BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

SPEEDISHUTTLE'S ANSWER TO PETITION FOR ADMINISTRATIVE REVIEW OF SHUTTLE EXPRESS, INC.

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1 Pursuant to WAC 480-07-825(4), Speedishuttle Washington, LLC d/b/a Speedishuttle Seattle ("Speedishuttle") files the instant Answer to the Petition for Administrative Review of Shuttle Express, Inc.

I. INTRODUCTION

2 Shuttle Express unabashedly sought this rehearing and complaint proceeding seeking to eliminate competition from the shared-ride airport ground transportation market, requesting that Speedishuttle's certificate be cancelled due to alleged misrepresentations during the brief adjudicative proceeding on Speedishuttle's application on January 12, 2015. Now, its strategy appears to have dramatically backfired, resulting in an Initial Order finding that Shuttle Express failed to serve to the Commission's satisfaction and proposing issuance of a material fine.[1] In its Petition, Shuttle Express attacks the Administrative Law Judge ("ALJ") as well as every decision of the Commission with which Shuttle Express does not agree, even including historical decisions involving Shuttle Express from prior closed and unappealed dockets.[2]

3 Shuttle Express' continuing refusal to accept various ALJ rulings and final orders of the Commission demonstrate, on a fundamental level, that it is unwilling to abide by Commission rules unless those rules align with Shuttle Express' particular business interests. That transparent business philosophy is established in the record through its innumerable rule violations over the years, including those which have now been revealed in relation to Speedishuttle's consolidated complaint. Thus, contrary to Shuttle Express unrelenting attempts to distort the record and posit implausible justifications for its established misdeeds, the Commission is left with no alternative

[1] Albeit a fine less than the total profit Shuttle Express reaped from its rule violations. *See* discussion in footnote, *infra*.

[2] *See, e.g.*, Petition for Review, fn. 18, arguing against the findings and conclusions of Order 04, Docket TC-120323. (Mar. 2014).

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but to affirm the Initial Order in finding that Shuttle Express has not and will not serve to its satisfaction

4 And, despite Shuttle Express' now familiar complaints regarding the scope of this proceeding and the discovery it was permitted, the Commission early on correctly limited the scope of the complaint and rehearing by Order 08. Order 08, as amended by Order 17, prescribed that the Commission would review whether Speedishuttle is providing the service it is authorized to provide, whether Speedishuttle's pricing is predatory, and whether Shuttle Express has failed to serve to the satisfaction of the Commission. As consolidated with Speedishuttle's Complaint, the Commission must also determine whether Shuttle Express violated WAC 480-30-213 by its use of independent contractors and non-owned vehicles, as well as whether it violated Washington law and Commission rule by payments of commissions to hotel concierges without filing an approved agreement with the Commission.

5 Order 08 also expressly indicated what would not be considered in this proceeding: "[t]he Commission will not alter its conclusion that the business model Speedishuttle described in its application and during the evidentiary hearings represents a different service than the service Shuttle Express provides."[3] Yet, for all of its brash, shop-worn allegations in its Petition for Rehearing that Speedishuttle lied to the Commission, after Speedishuttle demonstrated that it is indeed offering service in Mercedes vans, provides Wi-Fi and Speedishuttle TV", a web-based reservation system in Asian languages, and greets its passengers, Shuttle Express has now essentially jettisoned those core assertions in favor of an unequivocal frontal attack on Order 04's qualitative findings about Speedishuttle's business model with which it continues to fervently disagree. This about-face in tactics proves what this rehearing was engineered by

[3] Order 08, ¶ 24, Docket TC-143691 (Sept. 2016).

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Shuttle Express to be all along---an untimely, groundless appeal. Because the Commission has been consistent in its rejection of that approach, it should also now completely reject Shuttle Express' retrenched challenges to Final Order 04's findings in their entirety.

6 During this unusually protracted litigation, the ALJ reviewed hundreds of pages of prefiled testimony (much of which had to be separated out or otherwise extracted through two motions in limine filed by Speedishuttle after Shuttle Express increasingly refused to abide by Order 08's limitations on the scope of this proceeding), and listened to two days of testimony, ultimately concluding that Speedishuttle's service as actually implemented was not the same as Shuttle Express, that Shuttle Express had indeed violated Commission rules – repeatedly—and that it therefore did not and would not serve to the Commission's satisfaction, and that Shuttle Express failed to establish a prima facie case of predatory pricing by Speedishuttle. Shuttle Express now challenges these findings in toto, but in doing so, critically fails to demonstrate through rational argument or legal authority that the Administrative Law Judge erred in any of her findings of fact or conclusions of law.[4] As a consequence, the Commission should fully affirm the Initial Order.

[4] Shuttle Express also attempts to raise non-specific contentions of error by claiming in footnote 4 of the Petition for Review that it incorporates its post-hearing briefs by reference and that it does not waive its position on any issue supported by the record. Further, in footnote 6 of the Petition for Review, Shuttle Express claims "it is difficult to strictly apply this rule to the petition, because essentially the entire discussion, analysis and findings of the Initial Order are in error… The Commission should liberally construe this pleading, if necessary." However, passing treatment of an issue or lack of reasoned argument is insufficient to merit consideration upon appellate review. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration"). Further, by attempting to incorporate its entire post-hearing briefs, Shuttle Express would exceed the 60 page limit set forth in WAC 480-07-825(3). Thus, Shuttle Express preserves nothing by its "incorporation by reference." *US West Communs., Inc. v. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 111-12, 949 P.2d 1337, (1997)(holding that attempting to incorporate trial memorandum by reference in an appellate brief violates the rules of appellate procedure because it causes the brief to exceed page limitations).

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II. ARGUMENT

A. Shuttle Express' Striking and Persistent Credibility Issues Support the Initial Order's Findings

7 While not discussed in great detail in the Initial Order, or set forth in specific findings of fact, the issue that truly should dominate the Commission's review of the Initial Order at this stage is Shuttle Express' utter lack of credibility in this proceeding. Contrary to Shuttle Express' blustering assertion that "the record developed by Shuttle Express was overwhelming and cried out for the relief sought,"[5] nearly every one of Shuttle Express' factual assertions and legal arguments have proven to be nothing more than a contortion or distortion of the truth, starkly revealing the transparent motives of the party asserting them. While the Commission will necessarily review the record as a whole, because it did not have a front-row seat on the tactics of Shuttle Express in this proceeding,[6] some further overview may prove instructive.[7]

[5] Petition for Review, ¶ 83.

[6] For example, the post-hearing briefs and the Initial Order do not address how at the hearing, Shuttle Express' defensive legal theories were very much in a state of flux. This was so much the case that Shuttle Express on the record even stated its positions on its use of independent contractors were "evolving" and it even claimed that use of independent contractors to provide shared ride, multi-stop service would be legal because there is a single contract between Shuttle Express and the limousine carrier. Kajanoff, TR. 551: 3 – 556: 7. One such "evolving" theory even directly rejects the unambiguous findings and conclusions of Order 04, Docket TC-120323: ("Shuttle Express does not agree with that holding, but decided not to appeal it out of a desire to work with the Commission cooperatively and move forward with business," Petition for Review, ¶15, fn. 18), which found using independent contractors evades Commission regulatory investigations, and thus, rather than being a mere technical violation, presented serious safety concerns for the Commission.

[7] Significant examples of credibility challenges in its legal arguments or theorizing are found in Shuttle Express' arguments regarding the so-called misrepresentations of Speedishuttle (which Shuttle Express attempted to establish through nothing more than smoke and mirrors). The first is the mythical premise that Speedishuttle pledged to serve the unserved. *See* Marks, TR. 548. The ALJ stated clearly on the record "[t]hat's not anywhere in the record up to this point. Speedishuttle never said it was going to just stick to serving a specific subset. It was the Commission that brought that up in the orders." Wood, TR. 360: 15 – 25. Second, and related, is the claim that Speedishuttle was in effect "a wolf in sheep's clothing," always intending to offer a "mirror image," door-to-door service to Shuttle Express all along. Shuttle Express claimed to have established this latter apocryphal premise by pointing to multiple contacts between the Port of Seattle and Speedishuttle in spring, 2015 after its certificate was granted and which related to signage and kiosk location, appearance, and configuration. As previously argued in Speedishuttle's Post-Hearing Brief, by either failing to connect the dots on these types of bold assertions or when confronted on these points, relying on concocted or "whole cloth" explanations, the results are symptomatic of Shuttle Express' complete credibility lapses in this proceeding.

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i. Shuttle Express' Witnesses Uniformly Mischaracterized Evidence and Provided Inaccurate Testimony

8 As mentioned, assessing the credibility of the various witnesses is crucial to understanding the appropriate weight given to their testimony by the Administrative Law Judge, whose assessment of credibility must be statutorily afforded due regard by the Commission when reviewing the findings of fact made in an Initial Order 19.[8] Shuttle Express' testimony mostly proffered broad conclusions that mischaracterize the very information on which they are purported to be founded, or are simply false. Its witnesses also attempted repeatedly to evade questions on cross-examination, answering something other than what was asked or feigning to misunderstand the question. Considering the frequency and pervasiveness of these deficiencies in testimony, the ALJ would have been free to disregard any unsupported statement made by Shuttle Express' witnesses.

9 One of numerous testimonial examples of Shuttle Express' lack of credibility may be found in the prefiled testimony of Wesley A. Marks. There, Marks testified under oath that Speedishuttle claimed to be clueless about whether its Wi-Fi even worked, stating "[w]e even asked them for documents to show if the Wi-Fi was even turned on or working properly in their vans. Again, they denied any knowledge of the operability or real-world functioning of the Wi-Fi service."[9] Yet, as Jack Roemer pointed out, Shuttle Express never asked if Wi-Fi was properly working and

[8] RCW 34.05.464(4), The Commission will generally give deference to the Administrative Law Judge's credibility findings. Order M.V. No. 137697, *In re John W. Zuber d/b/a Zuber Construction* (May 1988). The presiding officer is in the best position to observe the demeanor of the witness – an essential element in determining credibility…The issue of the witness's credulity was not summarily dealt with, but shows a reasoned evaluation of the demeanor and the evidence presented. The Commission cannot, on this record, say that the presiding officer erred in evaluating the credibility of this witness. Order SBC No. 468, *In re Belairco, Inc,* (May 1990) at p. 7.

[9] Marks, WAM-1T.

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Speedishuttle never denied knowledge of the operability or real-world functioning of the Wi-Fi service.[10]

10 A review of Shuttle Express' data requests that did address Wi-Fi will demonstrate Marks' testimony was nothing more than an attempt to support an unfounded allegation through creative re-interpretation if not intentional misdirection, as they simply fail to ask if the Wi-Fi worked, and the responses clearly provide that Wi-Fi was installed on each van.[11]

11 Paul Kajanoff's testimony can similarly be correctly categorized as dubious and as frequently evasive. In addition to contradicting his testimony at the Speedishuttle application hearing regarding Shuttle Express' use of independent contractors, Kajanoff essentially had to admit he based some of his conclusions on information which was simply incapable of supporting the conclusion offered.

12 For example, Kajanoff claimed in his pre-filed testimony that the data showed Speedishuttle was not attracting new passenger types.[12] Yet, upon cross-examination, Kajanoff admitted Shuttle Express had absolutely no information which supported that conclusion.

