

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

SHUTTLE EXPRESS, INC.

Petitioner,

v.

THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION, as an
agency of the STATE OF WASHINGTON,

Respondent.

CASE NO. _____

PETITION FOR JUDICIAL
REVIEW OF COMPLAINANT/
PETITIONER BELOW
SHUTTLE EXPRESS, INC.

1 Pursuant to RCW 34.05.510, *et seq.*, petitioner Shuttle Express, Inc. (“Shuttle Express” or “Petitioner”) hereby petitions for judicial review of Order 20/13/10, Final Order (“Final Order”) of the Washington Utilities and Transportation Commission (“UTC”) entered and served in its Docket Nos. TC-143691, TC-160516, and TC-161257 (collectively, the “Dockets”) on November 17, 2017.

2 Shuttle Express also has filed a tort claim against the UTC as an agency of the State of Washington, for damages based on conversion and/or negligence of the UTC based on its *ultra vires* actions against Shuttle Express in UTC Docket TC-120323 (“Claim”). Upon passage of the mandatory sixty (60) days waiting period set forth in RCW 4.92.110, assuming the Claim is not then paid, Shuttle Express intends to move to amend this petition to add a tort complaint because this petition and the Claim are based on many common factual and legal issues. Thus, consolidation of the judicial review proceeding with the expected tort complaint would be in the interests of judicial efficiency and would promote the administration of justice. Accordingly, Shuttle Express will ask the Court to defer the case schedule as may be necessary or beneficial to the effective joinder of this petition and anticipated complaint.

3 For its petition, Shuttle Express alleges as follows:

PARTIES

4 The mailing address of the petitioner, Shuttle Express, is:

ATTN.: Mr. Jimmy Sherrell, President
Shuttle Express, Inc.
800 SW 16th St.
Renton, WA 98057

5 The name and mailing address of the petitioner's attorney is:

Brooks E. Harlow, WSBA # 11843
Lukas, LaFuria, Gutierrez & Sachs, LLP
8300 Greensboro Drive, Suite 1200
Tysons, VA 22102
bharlow@fcclaw.com

6 The name and mailing address of the agency whose action is at issue is:

ATTN.: Mr. Steven V. King, Executive Director and Secretary
Utilities and Transportation Commission (“UTC”)
1300 S Evergreen Park Drive SW
Olympia, WA, 98504

7 The name and mailing address of the other party to the action at issue is:

Speedishuttle Washington, LLC
Incorp Services, Inc.
4505 Pacific Hwy E Ste C-2
Fife, WA 98424

The UTC is an agency of the State of Washington (“State”) and at all times relevant hereto was acting or purporting to act on behalf of and as an agent for or a division of the State.

AGENCY ACTION SUBJECT TO PETITION

8 The agency action at issue, is the Final Order, described above. A copy of the Final Order is attached hereto as Appendix A and is incorporated herein for the purpose of showing a number of the acts, errors, and omissions of the UTC. The Petitioner also seeks review of any and all interlocutory actions and orders of the UTC that were implicitly or explicitly adopted in the Final Order, that affected or could be used to support the Final Order, or that otherwise were improper, unfair, or unlawful and contributed to the Petitioner being aggrieved in the Dockets. Other actions and orders will be established upon the filing and introduction of the agency record with the Court. If necessary and appropriate under the Administrative Procedure Act (“APA”), additional evidence outside the record may be offered by the Petitioner.

9 The persons who were parties in the adjudicative proceedings that led to the UTC's action were Petitioner, the UTC, and Speedishuttle, Washington, LLC ("Speedishuttle").¹

BACKGROUND OF PETITION

10 The UTC is charged by the legislature in RCW 80.04.040 to, "[r]egulate in the public interest, as provided by the public service laws, all persons engaging in the transportation of persons or property within this state for compensation." That includes Speedishuttle and Shuttle Express, who both transport or transported persons for compensation in the state as "auto transportation company[ies]" governed by RCW Ch. 81.68. The Commission is empowered by these, other public service laws, and the APA to hear and decide the Shuttle Express petition and complaint in Dockets TC-143691 and TC-160516, and also the Complaint of Speedishuttle in Docket TC-161257, which were all addressed in the Final Order. *See also* RCW Ch. 34.05.

11 UTC Docket TC-143691 was originally commenced as an application by Speedishuttle for new authority to transport passengers between SeaTac airport and the same territory already served by Shuttle Express (most of King County). Because the territory was already being served to the satisfaction of the UTC, the new application could not be granted lawfully unless Speedishuttle was proposing a different service that Shuttle Express was offering. Accordingly, the UTC granted the application based on findings of numerous service differences that would serve passengers that Shuttle Express was not then serving.

¹ Capital Aeroporter was a party to Docket TC-143691 in an earlier phase that led to a "final" order on March 30, 2015. That order and the proceedings that led to it are not challenged here, because the 30 day period to seek judicial review of that order ran long ago. Capital Aeroporter did not appear or participate in the more recent proceedings and therefore was not accorded party status by the UTC.

12 After Speedishuttle commenced operations it became apparent that it was providing exactly the same service, to exactly the same passengers, as Shuttle Express was serving and had been serving for many years to the satisfaction of the UTC. Shuttle Express filed a petition for a rehearing based on these and other facts in Docket TC-143691. Shuttle Express also filed a consolidated complaint against Speedishuttle, which was assigned Docket No. TC-160516. The petition for rehearing was granted and the UTC agreed to consider the petition and complaint together.

13 In November of 2016, Speedishuttle filed a complaint against Shuttle Express alleging violations of certain UTC rules. The Speedishuttle complaint was assigned Docket No. TC-161257 and was consolidated with the two Shuttle Express-initiated dockets. The actions complained of by Speedishuttle were supported, in part, by the UTC staff and became the basis for fines and penalties levied in the Final Order. In particular, the UTC fined Shuttle Express \$120,000.00 for passengers carried by limousine carriers who had originally reserved transportation on Shuttle Express vans.

14 In addition to operating as an auto transportation company regulated by the UTC under RCW Title 81, Shuttle Express contracts for the transportation of persons by in limousines, as defined in RCW 46.04.274 (“Limousines”) by Limousine carriers, as defined in RCW 46.04.276 (“Limousine Carrier”). Shuttle Express does not own or operate the Limousines nor employ the Limousine drivers. The Limousine Carriers are independent contractors who own Limousines. Each and every Limousine and Limousine Carrier contracted by Shuttle Express is and has been duly licensed by the Washington Department of Licensing.

