ¶ 21 ("the totality of these features demonstrate that the proposed service uniquely targets a specific subset of consumers").

[111] *E.g.,* WAM-1T at 17-19.

there is no dispute that walk up passengers are not particularly tech-savvy—they did not book online or on their phone. They may be non-English speaking, but if so they are not receiving multi-lingual service from Speedishuttle.[112] And they do not and cannot receive the personal greeter service.

*66* In sum, there is not a single distinction or difference that would support Speedishuttle being granted authority to provide share-ride service to passengers who do not make a reservation in advance in some way. The Initial Order's reliance on the Commission's inaction on the issue in November of 2015 is misplaced.[113] The Commission did not have the extensive record it has now. And the Commission overlooked numerous laws, rules, and precedent that allows the Commission to "attach to the exercise of the rights granted by the certificate to [*sic*] such terms and conditions as … the public convenience and necessity may require."[114] As discussed in Shuttle Express's post-hearing briefs, if Speedishuttle is permitted to continue operating the public interest requires a restriction against walk-up service for a number of reasons, not the least of which is that the Speedishuttle service needed to be and needs to be truly "different."[115]

6. *It is Speedishuttle that has not served to the full extent of its authority.*

*67* The Initial Order has a whole section devoted to attempting to support a finding of Shuttle Express's supposed "failure to provide service to the full extent of its authority." Initial Order ¶

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[112] *E.g.*, WAM-1T at 19.

[113] Initial Order, Note 58.

[114] RCW 81.68.040; WAC 480-30-036, 096(3)(a)(ii), 281(2)(c)(ii) and 356(3)(d)(ii). *See also* Shuttle Express Post Hearing Brief at 18 and 21-22.

[115] *E.g.*, DJW-3T at 6-13. Once again, the ALJ excluded very pertinent testimony of Mr. Wood that would have bolstered the public interest case that should have been considered. *See* Order Nos. 16 and 18.

107. Yet—again in the one-sided mode—the order does not discuss at all the undisputed evidence that Speedishuttle does not serve to the full extent of its authority, probably by design. The Initial Order errs for several reasons regarding its analysis of Shuttle Express's service extent. And it completely fails to address Speedishuttle's failure to serve. And in the same persistent pattern of a glaring legal omission, both the flawed discussion and the missing discussion ignore the public interest issues. Meeting the public interest is the key to properly addressing both and following the law.

*68* The only thing in the record that is not years old and stale[116] about Shuttle Express's service extent is that a few customers are asked if they would prefer to ride solo in a limousine rather than a van. As with all of the examples, each passenger that changes to another mode of transportation ***is asked*** if they are willing to do so.[117] The undisputed testimony in the record is that if or when a passenger declines, they will be provided with the regulated service.[118] For the reasons discussed above, passengers are free to choose (or not choose) a limousine over a regulated van; and when they do, the passenger is no longer requesting auto transportation service. Once the passenger terminates their request for a regulated service, the carrier is not "failing to provide service." It does not matter what the passenger's reasons are.

*69* Asking some passengers if they want to upgrade to a limousine, rather than wait around indefinitely for a van to fill up is a smart business decision that is perfectly legal. And, most

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[116] Mr. Sherrell's testimony about asking passengers if they would like to drive and be reimbursed for their parking is four years old, anecdotal, and exceptional. The Commission's rules recognize that sometimes service failures are inevitable due to extraordinary circumstances. WAC-480-30-140(3)(c).

[117] Indeed, even in the stale drive/park example cited, Mr. Sherrell made clear that passengers were asked, not "told" to drive and park.

[118] WAM-3T at 34.

importantly, it serves the public interest in a number of ways.[119] In failing to consider the public interest, the Initial Order would make Shuttle Express share ride service more cumbersome, slower, and more expensive for the public. In a declining industry the long term effects could hasten its demise, especially in rural and suburban areas.

*70* Speedishuttle has a more insidious way of failing to serve all of King County—a fact that was not really disputed.[120] Speedishuttle does not even bother to try to keep solo customers happy by offering them an alternative. More likely, Speedishuttle has priced its services in such a way that few if any passengers want to take Speedishuttle to suburban or rural areas.[121] As a consequence, the shift in passengers is very asymmetric, with most of Shuttle Express's passenger losses coming from the high volume, high frequency, low cost Seattle and Bellevue hotels, plus cruise terminals in the summer.[122]

*71* In short, Speedishuttle is serving almost exclusively the typical tourists (not just tech-savvy & non-English) that have always been served by Shuttle Express, while providing very little service beyond the tourist Meccas. Apart from the legality of that, the public interest implication is that suburban and rural King County is likely to lose share-ride service if the errors of the Initial Order are not corrected.[123] Absolutely zero consideration of these public interest considerations can be found in the Initial Order.