> Q Now, you state that SpeediShuttle is not attracting any new demographic at all. What information do you have about the actual people who ride on SpeediShuttle to know what demographics they have?
> A They have not provided any. I have no information. [13]

13 Additionally, in order to apparently support his bald allegation that Speedishuttle was not paying minimum wage to its employees, Kajanoff testified under oath that Speedishuttle was a *franchisee* of the Go Group.[14] In response, Jack Roemer testified that not only was this false, but because Jimy Sherrell is a Board Member of Go Group he surely could have provided proof to

[10] Roemer, HJR-1T 14: 13- 16: 6.
[11] HJR-10, HJR-14.
[12] Kajanoff, TR. 406: 12 – 21.
[13] *Id.* 406: 22 – 407: 1.
[14] Kajanoff, TR. 421: 3 – 9.

back up the allegation had it existed.[15] After having received Roemer's responsive prefiled testimony, Kajanoff modulated his claim upon cross-examination, testifying Speedishuttle instead was a *licensee* of Go Group.[16] While the shift from franchisee to licensee may seem casual and inconsequential, in the context of Seattle's minimum wage law, the difference is monumental. Pursuant to Seattle Municipal Code 14.19 et seq., the minimum wage an employer must pay depends on the size of the employer. Franchisees must use the total of employees within the network of franchises in determining its size.[17] No such requirement exists for mere licensees. Thus, Kajanoff did not just change terminology; instead, he effectively admitted his entire bizarre minimum wage allegation was baseless.

14 Kajanoff also repeatedly attempted to evade questions which ultimately demonstrated that Shuttle Express' claimed operating losses in 2016 excluded significant revenue it received from its auto transportation passengers who were outsourced to limousine drivers (which, in turn, raised questions of whether it truly suffered a financial loss):

> Q Now, in your revenues that you report to the Commission, I understand that you exclude the fares you received from independent contractors who transport passengers that originally reserved auto transportation or your share-ride service, correct?
> A They only report auto transportation, that is correct.
> Q Okay. When you are talking about the loss that you incurred in 2016, are you also only talking about door-to-door shared ride in King County?
> A I'm talking about our certificate tariffed work.
> Q So you're talking about all tariffed work? What does "tariffed work" mean?
> A Everything under our certificate.
> Q So that includes charter?
> A No.
> Q Okay. It includes scheduled as well, correct?
> A Auto transportation, correct.

[15] Roemer, HJR-1T. 48: 9 – 15.
[16] Kajanoff, TR. 420: 21 – 421: 6.
[17] SMC 14.19.010. "'Schedule 1 employer' means all employers that employ more than 500 employees, regardless of where those employees are employed, and all franchisees associated with a franchisor or a network of franchises with franchisees that employ more than 500 employees in aggregate."

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Q You actually earned positive revenue from those trips made by independent contractors, correct?
A I don't understand the question. What are you asking?
Q Okay. To be clear, there are passengers who reserved auto transportation service who were placed in town cars, and you paid the drivers or independent contractors of those town cars or limousines a fee, correct?
A Yes.
Q Okay. Your net fees or your net fares exceeded what you paid the independent contractors for that transportation in 2016, correct?
A You're asking me about a line of business that is -- I'm confused.
JUDGE PEARSON: Let me step in here because I am interested in knowing the answer to this question. Those rides that were the subject of Staff's investigation that originate as auto transportation reservations Shuttle Express gives to an independent contractor, do you still make money off of those or do you lose money off of those?
THE WITNESS: Can I explain it?
JUDGE PEARSON: Yes.
THE WITNESS: Thank you. So the auto transportation work under our tariff is subdivided between that and everything else. I did not subdivide the independent contractor work.
JUDGE PEARSON: I understand that. I'm asking about individual trips. When someone makes a reservation for auto trans, and then you -- and I'm using your words -- quote, "convert it" to the independent contractor trip, and you send a limo to get them, you collect a fare from the customer, do you retain a portion of that fare or does it all go to the independent contractor?
THE WITNESS: Yes, we retain a portion. Yes.
BY MR. FASSBURG:
Q That portion that you've retained, is that included within the numbers you used to calculate your loss?
A No.
Q Do you have here today what the number was for all retained fares for independent contractors who transported passengers -- let me rephrase. The subject we're talking about, these trips, for 2016 do you have the total number of the amount that you retained when you paid the independent contractors?
A Yes.
Q What is that amount?
A I don't know off the top of my head. What specifically are you asking?
JUDGE PEARSON: I guess my question would be what's the percentage that you retained? What percentage do you pay to the independent contractor and what percentage do you retain for the trip fare?
THE WITNESS: On average for everything that we do with an independent contractor?
JUDGE PEARSON: No, for the trips that originate as auto trans and then you, quote-unquote "convert" them to an independent contractor. We're speaking specifically about the violations alleged in Staff's investigation. So those trips,

those 35,000-some-odd trips, on average, what percent do you retain from that fare versus what percent is paid to the independent contractor?
THE WITNESS: Roughly 11-ish.[18]

15 Other examples of similar inaccuracies and overreaches are strewn throughout Shuttle Express' pre-filed testimony. Ironically, these examples stand in stark contrast to Shuttle Express' representation on review that the body of evidence submitted by it and rejected by the ALJ was "detailed, specific, and verifiable" and exemplifies the broad brush by which it presented its case and by which it consistently failed to demonstrate/establish the accuracy of in its showing.

ii. Credibility is also Wanting in Shuttle Express' Theories of the Law and Renditions of this Record

16 But these pervasive credibility issues alone do not end with the assessment of its witnesses' testimony. "Credibility challenges" have characterized Shuttle Express' litigation posture throughout this long proceeding. Indeed, credibility concerns also arise in Shuttle Express' complaints about the scope of authorized discovery[19] and in its overall legal reasoning regarding this case.

17 For example, the Administrative Law Judge accurately observed in footnote 23 of the Initial Order that Shuttle Express had mischaracterized the discussion in recent Order 01 of Docket TC-160819 regarding the jurisdiction of the Commission over limousine operations as recognizing that the Commission "cannot claw back jurisdiction the legislature has taken away," when, in

[18] Kajanoff, TR. 416:22 to 420:4. Note, the total fares paid for the 40,727 trips identified by Shuttle Express for the period January 16, 2014 – September 29, 2016 ($2,047,963.15), minus the portion paid to independent contractors ($1,863,300.29), left Shuttle Express with a profit which actually exceeded the total fine levied in the Initial order. *See*, Exh. DP-3 which sets forth the total fare and payments to ICs for trips delegated to independent contractors.

[19] These discovery complaints were not addressed as contentions of error and are thus waived. WAC 480-07-825(3), (providing that Petitions for Administrative Review must "clearly identify the nature of each challenge to the initial order, the evidence, law or other authority the petitioner relies upon to support the challenge and state the remedy the petitioner seeks." "Petitions for review of initial orders must be specific.") To the extent the Petition for Review were to be liberally construed here to challenge any discovery rulings, Speedishuttle is unable to respond as a result of the lack of specific arguments.

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reality, the Commission merely acknowledged in that Order that it had no power to usurp the separate functions of the DOL or Port of Seattle regarding limousine carriers and chauffeurs.

18 This is only the tip of the iceberg on contortions of source materials cited by Shuttle Express. For example, to be discussed in greater detail below, in order to falsely support its "qualified monopoly" mantra on auto transportation entry standards, Shuttle Express argues in its Post-Hearing Reply Brief that the statutory entry standards for auto transportation services which are contained in RCW 81.68.040 are more akin to the commercial ferry entry standards in RCW 81.84.020 than they are to the solid waste entry standards which the Commission has ruled do not provide an exclusive monopoly.[20] Yet, in reality, the statutory entry language for contested auto transportation and solid waste applications read nearly identically, while the entry standards for ferry companies are far more stringent and hardly analogous to auto transportation statutory provisions in RCW 81.68.040.

19 Considering the cursory and conclusory nature of the vast majority of Shuttle Express' case, these constant inconsistencies, meanderings, and inaccuracies (others of which are also explored by Appendix)[21] undoubtedly weighed heavily against Shuttle Express in attributing the appropriate weight to be given its evidentiary presentation in the Initial Order. As a result, the Commission should be trepidatious with respect to Shuttle Express arguments here and examine carefully the logic and support behind any of Shuttle Express' broad allegations (many of which are new) before giving them any weight, whatsoever.

[20] *see*, Order 10, *In re Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington*, TG-120033 (July 2013).

[21] Additional examples are included in Appendix 1 and incorporated by reference as if set forth herein (but are included for purposes of page count limitations).

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B. Response to Specific Citations of Error on Petition for Administrative Review by Shuttle Express

i. Use of Independent Contractors in Non-Owned Vehicles Violates WAC 480-30-213

20 Shuttle Express boldly defends as its first contention of error on Petition that its use of independent contractors was not unlawful.[22] In arguing this point, Shuttle Express essentially makes three claims: (1) the UTC lacks jurisdiction over transportation provided by limousine operators; (2) there is no evidence Shuttle Express operates, manages or controls the transportation provided by the limousines, nor does Shuttle Express own limousines; and (3) the Commission tacitly authorized Shuttle Express' use of independent contractors. However, each of these contentions is wholly unsupportable. To begin, a historical recap of some of Shuttle Express' chronology in misleading the Commission about its use of independent contractors demonstrates that Shuttle Express' Petition for Review is in reality a loud pronouncement that it need not learn from past transgressions, mistakes and missteps, and cannot be told by this Commission to follow rules.

a. Credibility Collides with Decades'-Long use of Independent Contractors

21 In 2008, almost a full decade ago, the Commission Staff initiated an enforcement proceeding against Shuttle Express alleging it had used independent contractors in violation of WAC 480-30-213.[23] In that action, Shuttle Express argued that its independent contractors were not independent contractors, but were in fact Shuttle Express employees and therefore it did not violate WAC 480-30-213. Shuttle Express nonetheless subsequently was forced to admit its independent contractor program violated WAC 480-30-213, paid a fine, claimed it had discontinued its independent contractor program and signed a consent agreement to that effect.

[22] Petition for Review, ¶ 7.
[23] WAM-44X (Order 01, Docket TC-072228).

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22 In 2012, the Commission Staff initiated another enforcement proceeding against Shuttle Express alleging it had once again used independent contractors in non-owned vehicles in violation of WAC 480-30-213.[24] For its defense, Shuttle Express there rather astonishingly argued that it had not "operated" the vehicles driven by independent contractors because the drivers were not its employees.[25] Shuttle Express further contended its use of limousine carriers to provide "rescue service" did not violate WAC 480-30-213 because the services were lawful under Department of Licensing ("DOL") regulation of limousine operators which require limousine operators to operate on a single contract on a pre-arranged basis.[26]

23 Despite this reformulated defense, Shuttle Express also acknowledged it was going to seek an exemption from the auto transportation rules to permit its continued use of rescue service and "[i]n return, Shuttle Express commits to being more proactive in seeking regulatory guidance and permissions when it modifies its operations and specifically will review **any** independent contractor operations or operational changes whatsoever with the Commission in advance."[27] The Commission ultimately disagreed with Shuttle Express, entering a final order finding Shuttle Express' use of independent contractors to be a willful violation by which it evaded the UTC's safety obligations. "The problem is not, as Mr. Sherrell stated, that the Commission does not know how to regulate auto transportation services… [t]he problem is Shuttle Express' refusal to be regulated like every other public service company and to comply with the law in its entirety, not just the provisions the Company chooses to follow."[28] This subjective "pick and choose"

[24] WAM-29X (Order 04, Docket TC-120323).
[25] WAM-28X (Petition for Administrative Review, Docket TC-120323, ¶¶ 11 – 23.
[26] WAM-28X, ¶¶ 24-27.
[27] *Id.* ¶ 85 (emphasis in original).
[28] WAM-29X, Order 04, ¶33-34, Docket TC-120323.