15 For a time the UTC had jurisdiction over limousines until the Legislature, in 1996,

transferred “[a]ll powers, duties, and functions of the utilities and transportation commission pertaining to the regulation of limousines and limousine charter party carriers ... to the department of licensing.” Consistent with legislative divestment of the UTC’s jurisdiction, the UTC has not, since 1996, asserted jurisdiction over nor attempted to regulate the operations of Limousines, with some relevant exceptions.

16 In 2012, the UTC commenced an enforcement action against Shuttle Express, asserting jurisdiction over some, but not all, of the operations of Limousines under contract with Shuttle Express in its Docket No. TC-120323 (“Enforcement Docket”). The UTC’s final order in the Enforcement Docket (“Enforcement Final Order”) levied fines and penalties again Shuttle Express for transportation of passengers, by Limousines, but only when those passengers were in a group, transported in a single vehicle, only to or from SeaTac Airport, and in instances when the vehicle made more than one stop because the passengers were not part of single party (“multi-stop” trips). The Enforcement Final Order is attached as Appendix B. The UTC staff did not seek—and the UTC did not impose—any fines or penalties for any transportation of passengers in a single party (“single-stop” trips), although its investigation uncovered and noted thousands of such trips contracted for by Shuttle Express to and from SeaTac Airport.

17 The UTC imposed, enforced and collected a “fine” of \$60,000.00 from Shuttle Express for the multi-stop trips at issue in and pursuant to the Enforcement Final Order. The fines and penalties were based on alleged violations of WAC 480-30-213 by Shuttle Express for referring passengers to independent contractor Limousine Carriers. At the time, both the UTC and Shuttle Express believed that the UTC had cause to assert jurisdiction over the transportation because the Department of Licensing had not asserted

jurisdiction and the UTC could claim that the multi-stop trips were not arranged under a “single contract.” Having a “single contract” for the transportation is a prerequisite to a service qualifying as a Limousine Carrier under RCW 46.04.276. Shuttle Express did not seek judicial review and was forced to pay the fine of \$60,000, to avoid further and potentially more egregious enforcement actions and proceedings by the UTC. Shuttle Express immediately ceased multi-stop referrals to Limousines, after the Enforcement Final Order. But it continued to refer single stop-trips after consulting with the UTC staff, based on the staff’s testimony in the Enforcement Docket, and based on the clear distinction between the single and multi-stop trips made in the Enforcement Final Order.

18 In 2016, the UTC commenced a rulemaking proceeding in its Docket TC-161262 for the purpose of amending and repealing certain rules pertaining to auto transportation companies, including the rule on use of independent contractors. On May 11, 2017, the UTC held a “workshop” in the rulemaking. At that workshop, an authorized representative of the Department of Licensing appeared at the invitation of the UTC. The representative stated the position of the Department of Licensing on a number of issues, including whether single and multi-stop trips in a Limousine under a contract between an auto transportation company and a Limousine Carrier would qualify as “single contract” in the interpretation of the Department of Licensing of RCW 46.04.276. The answer was “yes.”

19 On July 31, 2017, the UTC adopted permanent rule changes and filed them with the Code Reviser. The rule changes included repeal of WAC 480-30-213 barring the use of independent contractors and adoption of new rules which expressly allowed the use of independent contractors.

20 For the first time ever, in the Final Order challenged by this judicial review petition the UTC fined and penalized Shuttle Express for single-stop transportation performed by licensed Limousines carrying passengers under contract with Shuttle Express. Not only did it levy a \$120,000.00 fine, it retroactively held that because Shuttle Express had referred passengers to licensed Limousine Carriers Shuttle Express would not—in the future—provide service to the satisfaction of the UTC. It made these findings notwithstanding that the Legislature in 1996 had eliminated all UTC jurisdiction “pertaining” to Limousines and the fact that the UTC itself had already repealed the rules that were the basis for the fine.

21 In retroactively finding that Shuttle Express would not serve to its satisfaction, the UTC also denied Shuttle Express any relief on rehearing against Speedishuttle. Moreover, it then unlawfully expressly permitted Speedishuttle to provide exactly the same service to the same territory as Shuttle Express was already providing.

22 Because the Department of Licensing has and at all material times had exclusive jurisdiction over all transportation of passengers by Limousine Carriers, in licensed Limousines, the UTC actually lacked any and all jurisdiction over both the single-stop trips that were the subject of its fines in the Final Order and the multi-stop trips addressed in the Enforcement Docket. Accordingly, both the Final Order and the Enforcement Final Order were *ultra vires* acts and are and were unenforceable.

STANDING

23 Petitioner was a full party to the Dockets, participated actively, and has exhausted its administrative remedies within the meaning of the APA. Shuttle Express has standing to obtain judicial review of agency action because it has been and will be aggrieved and

adversely affected by the Final Order.

24 The Final Order has prejudiced and is likely to prejudice Shuttle Express including, but not limited to, by the imposition of substantial fines and penalties, the refusal to accord affirmative relief to Shuttle Express based on the wrongful acts and omissions of Speedishuttle established in the record below, and the ongoing imposition of UTC regulations on the operation of limousines which is outside the scope of the UTC's jurisdiction and conflicts with and usurps the jurisdiction of Washington's Department of Licensing ("DOL").

25 The asserted interests of Shuttle Express are among those that the UTC was required by RCW Titles 80 and 81, and in particular RCW Chapters 81.04 and 81.68 when it engaged in the agency actions challenged.

26 A judgment in favor of Shuttle Express would substantially eliminate or redress the prejudice to Shuttle Express caused and likely to be caused by the Final Order. Accordingly, Shuttle Express is entitled to obtain judicial review of the Final Order and related UTC actions.

REASONS RELIEF SHOULD BE GRANTED

27 The court should grant Shuttle Express relief from the Final Order in the adjudicative proceeding for a number of reasons. Full detail of the reasons would not be consistent with the requirement of Civil Rule ("CR") 8(a) that a claim for relief "shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief" and is more appropriately reserved for full briefing and trial. The salient reasons are identified and summarized herein below consistent with CR 8 and RCW 34.05.546 and 570.