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[119] *See, e.g.,* WAM-3T at 27-35.

[120] *See,* PK-1T at 12-14, PK-3T at 16-18.

[121] *Id.*

[122] PK-1T at 13-14.

[123] *E.g.,* DJW-3T at 11-13. Again much valuable testimony of Mr. Wood on sustainability was improperly excluded. *E.g.,* Order 18.

### 7. *Speedishuttle's promised 20 minute wait times are not met*.

*72* In a discussion of Shuttle Express's combined service, the Initial Order again makes a number of errors. First, contrary to the record, it concludes that Shuttle Express's door-to-door service "necessarily" results in longer wait times for share-ride passengers. Initial Order ¶ 108. This is pure supposition and contrary to the record.[124] Next, the Initial Order ignores Shuttle Express's target wait time (20 minutes) and actual average actual wait time, which is also 20 minutes. Both of these numbers are supported by specific record evidence.[125] Instead, the Initial Order implies that 30 minutes "appears to coincide" with wait times on combined trips. Initial Order ¶ 109. Exactly what this is supposed to mean is murky, but the conclusion is that this coincidence (which no witness supported as reflecting actual practice), results in longer wait times from combined operations. *See id.*, ¶ 110. Apart from no record to support such a conclusion, the actual testimony and data contradicts it.[126]

*73* While on the one hand the Initial Order fabricates findings on the Shuttle Express wait times, on the other hand it seems to accept the Speedishuttle 20 minute wait time "target." In order to find that the Shuttle Express combined service is "different" the Initial Order has to find that Speedishuttle is 20 minutes or close while Shuttle Express is 30 minutes or close. *See* Initial Order ¶ 109. But that logic is unsupportable. All the record shows on Speedishuttle wait times is that they are longer than 20 minutes and how much longer Speedishuttle fails to track.[127]

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[124] WAM-3T at 7.

[125] WAM-1T at 24.

[126] WAM-3T at 7 ("Possibility passengers … required to wait …?" "A. Not at all."); *see also*, WAM-1T at 24.

[127] WAM-3T at 11-12.

*74* Earlier the Initial Order also asserts that the "20 minute guarantee" was only in Order 02, not the Commission's final Order 04. But, again, that is false, as Order 04 expressly affirmed and adopted all the findings and conclusions of Order 02. Order 04 ¶ 33. And Finding No. 5 of Order 02 expressly incorporated all the alleged "factors [that] distinguish the service" of Speedishuttle. In other words, the Commission most definitely relied on the 20 minute "guarantee" and all the other factors discussed in Order 02.

### E. The Initial Order Completely Fails to Address the Public Interest, as Required by RCW 80.01.040.

*75* "The utilities and transportation commission shall: … Regulate in the public interest, as provided by the public service laws, all persons engaging in the transportation of persons or property within this state for compensation." RCW 80.01.040(2). This proceeding raises important public interest issues, including whether county-wide door-to-door airport shuttle service is sustainable[128] with two carriers splitting a shrinking market, as well as whether an applicant that appears to have prevaricated about its intention to serve currently unserved airline passengers can or should be rewarded indefinitely for its prevarication. The Commission's first and overriding duty under the law is to protect the public interest. It should not be last. It should not be ignored, as the Initial Order does in countless ways. Many numerous small public interest oversights are discussed throughout the Petition, above. Here, the largest, overriding public interest failures are summarized.

[128] Interlocutory orders and evidentiary rulings on the issue of sustainability have been a bit inconsistent, in some cases rejecting the issue. But in other cases significant testimony on sustainability has been allowed. *E.g.*, DJW-1T at 28-31; PK-3T at 8-9. Shuttle Express submits the public interest issue is the most important issue, and one the Commission is duty-bound to consider. *See, e.g.*, RCW 80.01.040(2).