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approach to regulatory compliance by Shuttle Express was thus unequivocally rejected by the Commission in its Final Order yet characterizes its compliance posture to this day.

24 Next, in January 2015, Paul Kajanoff, President of Shuttle Express, testified under oath at the brief adjudicative proceeding on Speedishuttle's application in Docket TC-143691, that Shuttle Express had ceased its independent contractor program other than during a temporary exemption period granted Shuttle Express in 2013.[29] Kajanoff's claim that Shuttle Express was no longer using independent contractors was doubled down upon in the sworn declaration of Wesley A. Marks, when Shuttle Express again sought a temporary waiver from WAC 480-30-213 in Docket TC-160819 in September, 2016, while this case was pending. In that Declaration, Mr. Marks made repeated statements as to why Shuttle Express needed an exemption from the prohibition on the use of independent contractors, including the justification that: "[i]n order to be able to compete effectively with Uber, Wingz and Lyft, Shuttle Express seeks to use its independent contractors and vehicles in addition to its employee drivers and company owned vehicles to supplement and increase the service level and experience of the travelling public."[30] Finally, in this present proceeding, when Speedishuttle served Shuttle Express with a data request regarding its use of independent contractors, Shuttle Express falsely denied having used them subsequent to January 2014 (its subsequent exemption in 2016 notwithstanding).[31]

25 Now that it has been conclusively revealed through Speedishuttle's Complaint that Shuttle Express never actually ceased the use of independent contractors, Shuttle Express deflects that reality by announcing in its Petition for Administrative Review (and despite its request for

[29] WAM-50X,

[30] WAM-48X, Declaration of Wesley A. Marks, ¶ 9.

[31] HJR-19. While Shuttle Express struggles mightily to explain its response here as being accurate, blaming instead the framing of the question, the question clearly asked about the use of "'rescue service' or service to an airport passenger subject to WUTC jurisdiction by an independent contractor," thus Shuttle Express' familiar refrain to explain away its disingenuous data request responses concealing its ongoing use of independent contractors should carry no weight with the Commission. Accord: Pratt, TR. 869, 870.

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exemption in 2016), that the Commission actually has no jurisdiction over trips involving passengers who reserve auto transportation service but who are instead transported via limousine.[32] It asserts that by its "referral" of passengers to limousine operators, Shuttle Express is not "using" independent contractors through exertion of control,[33] and also that the Commission implicitly and explicitly authorized Shuttle Express to transport shared ride passengers on over 40,000 trips via independent contractors, in Docket TC-120323.[34] These machinations of statutory and regulatory terminology fly in the face of the broad prohibitions consistently discussed by the Commission in each of the prior enforcement proceedings against Shuttle Express.

26 The almost never-ending cycle of disingenuous representations by Shuttle Express in sworn declarations, discovery responses and live testimony that it would stop using independent contractors in violation of Commission rules while simultaneously concealing their on-going use, and then fashioning a novel retroactive legal argument as to why the practice was acceptable after it is caught red-handed again, demonstrates that Shuttle Express had absolute knowledge and awareness of the impropriety of its practices, that it actively sought to conceal those practices, and that it only observes rules it unilaterally deems compatible with its business practices, in a classic "self-regulator" posture.

27 Yet, once again, in spite of its well-established history of regulatory non-compliance, Shuttle Express boldly plows ahead on Petition for Administrative Review to assert that a more one-sided and error-filled initial order rejecting these practices could hardly be imagined.[35] It is true that the Initial Order consistently rejects Shuttle Express' petition and complaint premises and, in

[32] Petition for Review, ¶¶ 22-27.
[33] *Id.* ¶ 21-22
[34] *Id.* ¶ 24.
[35] *Id.* ¶ 2.

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its critical findings, concludes that Shuttle Express' rule violations demonstrate it did not and will not serve to the satisfaction of the Commission. But considering that Shuttle Express only attempted to meet its burden of proof in its rehearing and complaint case with its own exaggerated rhetoric, conclusory arguments, misleading descriptions and inaccurate testimony, [36] and by improperly attempting to repeatedly shift the burden of proof to Speedishuttle, while Speedishuttle, in turn, submitted Shuttle Express' own factual admissions to demonstrate Shuttle Express' rule violations (both recurring and new), it can hardly be said the Initial Order was based on "vague, conclusory, and self-serving testimony" as charged by Shuttle Express.[37]

b. **Jurisdiction of the Commission**

28 In attempting to avoid the proposed financial sanction and ultimate legal conclusion that Shuttle Express did not and will not serve to the Commission's satisfaction,[38] Shuttle Express now abruptly announces that the Commission lacks the jurisdiction to regulate transportation provided in limousines vehicles because the legislature supposedly divested the UTC of that regulatory responsibility and shifted it to the Department of Licensing.[39]

29 Shuttle Express presents its arguments on this issue in multiple fashions. While each of the bases asserted by Shuttle Express is incorrect, the inherent invalidity of Shuttle Express'

[36] See, e.g., Shuttle Express' hyperbolic argument that "[w]here the evidence adduced by Shuttle Express was so overwhelming as to be completely unassailable, the Initial Order simply "moved the goalposts" – revising prior Commission orders to make the unassailable facts no longer relevant." Petition for Review, ¶ 3. Shuttle Express never here explains what the evidence was that was "so overwhelming as to be unassailable" or what goalposts were allegedly moved, but its over-the-top descriptions of the "overwhelming" nature of evidentiary showings have been previously rejected by this Commission. *See* Order 04, ¶ 12 Docket TC-120323 ("Shuttle Express' factual argument is equally flawed. The Company claims it 'presented overwhelming evidence that it does not manage the independent contractor's businesses…to the extent that Shuttle Express could be deemed the operator of the rescue rides in this case.' To the contrary, the record evidence demonstrates that Shuttle Express controlled or directed the functioning of the independent contractors in the Company's provisioning of its 'rescue service'"). These types of characterizations only magnify the abject lack of record support for Shuttle Express' alleged proof, underscoring the consistent failure by it to meet its proof burdens throughout this proceeding.

[37] *Id.*

[38] Initial Order, ¶ 190.

[39] Petition for Review, ¶ 8.

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assertion regarding the jurisdiction of the UTC in this case is established by one single fact: as an auto transportation company, Shuttle Express is subject to the jurisdiction of the UTC. Thus, regardless of whether limousine carriers or chauffeurs are engaged in the auto transportation business, when carrying Shuttle Express' auto transportation passengers, Shuttle Express must abide by Commission rules.

30 Contrary to the obfuscations of Shuttle Express, the Commission rule at issue with respect to Shuttle Express' use of independent contractors is simple: when engaging in its auto transportation business (transporting passengers between fixed termini or over a regular route), Shuttle Express may not use independent contractors or non-owned vehicles.[40]

31 Factually, Shuttle Express' violation of this rule is also apparent. Shuttle Express admits the 40,727 trips made by independent contractors at issue were all made to transport passengers who reserved auto transportation service from Shuttle Express and who paid auto transportation fares.[41] Those trips were never cancelled and the fares were never refunded, and instead, Shuttle Express simply paid a third party to transport the passengers on the trip reserved on Shuttle Express. In this scenario, the only justifiable conclusion is that Shuttle Express used an independent contractor and transported passengers on non-owned vehicles in direct violation of WAC 480-30-213.

32 Although this straightforward finding is supported by prior conclusions of the Commission in Docket TC-120323, Shuttle Express now attempts to extricate itself from the jurisdiction of the

[40] Notwithstanding recent rule changes after the record closed in this matter which now permit use of independent contractors when certain safety rules are followed, Shuttle Express was unquestionably subject to the previous rules in existence when it violated them. And to the extent Shuttle Express now improperly attempts to argue its rule violations are vitiated by the subsequent rule change, it should be noted that this record demonstrates Shuttle Express' past use of independent contractors would also violate the new rules, which require safety standards not utilized by Shuttle Express in the past.

[41] Shuttle Express Response to Staff Data Request No. 2, February 3, 2017, Exh. DP-3.

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Commission and its rules through selective parsing of the regulations and the Commission's statutory authority and through misdirection regarding its unrelated limousine services.

33 First, Shuttle Express here argues that the Department of Licensing has exclusive jurisdiction over trips made in limousines based upon the vehicles used and the transportation provided, not on how it was arranged or which entity provided the transportation.[42] Yet, according to RCW 81.68.020, the UTC is charged with regulating companies or persons engaged in the business of operating as a common carrier of any motor-propelled vehicle for the transportation of persons and their baggage between fixed termini or over a regular route for compensation on any public highway in this state. And the express exceptions to the UTC's jurisdiction stated in RCW 81.68.015 do not exclude limousine carriers or chauffeurs from those regulated transportation services. Thus, nothing about the nature of the vehicle being a "limousine" exempts limousine carriers from the Commission's jurisdiction when they provide auto transportation service. The conclusion Shuttle Express demands requires yet another absurd construction of the law.

34 Next, in its continuing effort at deflection, Shuttle Express asserts that it reviewed its limousine operations with Commission Staff who agreed that they did not violate Commission rules.[43] This, however, clearly attempts to muddy the difference between Shuttle Express' pre-arranged limousine service and its use of limousine operators to transport its auto transportation customers. Neither Speedishuttle, the Commission Staff, nor the ALJ allege Shuttle Express is prohibited from booking limousine transportation for customers who desire a limousine service, at Shuttle Express' limousine rates, and then referring that service to an independent contractor limousine carrier. And according to Shuttle Express' Petition for Review, it was apparently *that* service which Commission Staff apparently reviewed and determined to be legal in Docket TC-

[42] Petition for Review, ¶¶ 13-14.
[43] *Id.* ¶ 12.

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120323.[44] Instead, the practice at issue here involves Shuttle Express' reassignment of passengers who reserved auto transportation services, at lower auto transportation rates, who were then transported on vehicles of independent contractors.

c. **"Operating" the Transportation Provided by Independent Contractors**

35 Shuttle Express also erroneously asserts that the record does not support that it controls or directs the function of the independent contractors to provide regulated service, and claims that Staff's case is contradictorily based upon a lack of control.[45] Again, these arguments demonstrate Shuttle Express has never accepted the Commission's Final Order outcome in Docket TC-120323 which any party should not, in this rehearing, be retrying under a classic collateral estoppel approach.

36 In Order 04 in Docket TC-120323, the Commission ruled that it is a "fundamental tenet of regulation that a company receives a certificate of public convenience and necessity ("CPCN") so that the *company* can provide auto transportation service. Commission oversight of a regulated company would be meaningless if that company could unilaterally delegate to another entity part or all of its obligation to serve the public."[46] The Commission went on to reason that to "operate" as used in WAC 480-30-213 is a transitive verb meaning "to control the functioning of."[47]

37 Additionally, in that order, the Commission found that, contrary to Shuttle Express' claims that it presented that proverbial "overwhelming evidence" and does not manage the independent contractor's businesses, the record established that Shuttle Express controlled or directed the

[44] Petition for Review, ¶ 12 and fn. 13, discussing a meeting between Shuttle Express and Commission staff to discuss Shuttle Express' limousine operations, which Shuttle Express now disingenuously claims "guts" the Initial Order's finding that Shuttle Express concealed its dumping of auto transportation trips to independent contractors.
[45] Petition for Review, ¶ 21.
[46] WAM-29X, ¶ 9.
[47] *Id.* ¶ 10.