28 The Final Order is in violation of constitutional provisions as applied in that it levied

finances and penalties against Shuttle Express in a manner contrary to the requirements of due process of law. The UTC fined and penalized Shuttle Express for violation of purported rules that were unconstitutionally vague and with no notice or warning to Shuttle Express. Indeed, the UTC's penalties in the Final Order were applied to actions and procedures that the UTC had previously informed Shuttle Express were lawful, both explicitly and implicitly.

29 The Final Order's fine and penalties for the Shuttle Express practice of asking some passengers if they would prefer to be transported in a Limousine owned by an independent contractor holding a limousine license and regulated by the DOL instead of an "auto transportation vehicle" owned and operated by Shuttle Express is outside the statutory authority or jurisdiction of the agency conferred by any provision of law. In 1996, the legislature expressly divested the UTC of any and all jurisdiction over the management or operation of Limousines and transferred all regulation of Limousines from the Commission to the DOL. The 1996 law stated: "All powers, duties, and functions of the utilities and transportation commission pertaining to the regulation of limousines and limousine charter party carriers are transferred to the department of licensing." Washington Laws, 1996, Ch. 87, § 22.

30 The UTC engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure, including, but not limited to, its numerous and increasingly onerous restrictions on the scope of the rehearing and the scope of discovery allowed to Shuttle Express, contrary to the rights accorded to Shuttle Express under RCW 81.04.200. Moreover, the UTC's restrictions and restraints were applied inconsistently and unfairly to Shuttle Express, while the adverse parties were given

ample leeway to present their cases and facts, even when those facts went to the very issues that were the subject of the restrictions applied against Shuttle Express.

31 The UTC has erroneously interpreted or applied the law in numerous ways in the Final Order, including, but not limited to:

- a) Holding that referral of certain passengers to independent contractors licensed and regulated by the DOL was unlawful.
- b) Holding that certain commission payments by Shuttle Express to hotel concierges violated a UTC rule and using that erroneous holding to predict that Shuttle Express “will not provide” satisfactory service in the future, even though the rule is so vague that the UTC’s own staff took the position on the record repeatedly that Shuttle Express had actually complied with the rule.
- c) Holding that Speedishuttle could lawfully compete directly with Shuttle Express, providing exactly the same nature of service, notwithstanding the restrictions against such direct competition in RCW 81.68.040 and the Commission’s own order and findings in Order 04 in Docket TC-143691.
- d) Holding that Shuttle Express “will not provide [service] to the satisfaction of the commission” notwithstanding that the foundation for the predicted future unsatisfactory service was a rule that the UTC itself repealed months before the Final Order was entered and was based on operations that the UTC on numerous occasions had both expressly and implicitly declared were proper and lawful.
- e) Failing to order any relief or remedy for Speedishuttle’s below-cost pricing even though the predatory pricing was supported by overwhelming evidence,

unrebutted, and even admitted by Speedishuttle.

- f) The remedies in the Final Order failed to properly apply and enforce the public service laws, are inconsistent with the laws, and will harm both the Petitioner and the public interest.

32 The Final Order is not supported by evidence that is substantial when viewed in light of the whole record. Numerous findings and conclusions are contrary to overwhelming evidence and in some cases contrary to admitted or undisputed evidence.

33 The Final Order is inconsistent with rules of the UTC, including the now-repealed rule on auto transportation company use of independent contractors and the UTC's rule on filing of agreements entered into with agents authorized to sell tickets on behalf of the auto transportation company. The UTC has not explained its inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency.

34 The Final Order is arbitrary and capricious in a number of respects, including changing its interpretation of the scope and meaning of its now-repealed rule on use of independent contractors retroactively and with no notice to the Petitioner or other regulated auto transportation companies. Applying its new interpretation retroactively to Shuttle Express to support fines and other sanctions and penalties with no notice is also arbitrary and capricious.

35 Many of the foregoing highlights and summaries of the most salient reasons supporting relief from the errors in the Final Order overlap. That is, the errors identified often support reversal or other relief under more than one sub-section of RCW 34.05.570(3).

RELIEF REQUESTED

36 Based on the foregoing petition Shuttle Express prays for the following remedies and relief:

- a) Defer the schedule in this case as necessary or beneficial to amend this pleading to add a complaint or to join this petition with an anticipated complaint based on the Claim in about sixty (60) days, assuming the Claim is not granted by the State in that time frame.
- b) For a temporary and permanent injunction and stay barring the UTC from enforcing the Final Order;
- c) For judgment setting aside the Final Order;
- d) For a remand of the Final Order to the UTC for further actions consistent with the Court's findings and conclusions on each asserted violation or error by the agency under the standards for review set out in RCW Chapter 34.05, to be established at trial;
- e) For costs and such attorney fees as may be allowed by law; and

- f) For such other and further relief as may be deemed just and equitable.

Respectfully submitted this 14th day of December, 2017.

Attorneys for Petitioner, Shuttle Express:

LUKAS, LAFURIA, GUTIERREZ & SACHS, LLP



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CERTIFICATE OF SERVICE

I hereby certify that on December 14th, 2017, I served a copy of the foregoing document via first class mail, postage prepaid, with a copies via Federal Express overnight and via email, to:

<p>Mr. Steven V. King, Executive Director and Secretary Utilities and Transportation Commission 1300 S Evergreen Park Drive SW Olympia, WA, 98504 Email: records@utc.wa.gov</p>	<p>Julian Beattie Office of the Attorney General, Utilities and Transportation Division 1400 S. Evergreen Park Dr. SW PO Box 40128 Olympia, WA 98504-0128 (360) 664-1192 Email: jbeattie@utc.wa.gov</p>
<p>David W. Wiley Williams Kastner Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 (206) 233-2895 Email: dwiley@williamskastner.com</p>	

Dated at Tysons, Virginia this 14th day of December, 2017.