*76* The record in this case shows unequivocally that key differentiation factors touted by Speedishuttle either are not being provided as promised or, if they are being provided in some small measure are not material in the real world. These include: not serving only pre-arranged passengers, not greeting all passengers at the airport, not serving a non-English speaking demographic, and not departing airport within 20 minutes. The record also shows unequivocally that Speedishuttle has been and still is operating at a loss,[129] contrary to the discussion of the Initial Order. And at the same time Shuttle Express has driven Shuttle Express from a profit into a loss on share-ride,[130] an undisputed fact that the Initial Order completely ignores. The public is now faced with a loss of share ride service to all of King County,[131] a key fact the Initial Order also ignores.

*77* Because in the current market both carriers are now both losing money this means that one or maybe both carriers must ultimately fail if the status quo is maintained.[132] As Mr. Wood testified, even before one or both carriers exit the market the public is already being harmed, by increased wait times, reduced efficiency, and higher operating costs per passenger.[133] All of these problems are contrary to the short-term, and especially the longer-term, public interest. A large segment of the public still uses and values the van-provided share ride service and would

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[129] *E.g.,* PK-1T at 6-7; PK-2.

[130] PK-3T at 18 (2016 loss of $362,000).

[131] PK-3T at 2-5; DJW-1T at 29.

[132] DJW-1T at 28-29.

[133] *Id.* ("Over time, increasing financial stress as both providers continue to incur losses will result in additional pressure to reduce costs, usually by further lowering service quality. The final result could be the financial weakening of both providers to the point that neither can sustain its operations and must exit the market.").

be forever harmed if the service must be reduced in geographic scope, time of day, or even altogether.

*78* Thus, key public interest questions need to be answered as were discussed at length in the Shuttle Express post-hearing briefs, but ignored. The Commission has broad powers to regulate public service companies in a way that protects the public interest, not harms it, as would occur if the Initial Order were upheld. Our Supreme Court has noted, "The Legislature … conferred [on the Commission] by necessary implication every power proper and necessary to the exercise of the powers and duties expressly given and imposed. … Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law*." State ex rel. Puget Sound Nav. Co. v. Dep't of Transp. of Wash., 33 Wash*. 2d 448, 481, 486 (1949) (internal quotation marks and citations omitted).

*79* In *F.C.C. v. Pottsville Broadcasting Co.,* 309 U.S. 134, 138 (1940), the Supreme Court described the public interest standard as a "supple instrument for the exercise of discretion by the expert body … charged to carry out … legislative policy." The public interest has suffered and will further suffer if the Commission fails to use its public interest "instrument" to remediate the wrongs Speedishuttle has committed.

*80* Everything the legislature tried to prevent in prohibiting competing providers in the same territories is happening or will happen here. Wait times are up.[134] Passenger counts industry wide are down. Both carriers are now losing money. Areas served are already limited by Speedishuttle and Shuttle Express could have to do the same thing to survive. Indeed there is a substantial risk that both carriers will be gone in the foreseeable future, leaving King County

[134] WAM-1T at 24.

without any share ride service.[135] New entry with a new service has not caused the business to flourish. Instead it may kill it.[136] And the punitive ordering clauses and regulatory overreach proposed in the Initial Order will only serve to hasten the demise. As has already been stated once, regulatory actions and inactions have real-world consequences. The consequences of the Initial Order could hardly be worse.

## IV. RECOMMENDED FINDINGS OF FACT

*81* Based on the foregoing challenges, discussion, and citations, Shuttle Express recommends that the Initial Order's findings of fact be revised and extended as follows:[137]

[1-9, no changes]

(10) In the two years prior to the date Speedishuttle's Complaint was filed, Shuttle Express ~~used independent contractors to provide auto transportation service~~referred passengers who had previously reserved auto transportation service to limousine carriers licensed and regulated by the DOL. O~~o~~n 35,351 occasions passengers accepted such offers and switched to a limousine service at the same fare as their prior reservation.

(11) Shuttle Express enters into agreements with hotel employees to refer hotel customers and assist them to make reservations with Shuttle Express for transportation to the airport~~on behalf of hotel customers~~and, in exchange, receive a 10 percent commission. The fare is collected directly by Shuttle Express, not the hotel or hotel employees. ~~The form used for such agreements is not on file with the Commission.~~

(12) Speedishuttle uses newer Mercedes vans to provide service, and Shuttle Express uses ~~older model~~ Ford vans of various ages, generally up to five years old. The relative average ages of the two fleets is not in the record. To the extent the Mercedes vans are newer it is because Speedishuttle has only been in been in business for just over two years. Speedishuttle has not made any commitment to, and is under no regulatory obligation to, maintain a younger fleet than Shuttle Express.