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functioning of the independent contractors in the Company's provisioning of its "rescue service" based upon factors, including the following:

- Shuttle Express exclusively communicated with the customers in advance, including taking reservations for auto ttransportation service and informing the customers when an independent contractor would be providing that service;
- Shuttle Express dispatched the limousines to the customer locations;
- Shuttle Express set the fares the independent contractors could charge, limiting them to the Company's tariffed rates and charges; Shuttle Express received 34 percent of the customer fares that the Company or the independent contractors collected for the service;
- Shuttle Express provided insurance over and above the insurance it required the independent contractors to maintain to cover customers while they were being transported by the independent contractors;

38 Much like Shuttle Express' use of independent contractors at issue in that docket, Shuttle Express also directed the operation of the independent contractors here. In fact, the only thing that changed from Shuttle Express' practices when it was fined in 2014 to its practice at issue here is that it insists it never used limousines for multi-stop service.[48]

39 Indeed, Shuttle Express admits it communicated with the customers in advance, taking a reservation for auto transportation service. Shuttle Express admits it dispatched the limousines from the airport. Shuttle Express not only prescribed the fare to be charged, it actually accepted the charge and paid a portion to the independent contractor.[49] Moreover, this "delegation" of service was indeed unilateral. When cross-examined at hearing, Wesley Marks admitted that Shuttle Express does not permit customers to ask for limousine service at Shuttle Express' auto

[48] *See* Kajanoff, TR. 467: 5 – 469: 19 (discussing that Shuttle Express treats its single stop auto transportation trips the same as its limousine service, and suggesting that between its exemptions in 2013 and 2016 it used independent contractors in a similar way as during its exemption, but with single-stop instead of multi-stop trips). This testimony strongly infers there was no change in its outsourcing overall from the time of Order 04, Docket TC-120323.

[49] Marks, TR. 632; Kajanoff TR. 418-420.

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transportation fare.[50] Only Shuttle Express determines when it will use an independent contractor, and when it does, it does not cancel the reservation or refund the fare paid, it merely places the customer in the vehicle from the list of one of its contracted limousine operators.[51]

40 Ironically, after all this, were the Commission to agree with Shuttle Express that it did not "operate" the transportation service being provided on the vehicles of independent contractors as Shuttle Express itself alleges, it would then mean, conversely, Shuttle Express violated WAC 480-30-456 by disclosing customer information to independent contractors, which the Commission found Shuttle Express did not violate in Docket TC-120323, solely because it concluded that Shuttle Express had provided the transportation.[52] While that point was not raised by Speedishuttle in its complaint, and has not been addressed in the Initial Order, it would lend further support to the ALJ's conclusion that Shuttle Express did not and will not serve to the Commission's satisfaction.

41 Incredulously, as well, Shuttle Express now claims on Petition that exertion of control makes the independent contractors its *de facto* employees, eliminating the potential for violation of WAC 480-30-213, a premise that was previously rejected in Order 01, in Docket TC-072228. Albeit, if that were true, Shuttle Express would also have committed numerous other Commission rule violations through its failure to abide by Commission safety rules set forth in WAC 480-30-221. Once again, this strengthens the ALJ's finding that Shuttle Express did not and will not serve to the Commission's satisfaction.

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[50] Marks, TR. 635: 5-9.
[51] Id: 10-24.
[52] Order 04, Docket TC-120323, fn. 19: "We note that if we accepted the Company's position that the independent contractors were operating independently of Shuttle Express when providing "'rescue service' – which we do not—we would agree with Staff that Shuttle Express violated WAC 480-30-456 by releasing customer information to a third party for purposes other than providing the regulated service those customers requested."

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d. There is Simply no Credible Evidence to Support the Premise the Commission Ignored or Tacitly Approved Shuttle Express' use of Limousine Carriers to Transport Passengers who Reserved Auto Transportation Service

42 Finally, Shuttle Express defends its use of independent contractors for "single stop" auto transportation trips by alleging the Commission staff approved of and condoned the practice. However, on this point Shuttle Express relies solely on its own witnesses' hearsay rendition of those communications rather than calling any Commission staff to testify. The only supposed evidence on what Commission Staff opined was allowed was that it was "single stop," not whether it was reserved as limousine or as auto transportation. Considering that Shuttle Express here admits in its Petition for Review that it was limousine service that was discussed at the meeting,[53] it seems more likely than not Shuttle Express is simply misleading the Commission about the nature of that meeting when it now claims Commission staff approved of the practice at issue in this proceeding.

43 However, even if Shuttle Express had been candid with Commission staff regarding the complete nature of its service, the Commission's language in Order 04 in Docket TC-120323 was unequivocal in rejecting Shuttle Express' contentions (which Shuttle Express now has the audacity to claim were tacitly accepted through silence) that single-stop service was permissible. Notwithstanding that the single-stop service noted in Order 04 in that docket, was single-stop "rescue service," (which is not the same practice at issue in this proceeding), the Commission noted Shuttle Express' contentions in ¶ 37 regarding its violations being a "technical regulatory issue" and the premise that Staff conceded that "rescue service" provided on a single-stop basis

[53] Petition for Review, ¶ 12 "As Shuttle Express discussed with Commission staff several years ago, it also arranges for transportation of persons by limousine carriers throughout the Seattle region, including but not limited to, to and from SeaTac Airport."

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complied with Commission regulations, only to conclusively dispose of them in ¶ 38. There, the Commission broadly ruled:

> These rules specify a variety of safety standards for both vehicles and drivers to which certificated companies must adhere, and the rules authorize Staff to conduct inspections to verify compliance. By using independent contractors driving their own vehicles to provide regulated service, Shuttle Express was evading Commission oversight. It is immaterial whether DOL and the Company monitored the independent contractors. The Commission has not delegated its statutory enforcement obligations to those entities, and we have no intention of doing so. As structured, the Commission had no ability to inspect the independent contractors or their vehicles used to provide "rescue service" to ensure compliance with Commission safety requirements. The lack of past harm to passengers would be cold comfort to any future customers who are injured because of a failure to follow Commission rules. The Company's violation of WAC 480-30-213, therefore, is not a "technical regulatory issue" but a threat to the safety of the customers Shuttle Express agreed to serve.
>
> (Emphasis added).

If the Commission found that it was not acceptable to use independent contractors because that practice evaded Commission safety oversight, it obviously made no difference whether the evasion was through single-stop trips or multi-stop trips.[54] One way or another, the Commission broadly ruled previously the use of independent contractors was prohibited by WAC 480-30-213, and Shuttle Express knew full well that going forward it would not be permitted to refer its auto transportation passengers to independent contractors.[55]

e. **Alternatively, Shuttle Express is Refusing to Serve its Passengers**

44 As Speedishuttle alternatively argued, and the Administrative Law Judge ultimately concurred, if Shuttle Express newest rendition is correct and it did not unlawfully transport passengers on over 40,000 occasions on the vehicles of independent contractors, the only logical corollary would be that Shuttle Express refused to transport its passengers at all and engaged in what might be one

[54] A premise conclusively ratified by Dave Pratt both in prefiled testimony at DP– 6T: 5 and in live testimony at TR. 874, 875.

[55] And again, if it believed that practice was lawful, why did it request exemption from the subject rule in summer, 2016?

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of the largest service failures of any transportation company in UTC history. If that were the case, surely, objectively, the Commission would agree Shuttle Express could not be providing satisfactory service and could uphold the finding in Order 19 on that alternative premise.

ii. Unlawful Commission Payments

45 Much like its ever-evolving arguments regarding the legality of its use of independent contractors, Shuttle Express' defense of its payment of commissions to hotel concierge staff for booking reservations depends entirely on erroneous parsing of words and selective quoting out of context, with a result which is diametrically opposed to the meaning of the rule. In this instance, Shuttle Express claims that because WAC 480-30-391(2)(f)[56] requires in the ticket agent agreement "a statement as to how and when payment will be made to the company for tickets, less commission," that the entirety of WAC 480-30-391 thus only applies to circumstances where the agent collects the payment directly.[57] Yet, a review of the rule in its entirety reveals that this argument is yet another bout of Shuttle Express selectively quoting out of context.[58] This interpretation does nothing to negate the requirement that agreements with hotel concierges for the sale of tickets on behalf of the company must be in a format approved by the Commission.

46 The operative portion of WAC 480-30-391 actually exists in subsection (1). This section simply provides "[a]n auto transportation company may enter into contracts or agreements with a second party for the sale of tickets or fares on behalf of the company, provided the form of such contracts or agreements has been previously approved by the commission." Nowhere does the rule limit its application to only those situations where the agent is accepting payment directly.

[56] Inaccurately cited by Shuttle Express in its Petition as "WAC 480-30-391(**1**)(f)."
[57] Petition for Review, ¶ 31.
[58] Again, not unlike the example cited by the Administrative Law Judge in the Initial Order.

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47 The remainder of the rule is contained within WAC 480-30-391(2), which provides minimum requirements for the form. Shuttle Express now claims that the language in subsection (2)(f), which indicates the form must contain a statement as to how and when payment will be made to the company for tickets (less commission), controls when WAC 480-30-391(1) applies. Yet WAC 480-30-391(2)(e) states the form must also contain "[a] statement of the percentage of revenue or the set dollar amount that the company will pay the second party for performing those services." (emphasis added). These provisions cannot be read in the way Shuttle Express suggests. Instead, they are merely format requirements.

48 Moreover, a comparison of Shuttle Express' testimony and the commission agreement with the rule similarly demonstrates Shuttle Express violated WAC 480-30-391. However, applying the plain meaning of the term "sale" proves that hotel concierge staff were undoubtedly "selling" transportation regardless of whether it was the passenger or the agent who booked transportation from Shuttle Express.

49 The commission agreement at issue states:

> Thank you for your partnership with Shuttle Express! We are grateful for the continued opportunity to provide the highest-quality transportation for our mutual guests. To show our appreciation for your efforts to promote and sell our services, we offer a commission to those enrolled in our commission program.[59]

50 Contrary to Shuttle Express' convenient position here that the concierge staff are not its agents and that they are not selling tickets or fares, this agreement expressly recognizes that the hotel concierge is acting in partnership with Shuttle Express as its agent, and is "selling" Shuttle Express services within the meaning of WAC 480-30-391(1).[60] In that rule, at issue are agreements "for the sale of tickets or fares." In turn, the common meaning of "sale" includes

[59] HJR-26. (emphasis added).

[60] Note that Shuttle Express previously argued the hotel staff were merely making referrals. The commission agreement discusses how the concierge staff are to be paid for reservations they book, thus Shuttle Express subsequently modulated its argument.