_____/s/_____
Maureen Halligan
Legal Assistant

Attachment A

Service Date: November 17, 2017

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

<p>In re the Application of</p> <p>SPEEDISHUTTLE WASHINGTON, LLC d/b/a SPEEDISHUTTLE SEATTLE</p> <p>For a Certificate of Public Convenience and Necessity to Operate Motor Vehicles in Furnishing Passenger and Express Service as an Auto Transportation Company</p>	<p>DOCKET TC-143691 <i>(Consolidated)</i></p> <p>ORDER 20</p>
<p>SHUTTLE EXPRESS, INC.,</p> <p>Complainant,</p> <p>v.</p> <p>SPEEDISHUTTLE WASHINGTON, LLC d/b/a SPEEDISHUTTLE SEATTLE,</p> <p>Respondent.</p>	<p>DOCKET TC-160516 <i>(Consolidated)</i></p> <p>ORDER 13</p>
<p>SPEEDISHUTTLE WASHINGTON, LLC d/b/a SPEEDISHUTTLE SEATTLE,</p> <p>Complainant,</p> <p>v.</p> <p>SHUTTLE EXPRESS, INC.,</p> <p>Respondent.</p>	<p>DOCKET TC-161257 <i>(Consolidated)</i></p> <p>ORDER 10</p> <p>FINAL ORDER</p>

BACKGROUND

- 1 On October 10, 2014, Speedishuttle of Washington, LLC d/b/a Speedishuttle Seattle (Speedishuttle) filed with the Washington Utilities and Transportation Commission (Commission) an application for a certificate of public convenience and necessity to operate as an auto transportation carrier (Application). Shuttle Express, Inc. (Shuttle Express) objected to the Application. On March 30, 2015, the Commission entered Order 04, Final Order Affirming Order 02, which affirmed the initial order finding that Speedishuttle did not propose to offer the same service that Shuttle Express provides and overruled the objection to granting the Application.
- 2 On May 16, 2016, Shuttle Express filed a Petition for Rehearing of Matters in Docket TC-143691 alleging that Speedishuttle is providing the same service as Shuttle Express, not the service that the Commission found to be different. Shuttle Express contemporaneously filed a Formal Complaint against Speedishuttle in Docket TC-160516. The allegations in the complaint substantially overlap with the allegations in the Petition for Rehearing and further allege that Speedishuttle is engaging in predatory pricing by providing service below cost. On August 4, 2016, the Commission agreed to rehear matters in Docket TC-143691, adjudicate the complaint in Docket TC-160516, and consolidate the two dockets.
- 3 On December 1, 2016, Speedishuttle filed with the Commission a formal complaint against Shuttle Express in Docket TC-161257, alleging that Shuttle Express has used independent contractors and paid commissions to unauthorized ticket agents in violation of Commission orders and rules. On January 5, 2017, the Commission consolidated this docket with Dockets TC-143691 and TC-160516.
- 4 On May 10 and 12, 2017, the Commission conducted an evidentiary hearing before Administrative Law Judge Rayne Pearson. The parties filed initial post-hearing briefs on June 19, 2017, and reply briefs on July 14, 2017.¹
- 5 On August 25, 2017, the Commission entered its initial order in the consolidated dockets (Initial Order). The order finds that Shuttle Express's use of independent contractors violates applicable statutes and rules and assesses a \$120,000 penalty for those violations.

¹ Rather than repeat them here, we adopt the summary of the procedural history, evidence, and parties' positions in paragraphs 1-28 and 30-67 in the Initial Order.

The Initial Order also finds that Shuttle Express violated Commission rules by failing to file the form for its ticket agent agreements and by combining scheduled and door-to-door service. The Initial Order upholds the Commission's grant of a certificate to Speedishuttle both because Shuttle Express will not provide service to the Commission's satisfaction and because Speedishuttle provides a different service than Shuttle Express provides. Finally, the Initial Order finds that Shuttle Express failed to establish that Speedishuttle sets prices for its service below cost or engages in predatory pricing.

6 On September 15, 2017, Shuttle Express submitted a Petition for Administrative Review of the Initial Order (Petition). Shuttle Express essentially assigns error to all of the findings of fact and conclusions of law in the Initial Order. More generally, Shuttle Express contends that (1) it lawfully used independent contractors and paid commissions for referrals from hotel concierges; (2) "Speedishuttle's Business Model differences were not real, were not meaningfully implemented, and did not constitute a different service under the law"; (3) the Initial Order's findings and conclusions concerning whether Shuttle Express will provide service to the Commission's satisfaction are "not supported by cognizable new evidence"; (4) Shuttle Express's complaint that Speedishuttle is engaging in predatory pricing below cost is "actually supported by overwhelming evidence and admitted by Speedishuttle"; and (5) the remedies in the Initial Order "fail to properly apply and enforce the public service laws."²

7 On September 26, 2017, Speedishuttle and Commission staff (Staff) submitted their answers to the Petition. Both of these parties oppose the Petition and urge the Commission to approve and adopt the Initial Order as its own.

8 Brooks E. Harlow, Lukas, Nace, Gutierrez & Sachs, LLP, McLean, Virginia, represents Shuttle Express. David Wiley and Blair Fassburg, Williams, Kastner & Gibbs PLLC, Seattle, Washington, represent Speedishuttle. Julian Beattie, Assistant Attorney General, Olympia, Washington, represents Staff.

DISCUSSION AND DECISION

9 We largely deny the Petition. The record amply demonstrates that Shuttle Express has repeatedly and willfully violated Commission rules and regulations, will not provide auto transportation service to the Commission's satisfaction, and should be penalized for its

² Petition ¶ 7.

most recent infractions. Shuttle Express has not proven that Speedishuttle can engage, much less has engaged, in predatory pricing. Accordingly, Speedishuttle may retain its existing certificate without modifications. We agree with and adopt as our own much of the discussion in the Initial Order on those issues as supplemented by this Order.

- 10 On the other hand, because we conclude that Shuttle Express will not provide service to the Commission's satisfaction, we need not, and do not conclude that Speedishuttle provides a different service than Shuttle Express. Accordingly, we vacate those aspects of the Initial Order.