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[135] PK-3T at 4-5; DJW-1T at 28-29.

[136] DJW-1T at 29.

[137] The original findings are shown, using the numbers in the Initial Order, with proposed changes, additions, and deletions shown with strike-through and underlined text, in a legislative format.

(13) Speedishuttle has a minimal number of employees who speak a language other than English. None of Speedishuttle's employees speak Chinese, Japanese, or Korean, and none of the Speedishuttle employees who staff its walk-up kiosk speak a language other than English.

(14) Speedishuttle ~~uses~~does not know what percentage of its customers are greeted by personal greeters ~~to greet the majority of its customers~~. "Walk-up" passengers, who constitute more than 20% of Speedishuttle's passengers, are not greeted. Wholesale passengers constitute approximately 30-50% of Speedishuttle's passengers and do not have to provide their flight information to Speedishshuttle, in which case they are not greeted. Combined, more than 20% and up to 50% or more of Speedishshuttle's passengers are not greeted.

(15) Speedishuttle has installed working SpeediTV and WiFi in all of its vehicles. Speedishshuttle does not know if any of its passengers, or how many, watch, use, or are attracted by these features.

(16) The customers Speedishuttle serves through its wholesale travel contracts are primarily tourists. All of the passengers booked through wholesale agents were, still are, or could be served by Shuttle Express. Shuttle Express has always served and continues to serve tourists.

(17) Speedishuttle made representations at the Application hearing that it would not provide walk-up service. At the time it commenced service in 2015 or shortly thereafter it offered and provided walk-up service to airline passengers arriving at SeaTac who had not made prior reservations with Speedishuttle for ground transportation service. "Walk-up" passengers now constitute more than 20% of Speedishuttle's passengers and were previously served by, and could still be served by Shuttle Express.

(18) ~~Speedishuttle only uses vehicles owned by the company. Speedishuttle's vehicles are only driven by Speedishuttle employees.~~ [Immaterial.]

(19) ~~Shuttle Express uses non company vehicles driven by non-employees to provide service.~~ [Immaterial.]

(20) Shuttle Express combines its scheduled service with its door-to-door service pursuant to and as disclosed in its approved tariff. The combination does not cause Shuttle Express to fail to adhere to its published schedules and often reduces the wait time for door-to-door passengers.

(21) ~~On average, Shuttle Express passengers experience longer wait times for departure than~~ Speedishuttle~~'s~~ does not track or know what wait times its passengers ~~do~~experience. Speedishuttle does know that it has not been able to meet the 20 minute "guarantee" that it offered in its application for authority.

(22) Only a single trip in the record raised the issue of whether Shuttle Express makes stops on its scheduled routes that are not listed as flag stops in the company's tariff. The trip was one taken by Mr. Roemer. The stop at issue was a door-to-door stop, not a scheduled stop, which is why it was not listed as a flag stop in the schedule.

(23) Shuttle Express ~~made false representations at~~truthfully represented at the Application hearing that it had ceased using independent contractors to provide auto transportation services regulated by the Commission.

(24) Shuttle Express has ~~consistently~~ at times prior to 2007 relied on independent contractors to supplement approximately 5 percent of its operations. After 2007, Shuttle Express referred passengers who had previously requested auto transportation services to independent limousine carriers licensed and regulated by the DOL. Since 2012, Shuttle Express has only referred single persons or parties with prior auto transportation reservations to limousine carriers.~~, and did so for more than a decade in violation of Commission rules and orders.~~

(25) Shuttle Express's share ride trips bec~~a~~ome unprofitable ~~at a passenger volume of 3.5~~in 2016, in material part because passengers who would have previously ridden on Shuttle Express instead rode on Speedishuttle.~~ and~~ Speedishuttle's trips ~~become~~ started as unprofitable ~~at a passenger volume of 4.0~~in 2015 and remained unprofitable throughout 2015, 2016, and 2017 to the date of the hearing. Based on current operations of the two carriers, neither Shuttle Express nor Speedishuttle can become profitable without curtailing their service, such as by serving only hotels, cruise terminals, and core urban areas, or by reducing service quality, such as longer wait times or no service during off-peak hours.