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"operations and activities involving promoting and selling goods or services."[61] Considering that the services provided by the concierge staff ("efforts to promote and sell our services") nearly mirror the operational words in the definition of "sale," Shuttle Express' argument here fails yet again.[62]

51 Yet, Shuttle Express also now makes dubious claims that Wes Marks never admitted Shuttle Express pays hotel concierge staff for making reservations on behalf of customers, claiming that Shuttle Express' bench request response controls over Mark's live sworn testimony and that Marks' testimony was merely in answer to a leading question. The record, however, speaks for itself:

> Q You've admitted that Shuttle Express makes payments to concierge staff at hotels for what I think we've alleged were unlawful commissions or rebates; correct?
> A That was your allegation, yes.
> Q So just to be clear on the record, you have an agreement with those concierges that you produced in discovery that's the Shuttle Express commission guidelines; correct?
> A Yes.
> Q You don't file those with the Commission; correct?
> A That is correct.
> Q And those cover a payment from Shuttle Express to the concierge staff for reservations made for Shuttle Express service on behalf of passengers; correct?
> A Yes.[63]

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[61] Merriam Webster's Collegiate Dictionary (10th Ed.1993)(emphasis added).

[62] And so, too, must Shuttle Express' claims that enforcement of WAC 480-30-391 against it violates constitutional due process requirements. Shuttle Express there claims "when the company and the Commission 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." However, there is nothing in the record which suggests Shuttle Express sought an opinion of the Commission regarding the legality of its practice or even conferred with Staff before it commenced, formally or informally. Instead, Shuttle Express relies upon the subsequent, challenged interpretation by Staff as proof that the Commission somehow owed Shuttle Express advance notice of the application of a rule to a practice of which the Commission had no knowledge. Considering Shuttle Express' many past rule violations including kick-backs to bellhops and other hotel staff, Shuttle Express should have known for once to ask for permission rather than seek forgiveness. *See, Everett Airporter Services, Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express*, Docket TC-910789, (Jan. 1993)(finding Shuttle Express violated Commission rules by paying kickbacks to bellhops).

[63] Marks, TR. 661: 21 – 662: 13. If this brazen attempt by Shuttle Express to avoid the result of its own witnesses' testimonial admission feels like déjà vu, that is because it used nearly the exact same tactic in Docket TC-120323. Recall that in that instance, Shuttle Express attempted to avoid the result of Jimy Sherrell's admission that its independent contractor program violated or was inconsistent with Commission rules, claiming that the company

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52 Again, Shuttle Express is entitled to make argument, but its arguments consistently belie the facts. The findings of the Initial Order on Shuttle Express' failure to file its commission agreements with hotel staff are once again fully supported in law.

iii. Shuttle Express' Combination of Door-to-Door and Scheduled Services Violates Commission Rules

53 The record also unquestionably demonstrates that Shuttle Express also violates Commission rules regarding the information which must be included in a time schedule.[64] On this point, contrary to Shuttle Express' unsupported assertion that the Initial Order confuses or misinterprets the record, the record is clear and the supporting testimony uncontroverted. Jack Roemer used Shuttle Express' scheduled service and the vehicle on which that service was provided made stops at locations that Mr. Roemer could not have known the bus would make because they were not listed on the time schedule for Shuttle Express.[65] Shuttle Express witness Wesley Marks admits this occurred.[66] Wesley Marks also admitted that combining door-to-door service and scheduled service is a regular practice of Shuttle Express.[67]

54 This practice most obviously violates WAC 480-30-281(2)(b)(iv), which requires a company to list all flag-stops in its time schedule.[68] Shuttle Express witness Marks testified that Shuttle Express was permitted to combine door-to-door services and scheduled services because the

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had denied it violated the rules in its responsive pleadings. There, as it should here, the Commission rejected Shuttle Express' attempt to disclaim or explain away its witness's patent admission under oath.WAM-29X, Order 04, Docket TC-120323, fn. 31

[64] As noted, but not addressed by the ALJ, this practice also results in price discrimination in violation of state law pursuant to RCW 81.28.180. This issue is addressed in Speedishuttle's Post Hearing Brief, ¶ 83.

[65] Roemer, Exh. HJR-25T, 11: 21 – 12:11.

[66] Marks, Exh. WAM-3T, 4: 3 – 18.

[67] Marks, TR. 647: 5 – 15.

[68] The practice also results in passengers receiving the same service at two different prices. Marks, TR. 655: 1 – 661: 9. Such practice constitutes price discrimination as the Commission noted in *Everett Airporter Services, Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express*, Docket TC-910789, fn.4 (Jan. 1993)("RCW 81.28.180 prohibits a carrier from charging or receiving a greater or lesser rate from one person than from another for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances").

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scheduled route uses only flag stops.[69] Yet, none of the unlisted locations at which Shuttle Express' scheduled van stops for door-to-door passengers are known to passengers when the reserve scheduled service. Thus, this practice unquestionably prevents customers from being able to plan their travel based upon the route to be taken by the scheduled van.

55 Shuttle Express now takes issue with the Initial Order's finding because it claims that the door-to-door stops are not unlisted flag-stops for scheduled service, but door-to-door stops.[70] By this tortured logic, Shuttle Express may force a passenger who reserved scheduled service to downtown Seattle to ride first to Woodinville, so long as the stop in Woodinville is for a customer who reserved door-to-door service. Because that result is absurd, Shuttle Express' contention cannot be correct.

56 Similarly tortured is Shuttle Express argument that it may combine door-to-door and scheduled services based upon its notation in the "alternative means of transport" section of its tariff which was approved by the Commission.[71] The specific tariff rule by which Shuttle Express indicated it would combine door-to-door service and scheduled service permits alternate means of transportation not when merely convenient, but when the company "is <u>unable</u> to provide transportation at the time and place specified in the reservation that the company has accepted for that passenger."[72] Here, Shuttle Express does not contend that it was unable to provide scheduled service to scheduled service passengers, it merely found it more convenient to Shuttle Express to transport door-to-door passengers on the same vehicle. As a consequence, Shuttle Express' use of the notation in its tariff is a purely misleading attempt to use the tariff to justify its regular practice of combining door-to-door and scheduled services.

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[69] Marks, Exh. WAM-3T at 4: 3 – 18.
[70] *Id*., ¶ 27.
[71] *Id*.
[72] WAC 480-30-356(g). (Emphasis added).

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iv. As a Consequence of its Recurring Pattern of Rule Violations, Shuttle Express Unquestionably Failed to Serve to the Satisfaction of the Commission

57 While the Commission granted Speedishuttle's application to provide auto transportation service in King County in Order 04 in March, 2015, it expressly declined to reach a finding of whether Shuttle Express served to the Commission's satisfaction, concluding that once it found Speedishuttle did not propose to provide the same service, the analysis was complete and Speedishuttle was authorized to provide service. Specifically, Order 04 in Docket TC-143691 provided:

> The Initial Order, Order 02, addressed the considerations set forth in WAC 480-30-116(3), which provides that adjudications of auto transportation applications are "limited to the question of whether the objecting company holds a certificate to provide the same service in the same territory, whether the objecting company provides the same service, and whether an objecting company will provide the same service to the satisfaction of the Commission." All three elements must be present for the Commission to deny an application to serve a given route. We agree that Speedishuttle does not propose to offer the same service Shuttle Express provides and thus need not address whether Shuttle Express is providing service to the Commission's satisfaction.[73]

Additionally, the Commission's application docket notice for Speedishuttle's application gave clear indication that Speedishuttle sought a certificate to provide unrestricted door-to-door auto transportation service to the general public of King County, to and from Sea-Tac Airport.[74] Taken together, it seems unquestionable that Speedishuttle successfully sought and was originally granted a certificate to provide unrestricted door-to-door service between SeaTac Airport and points in King County.

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[73] Order 04, ¶ 17.

[74] Docket Notice, dated October 21, 2014 stating as to Applicant and Service Desired: Speedishuttle Washington, LLC, "DOOR TO DOOR PASSENGER SERVICE BETWEEN Seattle International Airport and points within King County." Note, this docket was never amended to limit the nature of door-to-door service and no amendment or restriction on the docketed application was contained in Order 04. *See, In re Application of Jon S. Pansie d/b/a Tri-Pan Services*, App. P-65704 Order M.V.C. No. 127558, May 26, 1983 (discussing the proper procedure for amending a docketed application to limit the service proposed).

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58 Because that result is now being challenged by Shuttle Express, [75] the question of whether Speedishuttle is actually authorized to provide the service for which it applied should be finally put to rest through affirmation of the Initial Order's conclusion that Shuttle Express did not and will not serve to the Commission's satisfaction.[76]

v. <u>The Statutory Entry Standards for Auto Transportation Permit the Commission to Authorize More than One Company in the Same Territory; Notwithstanding, the Commission Should Find Shuttle Express Failed to Serve to its Satisfaction</u>

a. Shuttle Express' Self-Serving Interpretation of RCW 81.68.040 is Contrary to the Law

59 It would hardly be overstatement to say that many of Shuttle Express' challenges to the Initial Order hinge upon its own inaccurate, unilateral and controverted interpretations of RCW 81.68.040.

60 Once again in its Petition for Administrative Review, Shuttle Express doubles down on its overreaching interpretation of that statute by suggesting: "[t]he Initial Order abandons all pretext of protecting the natural monopoly as required by the legislature." [77] Talk about ellipsis of proof of legal support!

61 Shuttle Express argues, based upon citation to its so-called economic "expert" Don J. Wood, that RCW 81.68.040 recognizes that auto transportation is a natural monopoly.[78] It also argues that the legislature did not authorize the Commission to grant more than one application "to operate in a territory already served,"[79] or for overlapping applications to be granted based on the service being "different." It further claims that, due to the use of the future tense "will serve" in RCW

[75] Not to mention its open hostility toward and rejection of WAC 480-30-140, which Shuttle Express now claims to be invalid under RCW 81.68.040.
[76] While Shuttle Express has repeatedly asserted this issue cannot be revisited because the Commission found in its favor on this point, [it actually made no finding on that point] the language of paragraph 17 of Order 04 unquestionably establishes otherwise.
[77] Petition for Review ¶36.
[78] Petition for Review, ¶31, fn. 52.
[79] *Id.*,¶ 31.

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81.68.040, existing certificate holders must be given notice of what the Commission expects of them before it "can abrogate their right of exclusivity."[80]

62 All of these claims are inaccurate. In fact, the legislature granted the Commission the discretion to determine when more than one auto transportation service company may serve a particular territory in any rational way.[81] Thus, contrary to Shuttle Express' unsupported and strained interpretation of RCW 81.68.040, the Commission was authorized by the legislature to adopt the objective "same service" and "service to the satisfaction of the commission" standards as set forth in WAC 480-30-140(2) and (3). It was also thus legislatively authorized to determine that a public service company does not provide service to the satisfaction of the Commission based upon a pattern of rule violations rather than purely customer service-oriented concerns, as it has done in the past.[82] That the Commission may consider rule violations in its satisfactory service determination is hardly a novel or illogical idea, as the Commission has explained before: "the object of the satisfactory service determination is not to punish a carrier for occasional or minor noncompliance but rather to allow customers in a territory the opportunity to receive service from an operator who is willing and able to operate lawfully and satisfactorily."[83]

63 Reinforcing this point is the recognition the Commission also previously determined that the statutory "satisfaction of the commission standard" does not limit the Commission's inquiry to service quality. In Order 10, *In re Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington*, TG-120033 (July 2013), the Commission stated exactly that:

> The legislature knew how to confine the Commission's inquiry to service quality provided by a single provider if it had intended to do so. The statutory provision

[80] *Id.*, ¶ 32, fn. 58.
[81] *Pac. NW. Transp. v. Utils. & Transp.*, 91 Wn. App. 589, 597 (1998).
[82] Order M.V.G. No. 1402, *In re R.S.T. Disposal Co., Inc. d/b/a Tri-Star Disposal*, App. No. GA-845; 851 (Jul. 1989) at ¶ 9, p. 3 and ¶ 17, p. 4.
[83] Order M.V.G. No. 1719, *In re Brent Gagnon, d/b/a West Waste and Recycling*, App. No. GA-76306 (Aug. 1994).