Misconduct and Scope of Review

- 11 As an initial matter, Shuttle Express accuses the administrative law judge of conducting a "one-sided and patently unfair proceeding."³ More specifically, Shuttle Express claims that she engaged in an "improper and undue (not to mention one-sided) narrowing of the proceeding,"⁴ "revis[ed] prior Commission orders to make the unassailable facts no longer relevant,"⁵ and used "invented" evidence to "freely and liberally" expand the case to support the other parties' positions.⁶ Such claims, like all allegations in a pleading or brief, must be well grounded in fact.⁷ These are not.
- 12 We find no basis in fact or law for Shuttle Express's accusations. The record demonstrates that the judge's conduct of the proceedings was fair and balanced, her rulings were consistent with Commission rules and prior orders, and substantial evidence supports her findings of fact. Shuttle Express's unsupported accusations to the contrary appear to us to go beyond zealous advocacy and are wholly inconsistent with the behavior we expect from counsel who appear before us and the parties they represent.
- 13 We expect parties, particularly those represented by counsel, to comply with the Commission's procedural rules. In its Answer to the Petition, Staff notes several instances in which Shuttle Express purports to preserve challenges and arguments that are

³ Petition ¶ 5.

⁴ *Id.* ¶ 2.

⁵ *Id.* ¶ 3.

⁶ *Id.*

⁷ *See, e.g.*, CR 11(a)(1) (stating that a party's or attorney's signature on a pleading, motion, or legal memorandum certifies that it is well grounded in fact).

not raised or discussed in the Petition. Staff recommends, “To protect the integrity of the review process, the Commission should state in its final order that Shuttle Express has waived any contention of error that is not specifically identified and adequately briefed in its petition.”⁸ We agree and so state.

14 The Commission’s procedural rule governing review of initial orders is prescriptive:

Petitions for administrative review must clearly identify the nature of each challenge to the initial order, the evidence, law, rule or other authority that the petitioner relies upon to support the challenge, and state the remedy that the petitioner seeks. *Petitions for review of initial orders must be specific.* The petitioner must separately state and number every contention. A petition that challenges a finding of fact must cite the pertinent page or part of the record or must otherwise state the evidence it relies on to support its petition, and should include a recommended finding of fact. A petition that challenges a conclusion of law must cite the appropriate statute, rule, or case involved and should include a recommended conclusion of law. A petition that challenges the summary or discussion portion of an initial order must include a statement showing the legal or factual justification for the challenge, and a statement of how the asserted defect affects the findings of fact, the conclusions of law, and the ultimate decision.⁹

The Commission will consider the challenges raised in a petition for administrative review that comply with these requirements. Unless it raises them on its own motion, the Commission will not address issues to which a party obliquely refers or attempts to cross-reference in a prior brief or other filing. Those issues are waived.

15 Accordingly, the only issues Shuttle Express has preserved for administrative review are those it has raised consistent with the requirements in WAC 480-07-825, specifically the contentions of error listed and summarized in paragraph 7 of the Petition. Whether intentional or not, Shuttle Express has waived all other issues, and we do not consider them.

⁸ Staff Answer ¶¶ 3 and 5.

⁹ WAC 480-07-825(3) (emphasis added).

Use of Independent Contractors

- 16 Prior to the date on which Speedishuttle filed its original Application and, later, its complaint, WAC 480-30-213 required an auto transportation company to use vehicles it owns and employ its own drivers to provide auto transportation service. The Initial Order concludes, “Shuttle Express violated WAC 480-30-213 each time it used an independent contractor to provide auto transportation service in the two years preceding Speedishuttle’s Complaint, a total of 35,351 times.”¹⁰ Shuttle Express challenges this conclusion on several grounds, primarily based on its position that the service being provided was not auto transportation service but limousine service, which is not subject to Commission regulation. We disagree.
- 17 Shuttle Express concedes that it arranged for vehicles and drivers other than its own vans and employees to transport passengers to the airport on 35,251 occasions during the relevant time period. Shuttle Express refers to these as instances of “upgrade service,” which the company explains as follows:
- We use the term upgrade to indicate that we’ve contacted the passenger and received positive approval to send them an *alternate vehicle* for their transportation. Generally, the dispatcher advises the guest that Shuttle Express would like to *upgrade their service from a shared van to a private town car or SUV at no additional charge*. If the customer accepts the change, then we dispatch the replacement vehicle and service to the guest and make no other change to their booking. If they decline, we send an employee driver in a company owned vehicle.¹¹
- 18 While some customers may prefer a town car to a shared-ride van, Shuttle Express cannot plausibly contend that its upgrade service is not auto transportation service as defined in Commission rules and the company’s tariff. A customer requested auto transportation service from Shuttle Express at the rates, terms, and conditions in the tariff, and Shuttle Express provided that service at those rates, terms, and conditions. The only distinction is that Shuttle Express used a vehicle owned and driven by a third-party contractor, rather than an employee driver in a company-owned vehicle. It is a distinction without a

¹⁰ Initial Order ¶ 179.

¹¹ Marks, Exh. WAM-2T at 34:1-7 (emphasis added).

difference. Shuttle Express represented to its customers that upgrade service is *better* service, not *different* service.¹²

- 19 Shuttle Express also contends that its upgrade service is not auto transportation service because Shuttle Express does not own the vehicle, and the statute defines “auto transportation company” as a person “owning, controlling, operating, or managing any motor-propelled vehicle used in the business of transporting persons and their baggage *on the vehicles of auto transportation companies* carrying passengers.”¹³ According to Shuttle Express, the highlighted language reflects legislative intent to define auto transportation companies as only those who use their own vehicles dedicated to providing that service.
- 20 The statutory language on which Shuttle Express relies is not reasonably susceptible to its interpretation. The phrase “on the vehicles of auto transportation companies” merely modifies “baggage,” requiring passengers and baggage to be transported in the same vehicle. That language does not limit which companies are auto transportation companies. The remainder of the definition does so by specifying persons “owning, controlling, operating, or managing *any* motor-propelled vehicle.” Shuttle Express cannot claim it is not an auto transportation company as defined in the statute because it is providing auto transportation service using vehicles it does not own.¹⁴
- 21 Shuttle Express further asserts that the Commission cannot regulate upgrade service because the vehicles used to provide that service are limousines, which are subject to the exclusive jurisdiction of the Department of Licensing (DOL). Staff correctly observes that we rejected a similar argument the last time the Commission found that Shuttle Express violated former WAC 480-30-213.¹⁵ Further, as Staff notes in its Answer, Shuttle Express cites to no record evidence demonstrating that DOL regulates these vehicles.