(26) Speedishuttle's passenger count increased from 2015 to 2016 by approximately 39,000 passengers. In the first full year of Speedishuttle's operations, Shuttle Express's share ride passenger count decreased by approximately 45,000 reservations and revenues declined by about $1.1 million, in material part because passengers who would have previously ridden on Shuttle Express instead rode on Speedishuttle.

(27) ~~Shuttle Express earns an average of $69 per trip, and Speedishuttle earns an average of $67.60 per trip.~~ Speedishuttle lost $0.66 per dollar of revenue in its first full year of operation. In the next five months of operation in the summer months of 2016, which are generally the most profitable months for airporters, it lost more than $0.26 per dollar of revenue on a pre-tax basis. Speedishuttle did not make available or introduce any more current data for its first 17 months of operations. Although Speedishuttle claimed it had a plan, it would not provide any details of any plan it had to become profitable in the future,

(28) Speedishuttle has not provided service throughout its authorized territory. Its higher prices to suburban and rural parts of King County tend to discourage passengers to and from those areas from using Speedishuttle.

(29) Shuttle Express currently provides service throughout its authorized territory.

(30). The entry of Speedishuttle into the share ride market in King County has not caused any increase in the number of passengers using a share ride service to or from SeaTac Airport. The overall number of passengers has continued to decline at approximately the same rate as before Speedishuttle entered the market.

(31). The entry of Speedishuttle into the share ride market in King County has not provided new service to any material number of passengers that were previously unserved by Shuttle Express. Most or all of the passengers served by Speedishuttle would have or could have been served by Shuttle Express if Speedishuttle were not operating.

## V. RECOMMENDED CONCLUSIONS OF LAW

*82* Based on the foregoing challenges, discussion, and citations, Shuttle Express recommends that the Initial Order's conclusions of law be revised and extended as follows:[138]

(1) Shuttle Express's referrals of single persons or multiple persons travelling together in a single party a total of 35,351 times to limousine carriers was not transportation that is under the jurisdiction of the Commission and therefore did not violate~~d~~ WAC 480-30-213, even though those carriers are ~~each time it used an~~ independent contractor~~s to provide auto transportation service in the two years preceding Speedishuttle's Complaint, a total of 35,351 times~~.

(2) Shuttle Express's payments of commissions to hotel personnel for referral of passengers who pay Shuttle Express directly for their transportation, even with the assistance of the hotel personnel, does not make the hotel personnel ~~'s failure to file with the Commission its~~ ticket agents for Shuttle Express and therefor the commission agreement form need not be filed with the Commission pursuant to ~~violates~~ WAC 480-30-391.

(3) Shuttle Express should ~~be required to file its ticket agent agreement form for approval within 30 days of the effective date of this Order.~~ continue to file agreement forms for person or entities who actually collect the fare from a passenger and remit it to Shuttle Express, in whole or in part.

(4) Speedishuttle's ~~luxury vehicles, personal greeters,~~ SpeediTV and Wi-Fi~~, wholesale travel contracts, and walk-up service~~ are consistent with the business model previously approved by the Commission, but are not sufficient to constitute a different service consistent with the requirements and limitations of RCW 81.68.040.

(5) Speedishuttle's failure to provide personal greeters to all or most passengers, solicitation of and service to airline passengers arriving at the airport who have not previously made reservations, and failure to implement multilingual staffing is not consistent with the business model previously approved by the Commission.

(6) Speedishuttle's service, as has been and is being provided, is not required by the public convenience and necessity. The service must be materially different from that of Shuttle Express and serve at least some material number of previously unserved passengers in order to be required by the public convenience and necessity as required by RCW 81.68.040. ~~exclusive use~~

[138] The original conclusions are shown, using the numbers in the Initial Order, with proposed changes, additions, and deletions shown with strike-through and underlined text, in a legislative format.

~~of company-owned vehicles driven only by company employees further distinguishes its service from the service that Shuttle Express provides.~~

(7) ~~Speedishuttle's provision of only door-to-door, non-combined service further distinguishes its service from the service that Shuttle Express provides.~~

(8) Pursuant to WAC 480-30-140(2)(b), the operations of Speedishuttle as presently constituted, do not provide~~s~~ different service than Shuttle Express~~Express provides based on the totality of its service features~~ consistent with the requirements and limitations of RCW 81.68.040.

(9) Pursuant to WAC 480-30-140(2)(c), Shuttle Express ~~does not~~ reasonably serves and has served the market.