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> limiting competitive entry for ferry service, for example, states that the Commission may not grant a new entrant such authority 'unless the existing certificate holder has failed or refused to furnish reasonable and adequate service.' We interpret as intentional the difference in the comparable language in these two sections of RCW Chapter 81 and construe RCW 81.77.040 accordingly. The legislature did not create a 'presumption' of monopoly or limit competitive entry to instances of service failures in that section. Rather, it has given the Commission discretion to determine the appropriate number of solid waste collection service providers who should be authorized to operate within a particular service territory consistent with the public interest.[84]

64 Yet, in furthering its quixotic quest to eliminate Speedishuttle from the marketplace, Shuttle Express blithely rejected the decision in *In re Waste Management* in its Post-Hearing Reply Brief, supposedly furthering Shuttle Express' case, by claiming:

> [t]here, the Commission based its decision to grant service in the same territory as an existing certificate holder on language in the solid waste statute that it found evidence a legislative intent to allow multiple carriers ('existing…*company or companies*). Here, the solid waste language on which the Commission relied is lacking in the auto transportation statute. RCW 81.68.040. The auto transportation exclusivity language is more like the parallel ferry statute, which the Commission held in Waste Management unquestionably did limit entry.[85]

A simple comparison of the verbatim entry standards in RCW 81.68.040, 81.77.040 and 81.84.020 demonstrates that the language used by the legislature in 81.68.040 and 81.77.040 are nearly identical, and both are wholly different from the entry standard for commercial ferries despite Shuttle Express' erroneous and misleading assertions to the contrary:

81.68.040	81.77.040	81.84.020
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	When an applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, the commission may, after notice and an opportunity for a hearing, issue the certificate only if the	The commission may, after notice and an opportunity for a hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the

[84] *Pacific NW Transp. Servs. v. WUTC*, 91 Wn. App. 589, 597, 959 P.2d 160 (1998) (interpreting the same language in RCW 81.68.040 as not specifying how the Commission is to make the determination of whether the existing companies will not provide service to the satisfaction of the Commission). Order 10, *In re Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington*, TG-120033 (July 2013), ¶¶ 7, 8.

[85] Shuttle Express Post-Hearing Reply Brief, ¶29, fn. 46.

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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.	existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission or if the existing solid waste collection company does not object.	rights granted by the certificate any terms and conditions as in its judgment the public convenience and necessity may require; but the commission may not grant a certificate to operate between districts or into any territory prohibited by RCW 47.60.120 or already served by an existing certificate holder, unless the existing certificate holder has failed or refused to furnish reasonable and adequate service, has failed to provide the service described in its certificate or tariffs after the time allowed to initiate service has elapsed, or has not objected to the issuance of the certificate as prayed for.

(Emphasis added).

65 Thus, as a matter of law and completely contrary to Shuttle Express' unfounded claim throughout the entirety of this proceeding, the legislature never intended nor "required"[86] that auto transportation service would necessarily be a natural monopoly and the Commission, by virtue of the above statutory language, bolstered by Washington appellate case law and WAC 480-30-140, has the absolute discretion to authorize overlapping auto transportation service so long as it has a rational basis to do so.

66 As to Shuttle Express' new claim that a certificate holder must be given notice of what the Commission expects of them before it can "abrogate their right of exclusivity," Shuttle Express again ignores on-point controlling precedent. In *Pacific NW Transp. Servs*, the Court of Appeals expressly rejected this exact theory, holding that the Commission was permitted to assess

[86] Petition for Administrative Review ¶36: 32 ("…it [the legislature] recognized that auto transportation service is a natural monopoly").

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satisfactory future service based upon past service.[87] Thus, once again, Shuttle Express is wholly incorrect in its understanding and rendition of the Commission's legislative authority and law here.

b. Applying these Standards, the Initial Order Correctly Ruled that Shuttle Express Did not and Will Not Serve to the Commission's Satisfaction

67 As addressed in detail above, Shuttle Express has a stunning history of rule violations, only some of which are even discussed in the Initial Order. Nevertheless, the Initial Order bluntly found that "Shuttle Express has an extensive history of noncompliance with Commission rules that constitutes a predictive pattern of behavior indicating that Shuttle Express will not provide service to the Commission's satisfaction on a going-forward basis."[88]

68 As noted early on, considering Shuttle Express' conduct, much of which is actually established by its own admissions in this proceeding, any final order which falls short of finding Shuttle Express did not and will not serve to the Commission's satisfaction would suggest to all other UTC regulated entities that regulatory compliance is an insignificant consideration. Thus, the Commission truly is left no other option but to find that at all times relevant to this proceeding Shuttle Express failed to provide service to the Commission's satisfaction.[89]

69 While rule violations alone support a finding that Shuttle Express' service is not satisfactory, the Initial Order also appropriately took into consideration various other factors under WAC 480-30-140(3). Specifically, WAC 480-30-140(3)(ii) provides the Commission may consider whether the company has made reasonable efforts to expand and improve its service to customers within the same territory or subarea within the territory. The Initial Order found that Shuttle Express'

[87] *Pacific N.W. Transp. Servs.*, 91 Wn. App. 602.
[88] Initial Order, ¶ 117.
[89] While the Commission could again fall back on WAC 480-30-140 for the principle that the Commission need not reach this determination, Speedishuttle respectfully reminds the Commission that it applied for and was granted an unrestricted certificate. Due process now suggests that the Commission make all findings which might support the issuance of an unrestricted certificate, especially considering Shuttle Express' overt threat of judicial review.

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use of independent contractors demonstrates as well that it failed to make reasonable efforts to expand or improve its service.[90] This finding was supported by ample evidence from Shuttle Express that, for economic and other reasons, it preferred to outsource passengers to a third party rather than transport those passengers on its company-owned vehicles. Thus, whether this practice violated the rules or not (it did), Shuttle Express cannot avoid a finding that on over 40,000 occasions, representing 5% of its business,[91] it refused or failed to transport passengers who reserved service from Shuttle Express on its own vehicles. Similarly, this, in isolation, unquestionably supports a conclusion that Shuttle Express did not and will not serve to the Commission's satisfaction.

vi. Speedishuttle Once Again Does not Provide the Same Service

70 In challenging the Initial Order's findings regarding whether Speedishuttle is providing the same service as Shuttle Express, Shuttle Express again relies heavily upon its erroneous and misplaced interpretations of RCW 81.68.040 to suggest that Speedishuttle could only have been granted a certificate if its new service would not serve the same passengers as those of Shuttle Express.[92] As addressed above and throughout this proceeding, RCW 81.68.040 was previously construed by the Court of Appeals to authorize the Commission to determine when it will permit multiple auto transportation companies to serve in the same territory in any rational way.[93] In that opinion, *Pac. N.W. Transp.*, at issue was whether the Commission erred in granting a certificate to a company that proposed to provide a more direct service than the incumbent.[94] The concurring opinion suggested the Commission could not judge satisfactory service based solely

[90] Initial Order, ¶ 115.
[91] Kajanoff, TR. 468: 19 - 469: 19.
[92] Petition for Review, pp. 30-38.
[93] *Pac. NW. Transp.*, 91 Wn. App. 589.
[94] *Id.*

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on past performance when the issue was an application for a different/new service and would require notice to the incumbent.[95] The court majority rejected that conclusion on multiple bases, including that the Commission has fact-finding discretion which it may exercise in any way supported by the record.[96]

71 Based on that holding, it follows that the Commission may adopt objective standards by which it will determine when to grant an application for new service (a/k/a "not the same service"). Where the record supports that an applicant will provide service which the incumbent carrier did not provide, the Commission has legislative authority to grant the application.

72 Those objective criteria which serve as the embodiment of the Commission's discretion in auto transportation applications can be found in WAC 480-30-140(2), which provide the Commission may determine an existing certificate holder does not provide the same service as that proposed by the applicant considering among other things, the following:

> (a) The certificate authority granted to the existing companies and whether or not they are providing service to the full extent of that authority;
> (b) The type, means, and methods of service provided;
> (c) Whether the type of service provided reasonably serves the market;
> (d) Whether the population density warrants additional facilities or transportation;
> (e) The topography, character, and condition of the territory in which the objecting company provides service and in which the proposed service would operate;
> (f) For scheduled service, the proposed route's relation to the nearest route served by an existing certificate holder. The commission views routes narrowly for the purpose of determining whether service is the same. Alternative routes that may run parallel to an objecting company's route, but which have a convenience benefit to customers, may be considered a separate and different service; and
> (g) Door-to-door service and scheduled service in the same territory will not be considered the same service.

Based upon these factors, the Initial Order correctly found on the totality of the differences between Speedishuttle's actual service in Washington and that of Shuttle Express, Speedishuttle would not provide the same service. While the various distinguishing features need not each be

[95] *Id.* at 606.
[96] *Id.* at 602.

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discussed here, each falls within the objective factors which the Commission set forth in WAC 480-30-140(2), and thus rationally support the Commission's original grant of Speedishuttle's certificate.

73 Shuttle Express now apparently takes issue with whether the Commission may consider newly-identified differentiation factors not expressed in Order 04 of Docket TC-143691, can rely upon the factors it did rely upon in Order 04,[97] or through rehearing, determine that it no longer relies upon factors discussed in Order 04.[98] Shuttle Express' attempts to constrict the facts upon which the Commission may make its findings, and to claim the Commission may not rely upon its findings in Order 04, are purely self-serving attempts to implicate a converse conclusion based upon its tortured interpretation of RCW 81.68.040, rather than resolving the pertinent question of whether Speedishuttle truly offers different service. If, in reality, the service offered by Speedishuttle is different from that of Shuttle Express, on rehearing, it should not matter whether the findings supporting the Initial Order are the same as those relied upon by the Commission in the BAP or upon which this rehearing is taken.

74 Shuttle Express also contests a number of the Initial Order's findings of fact regarding the service differentiation factors discussed in Order 04.[99] However, on each of these points, the Initial Order correctly evaluated the record, and the credibility (or lack thereof) of Shuttle Express' witnesses, and reached the appropriate rulings.

75 One such example may be found with respect to greeters. On this challenge, Shuttle Express bases its broad assertion that only half of passengers are being greeted on the inaccurate

[97] For example, now that Speedishuttle has shown that it indeed offers Wi-Fi and Speedishuttle TV, both of which were relied upon in Order 04, Shuttle Express attempts to reargue the Initial Order erred in relying upon those services to find Speedishuttle provides a different service from that of Shuttle Express. Petition for Review, ¶ 59 – 60. Putting aside the obvious collateral attack of Order 04 issue, Shuttle Express here apparently believes it can redefine the same service criteria under regulation.

[98] Petition for Review, ¶¶ 54-55.

[99] *Id.* ¶¶ 53 – 74.