¹² Shuttle Express’s operations are consistent with the common meaning of the word “upgrade,” *i.e.*, “to raise the quality of.” <https://www.merriam-webster.com/dictionary/upgrade>.

¹³ RCW 81.68.010(3) (emphasis added).

¹⁴ Indeed, the Commission’s most recent revisions to its rules governing auto transportation service allowing companies to use independent contractors would conflict with the statute if it required those companies to provide service only using their own vehicles.

¹⁵ *Commission v. Shuttle Express*, Docket TC-120323, Order 04 ¶ 13 (March 19, 2014).

- 22 Upgrade service actually involves two separate services. The first service is auto transportation service the travelling passenger receives from Shuttle Express. The passenger contacts Shuttle Express to arrange that service from Shuttle Express and pays Shuttle Express for the service. The second service is “limousine service” (for purposes of this discussion) that Shuttle Express obtains from an independent contractor. Shuttle Express contacts the contractor to arrange the limousine service and pays the contractor for that service. Shuttle Express then uses the limousine service to physically provision the auto transportation service to the travelling passenger. Whether or not DOL regulates the limousine service the independent contractor provides to Shuttle Express, the Commission has jurisdiction over the auto transportation service Shuttle Express provides to the passenger, regardless of the vehicles or drivers Shuttle Express uses to provision that service.¹⁶
- 23 Shuttle Express claims in its Petition that it merely “solicits passengers for the limousine carriers, refers them, and assists with the booking with independent limousine carriers who accept the proposed transportation. Shuttle Express may, in some cases, assist with the billing and collection of the limousine fares.”¹⁷ The testimony Shuttle Express cites for this proposition is to the contrary. Mr. Marks testified that the *only* change Shuttle Express made to the original booking was the vehicle used to provide the service: “If the customer accepts the change, we dispatch the replacement vehicle and service to the guest and make no other change to their booking.”¹⁸ Shuttle Express thus does not “refer” the customers to a limousine carrier or “assist with the billing and collection of the limousine fares” when providing upgrade service. The customer books auto transportation service from Shuttle Express and pays Shuttle Express the tariffed fare while Shuttle Express books and pays the limousine carrier.¹⁹

¹⁶ The Commission codified that concept in its most recent revisions. *See, e.g.*, WAC 480-30-221(1) (“A passenger transportation company must ensure that all vehicles and drivers used to provide passenger transportation services under the authority of the company's certificate comply with all federal, state, and local laws and rules, and commission orders, governing licensing, vehicle safety, and driver safety.”)

¹⁷ Petition ¶ 15 (footnotes omitted).

¹⁸ Marks, Exh. WAM-2T at 34:5-7.

¹⁹ We need not, and do not, reach Shuttle Express’s constitutional takings challenge because as a matter of fact and law, the Commission has not asserted jurisdiction over limousine services.

- 24 Finally, Shuttle Express argues that all of the trips at issue in this proceeding involved a single stop and that the Commission regulates only multi-stop trips as auto transportation service. According to Shuttle Express, Staff previously agreed with this conclusion and the Commission in its final order in Docket TC-120323 implicitly validated it. Shuttle Express is incorrect.
- 25 As the Initial Order observes, “Neither RCW 81.68 nor WAC 480-30 make any distinction between single-stop and multi-stop trips.”²⁰ Nor did the Commission implicitly validate such a distinction in Docket TC-120323. The only trips at issue in that docket were multi-stop trips. The Commission summarized Shuttle Express’s position that “Staff concedes that ‘rescue service’ provided on a single-stop basis complies with Commission regulations”²¹ but thereafter ignored that argument because it was not germane. The Commission did not conclude, implicitly or otherwise, that regulated auto transportation service does not include single-stop trips.
- 26 Shuttle Express nevertheless contends that Staff told the company that the Commission does not regulate single-stop trips and that Shuttle Express relied on that advice to its detriment. Staff, however, disputes that it ever gave such guidance. The only evidence Shuttle Express offered to support the alleged conversation with Staff was the self-serving hearsay of one of its own personnel. We do not find this credible, particularly in light of the circumstances surrounding upgrade service. Shuttle Express accepts the original booking from the travelling passenger as auto transportation service and only seeks to provide upgrade service if other passengers are not available to share the ride. Auto transportation service does not cease being auto transportation service simply because Shuttle Express does not subsequently receive additional bookings for a particular trip. Indeed, Shuttle Express acknowledges the regulatory status of this service by using its own vehicle and employee driver to provide the service to a single passenger or party if they decline an upgrade.²² Shuttle Express’s upgrade service is auto transportation service as defined in Commission rules and the company’s tariff.

²⁰ Initial Order ¶ 70.

²¹ *Commission v. Shuttle Express*, Docket TC-120323, Order 04 Final Order ¶ 37 (March 19, 2014).

²² Marks, Exh. WAM-2T at 34:6-7.

27 The Initial Order did not err by concluding that Shuttle Express violated former WAC 480-30-213 a total of 35,351 times in the two years prior to the date Speedishuttle filed its complaint.²³

Hotel Personnel Commissions

28 “An 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.”²⁴ The Initial Order finds that “Shuttle Express’s failure to file the form it uses for its commission-based booking program violates” this requirement.²⁵ Shuttle Express challenges this finding as unsupported and directly contrary to the evidentiary record. We disagree.

29 The Initial Order quotes several provisions in Shuttle Express’s “2015 Commission Guidelines” detailing how hotel personnel can earn commissions on Shuttle Express service they book for others, as well as Mr. Mark’s acknowledgement of that arrangement. This evidence provides substantial support for the Initial Order’s finding.

30 Shuttle Express argues that the term “book” is undefined in that context and thus does not support a legal conclusion that hotel personnel were acting as agents of Shuttle Express. We find no ambiguity in that verb or any reason to believe it has anything other than the common meaning: “to register (something, such as a name) for some future activity or condition (as to engage transportation or reserve lodgings).”²⁶ Shuttle Express also claims that Mr. Marks’s testimony came in response to a “very leading question that was framed in the passive voice about ‘reservations made for Shuttle Express service on behalf of passengers.’”²⁷ Shuttle Express made no objection to the question at the hearing, and the context of the questioning makes clear that it refers to reservations the hotel employee made for the travelling passenger.