(10) Pursuant to WAC 480-30-140(2)(a), Shuttle Express ~~does not~~ provides and has provided service to the full extent of its authority.

(11) If Shuttle Express~~'s failure~~ had made a scheduled service stop at a location that were not ~~to list all~~ listed as a flag stops on its scheduled routes in its tariff, that would violate~~s~~ WAC 480-30-391, but there is no evidence in the record that that has ever occurred. ~~Shuttle Express should be directed to cease and desist its practice of stopping at unlisted flag stops.~~

(12) ~~Due to its failure to reasonably expand and improve its service; its failure to provide service in a manner that meets advertised or posted schedules; and its extensive history of noncompliance, which constitutes a predictive pattern of behavior,~~ Shuttle Express is ~~not~~ providing, and will ~~not~~ provide, service to the Commission's satisfaction pursuant to RCW 81.68.040 and WAC 480-30-140(3).

(13) ~~Shuttle Express should be penalized $120,000 for 35,351 violations of WAC 480-30-213. The $120,000 penalty should be due~~Speedishuttle should submit a proposed tariff revisions consistent with the discussion and remedies in this order and Order Nos. 02 and 04, within 30 days of the effective date of this Order, that: a) prohibits the transportation of persons who have not previously made advance reservations, b) requires refunds automatically when feasible, and otherwise upon request, for every arriving airport passenger who is not greeted in baggage claim, and c) provided a mechanism for reserved passengers to request telephone or greeter assistance in a language other than English.

(14) ~~Shuttle Express~~ Speedishuttle should be required to complete and submit a compliance plan for Staff's review and approval, as described in paragraph _____~~149~~, above, for prominent notice of the right to a refund for no greeter—in vehicles, to callers, and on the Speedishuttle website and mobile apps—and for the reasonably adequate staffing of multi-lingual greeters and call center employees, within 90 days of the effective date of this Order.

## VI. CONCLUSION AND REMEDIES REQUESTED

*83* The ultimate remedy that Shuttle Express seeks is essentially the same as what it sought in its post-hearing briefs. First, the Commission should reject the Initial Order in its entirety and replace it. It is too flawed in too many places to be simply revised. The new Commission order should adopt the revised findings of fact and conclusions of law, as shown above. They are all well-supported by the record and the law, for the reasons discussed in this Petition and countless other reasons that cannot possibly be fit into the applicable 60 page limit. Viewed properly, the record developed by Shuttle Express was overwhelming and cried out for the relief sought. A rewrite is essential to uphold the law and serve the public interest.

*84* Next, based on all the corrections, and including a new discussion that is consistent with the overwhelming weight of evidence, the order should provide the following relief:

a. Dismiss the complaint in Docket TC-161257 with prejudice;

b. Assess no fines or penalties against Shuttle Express;

c. Require no changes in the operations or filings of Shuttle Express;

d. Amend the Speedishuttle auto transportation certificate to more closely hew to the services originally represented, including restricting service to prearranged reservations and require greeters;

e. Order Speedishuttle to cease and desist from providing "walk-up" service to or from SeaTac Airport;

f. Order Speedishuttle to complete and submit to staff for review and approval a compliance plan consistent with the order within 60 days of the order, including a verifiable statistical analysis of greeter needs and staffing, a plan to meet all customers with a greeter or issue full refunds automatically or at least upon request, a

plan to advertise and notify passengers of their refund rights on calls, in vans, on websites, and on mobile apps; and a plan to offer and provide multilingual greeter and reservation call service when indicated or requested by a passenger or potential passenger on the phone or at the airport;

g. Order Speedishuttle to complete and submit to staff for review and approval a proposed revised tariff along with the foregoing compliance plan, within 60 days of the order, that will guarantee all passengers arriving at SeaTac Airport a personal greeter, or will issue them full refunds automatically in most cases and, if and when not, will provide refunds upon request; or

h. If the foregoing is viewed as insufficient to fully protect the public interest or as infeasible in some regard, order that the Speedishuttle auto transportation certificate be cancelled within 30 days after entry of the order.

Respectfully submitted, this 15th day of September, 2017.

/s/

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*Counsel for Shuttle Express, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I electronically served via email the foregoing Initial Post-Hearing Brief on behalf of Shuttle Express, Inc. to:

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|---|---|
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Dated at Tysons, Virginia this 15th day of September, 2017.

/s/
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