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testimony of Jason Deleo and the frequently impeached Wesley Marks, neither of whom offered testimony about greeter levels beyond a few hours of purported actual observation. In its Post-Hearing Brief, Shuttle Express (in its standard *modus operandi*) attempts to conjure numbers to support its contentions.[100] These were no more based on the record testimony now than they were then, and once again there is nothing in the record to support Shuttle Express' contention of error on this statistic. To the contrary, Speedishuttle offered evidence that it does provide greeters, admitting 100% availability has not been perfected. Thus again, the Initial Order reached the correct finding.

76 Shuttle Express used similar tactics in its claim that Speedishuttle is cream-skimming and not serving to the full extent of its authority (which issues are also irrelevant and improperly raised in this proceeding). On that front, Shuttle Express asserts Speedishuttle is not serving low-volume areas.[101] A careful review of the record, however, reveals that Shuttle Express rests this theory on a combination of pure speculation and its false claim that Speedishuttle did not dispute that speculation. For example, Shuttle Express relies upon the pre-filed testimony of Paul Kajanoff who speculated about ways a provider could avoid serving an area as proof that Speedishuttle actually utilized those practices by use of discouraging tactics, or higher fares.[102] However, upon further cross-examination, Paul Kajanoff eventually admitted he had zero evidence Speedishuttle engaged in discouraging passengers in such a manner:

> Q Now you say there are subtle ways an auto transportation company could discourage passengers from going to the suburbs; isn't that right?
> A Certainly.
> Q Okay. You're not saying you have any evidence SpeediShuttle has told passengers that the trip to North Bend will be 45 minutes to an hour, correct? Did you have trouble hearing me?

[100] See Initial Post-Hearing Brief of Shuttle Express, ¶ 55, offering Shuttle Express' imagined percentages of wholesalers as evidence for number of non-greeted passengers.
[101] Petition for Review, ¶¶ 77 -78.
[102] *Id.* at ¶ 70, fn. 120.

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A I just want to understand.
Q Let me refer you to PK-1T --
A You asked about North Bend, whether their trip could have been 45 minutes to an hour?
Q No. That's why I want to make sure you got this correct. You stated on PK-1T, on page 14, on line 6, "There are subtle ways too, like telling a walk-up passenger that the wait to go to North Bend will be 45 minutes to an hour to fill the van." I just want to clarify, you aren't saying you have evidence SpeediShuttle did this; you're just talking about a way that you have imagined someone could do this, correct?
A It is just an example.
Q This was something that you came up with?
A It's an example. It's my testimony.
Q An example of a way that you have come up with how that could be discouraged, correct?
A That is an example, correct.
Q Not an example you have evidence SpeediShuttle has done, correct?
A That is possible.
Q What's possible?
A What you just said.
Q Yes or no: Do you have evidence SpeediShuttle has told passengers there will be a wait --
A I personally do not have that.[103]

77 Similarly, Paul Kajanoff admitted that he had zero evidence Speedishuttle has ever turned away any passenger who wanted to reserve service within its certificated territory, or that he had even compared Speedishuttle fares to those of Shuttle Express on a zip-code-by-zip-code basis for the areas Shuttle Express now claims Speedishuttle is allegedly avoiding.[104] As is true with nearly all of Shuttle Express' arguments, a careful review of the pre-filed testimony relied upon by Shuttle Express and the live cross-examination thereon reveals that Shuttle Express' claim that Speedishuttle avoids serving low-volume areas or otherwise "cream-skims" is nothing more than fantasy, raised and pursued to divert attention from Shuttle Express' service various shortcomings.

78 Yet again, considering that Shuttle Express posited its entire case on speculation, misleading data, and vacant arguments, the Commission should unquestionably affirm the Initial Order's prominent finding that Speedishuttle does not provide the same service as Shuttle Express.

[103] Kajanoff, TR. 436: 5 – 437: 14.
[104] *Id.*: 437:15 - 438: 13.

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vii. Speedishuttle's Pricing Causes no Legal Harm to Shuttle Express

79 Shuttle Express' also asserts the Initial Order erred in finding Shuttle Express' Complaint failed to meet its burden of proof on predatory pricing.[105] While the parties have long disputed what predatory pricing constitutes as a legal doctrine, for its Complaint, Shuttle Express has always relied upon nothing more than a vague allegation of "pricing below cost." Now Shuttle Express claims on Petition that it did indeed establish its central allegation by virtue of Speedishuttle's admission it is not yet profitable, and takes issue with the analysis set forth in the Initial Order on this finding. Yet, it never even articulates, much less establishes what legal harm was caused to Shuttle Express by the fact that Speedishuttle has failed to achieve an operating profit in its first two years of operations.

80 It now seems Shuttle Express' real complaint is that some of Speedishuttle's prices for a single passenger are lower than those of Shuttle Express, or even that Speedishuttle has passengers at all.[106] But, lower fares in and of themselves are not predatory, and, in fact, may actually serve under rule as a basis for a determination that an incumbent will not serve to the Commission's satisfaction.[107]

81 For fares to actually be predatory, they must be below an appropriate measure of cost.[108] But in shared ride transportation, the fare for a single passenger cannot be set as high as the cost of making a trip or else the service cannot be competitive with other modes of transportation.[109] The entire economic model of shared ride depends on multiple passengers sharing a vehicle.

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[105] Petition for Review, ¶ 39.

[106] For example, Paul Kajanoff charges Speedishuttle "undercuts" Shuttle Express pricing by 9% to downtown Seattle. Kajanoff, PK-1T, 13: 19. This is untrue, as addressed by Jack Roemer and also fails to consider, i.e., Shuttle Express does not charge for accompanied riders under 18 years of age.

[107] WAC 480-30-140(3)(a)(iv).

[108] In federal law, the appropriate measure is average variable cost. Speedishuttle asserts that in shared ride service, the measure would thus be average variable cost *per trip*.

[109] *See*, Roemer, HJR-1T, 51:12-17.

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Thus, single passenger fares are typically designed at less than the total cost of a trip, even for Shuttle Express. Considering that premise, for shared ride fares to be predatory, they must be so low that even given sufficient passengers, the company will still not be profitable.

82 Accordingly, whether a company is profitable or suffers an operating loss is irrelevant to whether fares are predatory. Otherwise, Shuttle Express' door-to-door prices must also now be predatory, as it presently claims to be losing money. Moreover, Commission precedent supports that operating losses, particularly for a start-up company, in and of themselves, do not support an allegation of predatory pricing. Shuttle Express well knows this despite its ongoing refusal to acknowledge it, because the Commission precedent on this issue involved an allegation against *Shuttle Express* based on that identical premise.[110]

83 Instead of actually seeking to prove predatory pricing, Shuttle Express, on Petition, instead takes issue with the related findings in the Initial Order and attempts to rebut them based upon its own familiar overstatements, incorrect analyses, and anecdotal theories and tables which are wholly unsupported by the record (and largely fictional). For example, Shuttle Express asserts in its Petition for Review, ¶ 39, "Shuttle Express presented extensive, objective, and numeric evidence that shows just how huge the losses are." It unsurprisingly offers no citation to the record, likely because nothing in the record supports that statement.

84 In attempting to challenge the Initial Order's finding that Speedishuttle's passenger count doubled from 2015 to 2016 (even when adjusting to comparable periods), Shuttle Express offers a truly bizarre, nonsensical table, which is not included in the record.[111] Presumably, this table

[110] *Everett Airporter Services, Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express*, Docket TC-910789 (Jan. 1993).

[111] Petition for Review, ¶ 40. Immediately prior to that overblown characterization, Shuttle Express even accused the presiding officer of making "false statements" in her holdings in ¶125 of the Initial Order by finding that Shuttle Express had failed to establish that Speedishuttle prices its service below cost. A finding in an initial order which a petitioner disputes hardly makes that ruling "false." Speedishuttle's admission that it has yet to make a profit is

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attempts to compare Speedishuttle's total passengers from 2015 to its total passengers in 2016. However, those were unequal periods, with 2016 data containing two slow season intervals while 2015 contained only one. For that very reason, the ALJ issued a bench request of Speedishuttle, (Bench Request No. 1), to provide the percentage of its passengers which were transported in the months of January to April 2016 so that an adjustment could be made. Shuttle Express intentionally ignores this in its own analysis because an apples-to-apples comparison cuts directly against the false narrative that Shuttle Express prefers to advance.

85 Next, Shuttle Express claims that if you take Speedishuttle's losses per dollar of revenue for a known amount of revenue and extrapolate to a greater amount of revenue, you can establish an even larger loss than acknowledged as Speedishuttle's revenues increase.[112] Again, Shuttle Express is misleading the Commission. Shuttle Express acknowledged at hearing that, mathematically, increasing passengers can increase profits.[113] Thus, when revenues grow due to the transportation of additional passengers, costs do not grow in equal proportion. If marginal costs do not grow in equal proportion to revenues, you cannot extrapolate the loss at one revenue amount to determine the loss at a larger one in the facile fashion in which Shuttle Express attempts. As a result, Shuttle Express' "analysis" in its Petition for Administrative Review is nothing more than an attempt to misdirect and distract the Commission once again.

86 Shuttle Express offers similarly misleading claims when it asserts that Speedishuttle's expenses are undeniably higher than those of Shuttle Express.[114] Offering this premise, Shuttle Express unsurprisingly relies upon information that does not exist in the record, and, once again, appears

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also not synonymous with establishing that an approved shared ride rate design keyed to increasing passenger load factors is predatory. The tone of Shuttle Express' attacks are characteristically sharp and seek to mask the vacuum in proof supporting the theories upon which its litigation position teeters.

[112] *Id.* ¶ 41.

[113] Kajanoff, TR. 394:13 to 396:11.

[114] Petition for Review, ¶ 43.

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comprised of whole cloth.[115] Nothing in the record supports the operating costs of Speedishuttle's Mercedes vehicles. Nothing in the records supports the operating costs of Shuttle Express' Ford vans. Thus, nothing in the records supports the claim operating Speedishuttle's vans is double that of Shuttle Express' vans. Again, the table inserted by Shuttle Express in paragraph 42 is not in the record, nor is the overwhelming majority of the hypothetical expenses set forth therein.[116] Yet once more, Shuttle Express propounds a hypothetical and then broadly declares that it indisputably establishes some material fact. The only thing that is undisputed about the "information" offered to rebut the Initial Order is that it is totally speculative and not actual evidence.

87 Similarly, Shuttle Express sets forth in Petition, ¶ 44 what it imagines *might* be the costs of providing greeter service. Again, this information is not in the record, is inaccurate, and is expressly based upon Shuttle Express' self-serving hypothesis. Shuttle Express does not have information to suggest the average time required to greet each reservation because it does not greet passengers. Even the number of outbound reservations is fictional. Because the information offered is hypothetical and speculative, it should be accorded no weight or consideration by the Commission and does nothing to establish error in the Initial Order.

88 This now-familiar pattern is repeated in ¶ 46, by Shuttle Express' claim that Speedishuttle's business declined in August 2016. There is simply nothing in the record to support this assertion. Paul Kajanoff testified he based it upon the number of outbound trips from SeaTac

[115] A motion to strike pursuant to WAC 480-07-375 would be truly appropriate here, but in order to save even more expense of additional litigation rounds, Speedishuttle instead requests that the Commission rely upon its previous rulings that arguments based upon evidence which is not in the record will not be considered. *See In re the Matter of the Application of Avista Corporation,* Docket No. UE-991255; Docket No. UE-991262; Docket No. UE-991409 (Apr. 2000).