31 Shuttle Express nevertheless claims that Staff in its response to Bench Request No. 5 stated that “Staff found that Shuttle Express was, in fact, paying certain Seattle-area hotel

²³ Accordingly, we adopt paragraphs 69-77 in the Initial Order.

²⁴ WAC 480-30-391(1).

²⁵ Initial Order ¶ 78.

²⁶ <https://www.merriam-webster.com/dictionary/book>.

²⁷ Petition ¶ 28.

staff for referring customers to Shuttle Express. However, the hotel staff are not selling tickets or acting as ticket agents. Instead, they are simply referring customers to Shuttle Express.” At best, this raises a conflict with other record evidence. Under the circumstances presented here, we find that the weight of the evidence supports the Initial Order’s findings. Shuttle Express’s 2015 Commission Guidelines document, witness testimony, and Staff’s finding that Shuttle Express was paying hotel staff in conjunction with auto transportation service, support the conclusion that Shuttle Express’s commission arrangement comes within WAC 480-30-391, and Shuttle Express should have filed the form of its agreement for Commission approval to make such payments prior to doing so.

32 Finally, Shuttle Express argues that it could not have violated the rule unless an agent actually sells the ticket for the service and collects the payment from the passenger, which was not the case here. We do not read the rule so narrowly. Both the language and the intent of the rule require an auto transportation company to inform the Commission in advance of any agreement to pay a portion of a company’s regulated fares to another person involved in the company’s ticket sales. The form agreement must include “a statement as to how and when payment will be made to the company for tickets, less commission,” among other items, but such a requirement does not specify who must make the payment or how the company will pay the commission.

33 Even if WAC 480-30-391 did not apply, Shuttle Express’s arrangement with hotel personnel would violate RCW 81.28.080. That statute provides, in relevant part, that a company “shall not refund or remit in any manner or by any device any portion of the rates, fares, or charges [in its tariff] excepting on order of the commission.”²⁸ As the Commission explained when it previously found that Shuttle Express had violated the applicable rule,

The regulation is designed to facilitate a carrier’s contract with agents such as travel agents or institutions. It is not designed to supersede the requirements of RCW 81.28.080, nor to allow payments to individuals whose jobs do not regularly include such duties. Payment is not proper to bellhops or other individuals whose regular vocations do not involve similar agencies or services, who are not understood by the public to be

²⁸ RCW 81.28.080(1).

engaged in such agency roles for compensation, and whose strategic locations afford them the opportunity to refer customers to certain carriers and away from others.²⁹

The current rule permits companies to compensate non-company personnel involved in the sale of tickets or fares for company services as long as the Commission has approved that arrangement, but pursuant to the statute, the Commission must approve *any* payment to third parties that is a refund or remittance of any portion of the company's tariffed fares. Paying a percentage of a company's fare to a third party in compensation for referring the customer is just such a payment.³⁰ Having failed to obtain Commission approval for those payments, Shuttle Express is violating applicable law by making them.

34 The Initial Order did not err by finding that Shuttle Express's failure to file the form it uses for its commission-based booking program violates WAC 480-30-391(1).³¹

Combining Scheduled and Door-to-Door Service

35 Commission rules require that "[a]n auto transportation company's filed time schedule must . . . [s]how the routes served, including the exact location of each regular stop, each flag stop, and any point to which service is provided."³² The Initial Order concludes that Shuttle Express's practice of combining scheduled and door-to-door service violates

²⁹ *Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc., d/b/a Shuttle Express*, Docket TC-910789, Commission Decision and Order Granting Administrative Review; Modifying Initial Order; Assessing Penalties at 6-7 (Jan. 6, 1993) (*EASE v. Shuttle Express*).

³⁰ Staff does not contest the Initial Order's findings on this issue for purposes of administrative review but took the view in response to Bench Request No. 5 that "the purpose of RCW 81.28.080 is not to restrict companies from using hotel staff to provide referrals for transportation. Rather, the statute protects passengers from being charged rates outside the filed tariff." We do not interpret the statute so narrowly. It expressly prohibits *any* refund or remittance, and we must give full effect to the words the legislature used. While "remit" can mean "refrain from exacting," it is also defined as "to send (money) to a person or place." <https://www.merriam-webster.com/dictionary/remit>. The statutory language thus is broader than reducing a tariff rate for a customer. Protecting passengers from being charged non-tariffed rates is certainly one of the statute's objectives, but particularly in the competitive transportation market, we adhere to our previous conclusion that the legislature is also concerned with payments to third parties "whose strategic locations afford them the opportunity to refer customers to certain carriers and away from others." *EASE v. Shuttle Express* at 7.

³¹ Accordingly, we adopt paragraphs 78-80 in the Initial Order.

³² WAC 480-30-346(2)(d); accord WAC 480-30-276(2); WAC 480-30-281(2)(b)(iv).

these rules.³³ Shuttle Express interprets Commission rules not to prohibit a company from making unscheduled stops when providing scheduled service as long as the passengers who obtain scheduled service are picked up and dropped off at the locations specified in the time schedule. The rules are not susceptible to Shuttle Express's interpretation.

36 Scheduled service and door-to-door service are separate auto transportation services, and Commission rules treat them as such. The time schedules for scheduled service in a company's tariff must identify "any point to which service is provided."³⁴ Adding door-to-door service points on a scheduled service route is fundamentally inconsistent with this requirement.³⁵

37 Shuttle Express nevertheless points to its tariff in which it states under the heading ALTERNATIVE MEANS OF TRANSPORT, "We also reserve the right to combine Door-to-Door passengers on a scheduled service route so long as the scheduled pick-ups should not be adversely affected."³⁶ Shuttle Express, however, cannot reserve rights it does not have. Company tariffs must state "whether alternate means of transport will be provided by the company *when it is unable to provide transportation at the time and place specified in the reservation* that the company has accepted for that passenger."³⁷ Shuttle Express does not claim that it combines door-to-door with scheduled service only when it is unable to provide the service the passenger has reserved. Rather, Mr. Marks testified that "it would not be financially reasonable to only serve passengers on some routes, so we do combine them with others in the general area."³⁸ Shuttle Express is not unable to provide a particular service simply because doing so "would not be financially reasonable."