[116] Shuttle Express admits as much in its Petition for Review, fn. 77: ("The details in the table are offered for illustrative purposes, to help with understanding the components of the bottom line cost differences."). Speedishuttle denies the information in the table is accurate.

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airport, but admitted that trips and passengers are not equivalent measures, and passengers can increase even as trips go down (which would actually increase profit rather than increase losses).[117]

89 Finally, Shuttle Express labels Speedishuttle a prevaricator yet again, claiming it warned the ALJ that Speedishuttle lied in its load factor numbers, and purporting to show that Speedishuttle's figure of four passengers per trip to be profitable is dishonest.[118] Yet Shuttle Express is here once more attempting to hoodwink the Commission. Its analysis of Speedishuttle's break-even point is based upon a conjectured comparison of total cost to total revenue, while load factor data is an analysis of the cost per trip to the number of passengers needed to earn fares sufficient to cover that cost. Moreover, the load factor data requested from Speedishuttle was based on a trip to downtown Seattle, whereas Shuttle Express' analysis is based upon a comparison of all revenues to all costs. Thus, Shuttle Express is once again attempting to make an improper comparison to support a false premise.[119]

90 Considering Shuttle Express attempts on the predatory pricing claim throughout seek to evade the result of the Initial Order through improper argument and fictional or incorrect rebuttal evidence, the Commission should wholly affirm the Initial Order's findings on Shuttle Express' predatory pricing complaint as well.

III. CONCLUSION

91 Shuttle Express initiated this proceeding and now must confront the aftermath of its concerted efforts. In this consolidated proceeding, the objective evidence of record establishes that Speedishuttle's fares have been reviewed by Commission staff under the prism of fare flexibility

[117] Kajanoff, TR. 401:1 - 402:7.
[118] Petition for Review, ¶¶ 47-48.
[119] Roemer, TR. 820:4-17.

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in WAC 480-30-420, are not markedly different from those of Shuttle Express, and can lead to profitability given sufficient time to grow Speedishuttle's ridership base. Thus, the Commission should affirm the Initial Order's findings on Shuttle Express' Complaint that it failed to demonstrate that Speedishuttle's fares are predatory.

92 Further, the record demonstrates Speedishuttle never misrepresented to the Commission how it intended to serve in Washington and has made numerous good faith efforts to carry out it its business model while providing service without discrimination. Because it has largely implemented its original business model, and in view of the additional differentiation factors recognized in the Initial Order, the Commission should once again affirm that Speedishuttle does not offer the same service as Shuttle Express.

93 Finally, the Commission should now closely examine the record regarding Shuttle Express' recurring rule-breaking practices in detail. While Speedishuttle has attempted to carefully portray to the Commission the reality of what the record evidence reflects, a close review of the pleadings and evidence submitted, in chronological sequence, will aptly demonstrate the lengths to which Shuttle Express has repeatedly gone to distort the record and evade the adverse results of its conduct. Because Shuttle Express' actions demonstrate a consistent disregard for the Commission's rules and regulatory mission, the Commission should use this opportunity to remind Shuttle Express that rules have both meaning and consequences for violations, sanction it accordingly for third-time infractions, and categorically affirm the Administrative Law Judge's findings and conclusions that Shuttle Express did not and will not serve to its satisfaction in fully upholding Initial Order 19.

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DATED this 26th day of September, 2017.

RESPECTFULLY SUBMITTED,

By */s/ Blair I. Fassburg*

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Appendix 1

-Critical Credibility Topics-

Credibility deficit:	**Legal or Factual Reality:**
Financial Statements and Costs	
Shuttle Express argues in its Petition for Review, ¶ 50: "Mr. Roemer claimed the company is "close" to break even. 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. And Speedishuttle refused to provide data that would either back up his testimony or allow Shuttle Express witnesses to rebut. 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. 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."	There is nothing in the record which supports that Speedishuttle's costs are higher than those of Shuttle Express because there is nothing in the record to reflect Shuttle Express' costs. Additionally, the costs incurred in Hawaii on behalf of Seattle are included in Speedishuttle Washington's financial statements: Q For those functions that have been transferred to Hawaii, would those be in your financial statements for Seattle? A The financial statement, yes. Absolutely. Roemer, TR. 794:15 - 18.
Order 04's Affirmation of Order 02 was not in Toto	
Shuttle Express argues that Order 04 adopted all findings of Order 02 in its Petition for Review, ¶ 74: "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." (Emphasis added).	Order 04 did, in ¶ 33, adopt findings in ¶¶ 20 – 27 of Order 02. But, the findings it incorporated, ¶¶ 20 – 27, do not incorporate "**all**" of the factors discussed as asserted incorrectly by Shuttle Express. Instead, Order 02, ¶ 5 found that it was based on "**a number of factors, discussed above**" without summarizing specific factors.
Shuttle Express claims the Commission most definitely relied upon all factors described in Order 02. Petition for Review, ¶ 74.	Order 04 actually makes no mention of walk-up passengers and in ¶¶ 19-21 makes findings based upon a discrete set of features raised by

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	Shuttle Express in its Petition for Administrative Review of Order 02, which do not include walk-up.
Cream Skimming/Failure to Serve	
Shuttle Express claimed "Speedishuttle is not serving much of suburban and rural King County at all" in its Petition for Review at ¶ 20, fn. 22, citing to PK-3T at 9 and DJW-1T at 28-29.	Kajanoff, Exh. PK-3T. 9 does not discuss whether or not Speedishuttle is serving suburban or rural communities. Wood, Exh. DJW-1T. 28-29 also does actually not discuss the allegation Speedishuttle is not serving suburban or rural King County. Where Shuttle Express does attempt to establish this allegation, Kajanoff, PK-1T. 12: 13 – 14: 5, the testimony addresses Speedishuttle's average fare, Paul Kajanoff's theories about what the average fare means with respect to the areas Speedishuttle is serving, and Paul Kajanoff's speculative theories about how an auto transportation company can effectively avoid serving an area. Nowhere in this testimony is there competent evidence to support the premise that Speedishuttle <u>actually</u> avoids serving a portion of its certificated territory.
Slanted Interpretation of RCW 81.68.040	
Shuttle Express claims in its Petition for Review, ¶ 36, that for the Commission to grant a certificate under RCW 81.68.040 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."	This issue was addressed at great length in Speedishuttle's Post Hearing Brief, ¶¶ 39 – 50, which argument will not be repeated in its entirety here. To address it succinctly, Shuttle Express's theory has been rejected by the Court of Appeals in *Pacific N.W. Transp. v. Util. & Trans. Comm'n.*, 91 Wn. App. 589 (1998). There, the Court of Appeals considered whether the Commission may use its discretion to grant an overlapping certificate to an applicant who proposed to offer non-stop service over the same route by which the incumbent offered less direct service. The Court of Appeals held that the Commission had discretion to do so under RCW 81.68.040. Because the passengers who would receive

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	non-stop service *could* have used a less convenient service than the non-stop service proposed by the applicant, the Commission necessarily has discretion to grant an application even when passengers to be served were already afforded the opportunity to receive auto transportation service.
Passenger vs. Trip Count Indicia	
Shuttle Express argues that Speedishuttle's increased passenger counts began to decline in August 2016 in its Petition for Review, ¶ ¶ 40, 46.	Shuttle Express relies wholly on the conclusory testimony of Paul Kajanoff here. Paul Kajanoff, however, admitted upon cross examination that he based his conclusions on the number of trips reported by the Port of Seattle, not the number of passengers transported by Speedishuttle. He further admitted passenger counts can increase even while trips decrease. Kajanoff, TR. 400:8 – 402: 7. Thus, his conclusion, and now Shuttle Express's arguments, are based upon a fatally-flawed premise and can be given no probative weight whatsoever.
Discovery Limitations	
In its Petition for Review, fn. 67, Shuttle Express argues that the Commission cannot find Shuttle Express failed to meet its burden of proof because of (the extremely intrusive and proprietary) discovery it wanted was not permitted.	Shuttle Express here requests the Commission expressly find that Speedishuttle engaged in predatory pricing based upon being denied full access to competitor Speedishuttle's books. Such a conclusion would be the height of arbitrariness and capriciousness and would violate the Administrative Procedures Act. RCW 34.05.570(3)(i).
Shuttle Express makes statements throughout its Petition for Review about lacking numerical data to support its unsupported pontificating about what might have been proven had it been permitted discovery. For example, in fn. 99, it complains about the lack of numerical data to support its hypothesis about how many guests are not greeted.	While the specific complaints are not addressed in a way which permits an informed response, the discovery sought by Shuttle Express quite frequently bore no relationship whatsoever to the data Shuttle Express now complains it was deprived from obtaining. Thus, Speedishuttle disputes the vague discovery complaints of Shuttle Express.

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Broadening Scope of Arguments on Appeal	
Shuttle Express complains about the scope of discovery it was afforded, but does not make any specific challenges. Instead, it vaguely carps that it was denied full access to Speedishuttle's books as would be permitted in a rate case. Petition for Review, ¶ 39.	Because Shuttle Express' arguments are not articulated and are not asserted as a contention of error, Speedishuttle cannot truly respond here. This is the first time Shuttle Express has argued that its predatory pricing case was tantamount to a rate case, and that contention is not supported by authority.
Complaint Remedy Dispute	
In its Petition for Review, ¶ 49, Shuttle Express claims that under its predatory pricing complaint brought pursuant to RCW 81.04.110 the Commission may cancel Speedishuttle's certificate.	RCW 81.04.110 provides the remedies available in a complaint case: "…[T]he commission shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service companies in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression or monopoly or to encourage competition." Here, Shuttle Express' complaint is that Speedishuttle sets individual fares below the cost of making a trip. "If Speedishuttle's services were not priced below cost, it would not be losing money, it would be making money." Petition for Review, ¶ 51. Yet Shuttle Express complains that its shared ride service, too, is now losing money. Thus, it too must be priced "below cost." The remedy available would be to require all companies to set individual fares above the cost of making a trip (which neither party here requests).
Capturing the Market/New Demographic	
Shuttle Express argues that Speedishuttle "captured 24-31% of the passengers that Shuttle Express used to carry, despite having asserted it would offer a "different" service	Shuttle Express repeats this claim throughout its testimony, in its briefs, and now in its Petition for Review. However, when cross-examined on the underlying foundation of this

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that would grow the overall market by serving the un-served" in its Petition for Review, ¶ 52.	position, Shuttle Express witness Wesley Marks admitted that Shuttle Express has no information by which passenger demographics can be determined, and no way in which passengers who once used Shuttle Express can be traced from one carrier to another. Marks further admitted that transportation network companies, light rail, and other modes of transportation have captured a significant portion of airport-transportation passengers and that he has no information to establish whether Speedishuttle's gain in passengers was directly attributable to Shuttle Express, or entirely new passengers. Marks, TR. 592: 22 – 599: 17.
Wholesale Bookings	
Shuttle Express realleges in ¶ 62 of its Petition for Review that "Wholesale bookings constitute 50% or more of Speedishuttle's passengers and serve mostly tourists."	Shuttle Express fails to cite to any location in the record to support this statement and it is simply incorrect. Roemer, Exh. HJR-1T: 3 - 10.

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2017, I provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document(s) via the web portal and provided an electronic copy to:

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Signed at Seattle, Washington the 26th day of September, 2017.

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