38 Shuttle Express's conduct with respect to this issue typifies our dissatisfaction with the company's operations. As we discuss below, Shuttle Express repeatedly adopts practices

³³ Initial Order ¶¶ 170, 172 & 189.

³⁴ WAC 480-30-346(2)(d) (emphasis added).

³⁵ Shuttle Express misses the point by arguing that these additional service points are not "flag stops." Whether characterized as unscheduled flag stops or a combination of door-to-door and scheduled service, Shuttle Express has not listed those service points in its time schedule for scheduled service in violation of Commission rules.

³⁶ Marks, Exh. WAM-2T at 4:15-18.

³⁷ WAC 480-30-356(3)(g) (emphasis added).

³⁸ Marks, Exh. WAM-2T at 4:8-9.

for provisioning regulated auto transportation service despite Commission rules prohibiting such practices. While we find that Shuttle Express's practice of combining door-to-door and scheduled service is inconsistent with WAC 480-30-346(2)(d), we do not uphold the Initial Order's finding that Shuttle Express violated the rule. In this instance, the Commission approved Shuttle Express's tariff provision or allowed it to go into effect by operation of law. Given the inconsistency of the tariff provision with the Commission's rules, we require Shuttle Express to correct this provision in its tariff rules. Further, if Shuttle Express seeks to combine door-to-door and scheduled service, it should raise that issue in Docket TC-161262, the rulemaking examining the rules governing auto transportation. Pending any revisions to those rules, Shuttle Express may not combine door-to-door and scheduled service except "when it is unable to provide transportation at the time and place specified in the reservation that the company has accepted for that passenger."³⁹

Application of RCW 81.68.040

³⁹ The statute governing Commission regulation of auto transportation companies provides in relevant part,

An auto transportation company shall not operate for the transportation of persons and their baggage for compensation between fixed termini or over a regular route in this state, without first having obtained from the commission under this chapter a certificate declaring that public convenience and necessity require such operation. . . . The commission may, after notice and an opportunity for a hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the commission⁴⁰

The Initial Order concludes that the auto transportation service Speedishuttle provides is not the same as Shuttle Express's service, and thus the Commission should continue to

³⁹ WAC 480-30-356(3)(g).

⁴⁰ RCW 81.68.040.

authorize Speedishuttle to provide service pursuant to its existing certificate.⁴¹ Although stating it was unnecessary in light of this finding, the Initial Order also concluded that Shuttle Express's repeated and persistent noncompliance with Commission rules demonstrates that Shuttle Express has not provided, and will not provide, service to the Commission's satisfaction.⁴² Shuttle Express challenges both of these conclusions.

40 The Commission may grant an application to provide auto transportation service in a territory that is being served by one or more existing carriers only if that company or those companies "will not provide the same to the satisfaction of the commission." The Commission has interpreted that statutory provision to require that an applicant seeking to provide service in an area already served by one or more certificated carriers must demonstrate that either (1) the applicant does not propose to offer the same service that is currently being provided in the territory; or (2) the existing provider(s) will not provide service to the Commission's satisfaction. We depart from the Initial Order by addressing the second inquiry first.

Service to the Commission's Satisfaction

41 The Commission has established several non-exclusive factors it considers when determining whether an auto transportation company is providing service to the Commission's satisfaction. As relevant here, those factors include whether the company (a) "[h]as made a reasonable effort to expand and improve its service"; and (b) "meets advertised or posted schedules."⁴³ The Commission bases its determination on the company's performance prior to the date the application for competing service is filed and will take into consideration whether evidence presented at the hearing "shows a pattern of behavior."⁴⁴

42 The Initial Order finds that (a) Shuttle Express's use of independent contractors to supplement its service demonstrates that it has failed to make reasonable efforts to expand or improve its service;⁴⁵ (b) Shuttle Express's practice of combining door-to-door

⁴¹ *E.g.*, Initial Order ¶ 112.

⁴² *E.g.*, *id.* ¶ 124.

⁴³ WAC 480-30-140(3)(a).

⁴⁴ WAC 480-30-140(3)(b).

⁴⁵ *E.g.*, Initial Order ¶ 115.

and scheduled service is a failure to meet advertised or posted schedules;⁴⁶ and (c) Shuttle Express’s “extensive history of noncompliance with Commission rules . . . constitutes a predictive pattern of behavior indicating that Shuttle Express will not provide service to the Commission’s satisfaction on a going-forward basis.”⁴⁷ Shuttle Express’s challenge to these findings and conclusions is perfunctory at best. Shuttle Express simply characterizes them as “finding fault with operations that are outside the scope of the Commission’s jurisdiction and finding violations of rules that have never been articulated or enforced before. But when those are stripped away, as they must be, there is no new evidence that supports a finding that Shuttle Express ‘will not provide’ service to the Commission’s satisfaction.”⁴⁸ We disagree.

43 We affirm and adopt the Initial Order’s findings and conclusions that Shuttle Express has repeatedly violated Commission rules and on that basis conclude that Shuttle Express will not provide service to the Commission’s satisfaction.⁴⁹ Shuttle Express has *thrice* violated the Commission’s former prohibition on using independent contractors to provide regulated auto transportation services. Shuttle Express has twice violated rules requiring Commission approval of agreements to pay ticket sale commissions to third parties. While we do not find that Shuttle Express is violating rules requiring separate provisioning of scheduled and door-to-door service, our review in this proceeding indicates that the company’s tariff rules do not conform to Commission rules and should be modified. Shuttle Express also violated its certificate by increasing the size of its vans beyond the restrictions in that certificate.⁵⁰

44 These violations show an unacceptable pattern of behavior. Rather than seek to amend its certificate or tariff or change Commission regulations with which the company disagrees,

⁴⁶ *E.g., id.* ¶ 116.

⁴⁷ *Id.* ¶ 117.

⁴⁸ Petition ¶ 33. Shuttle Express also argues in a footnote that the use of the future tense in the statute and “basic principles of due process suggest that notice and an opportunity to meet a new expectation is essential” prior to concluding that a company will not provide service to the Commission’s satisfaction. *Id.* n.58. The Commission and the Court of Appeals have already rejected this argument. *Pacific NW Transp. Servs. v. Washington Utils. and Transp. Comm’n*, 91 Wn. App. 589, 596, 959 P.2d 160 (1998). We continue to reject it here.

⁴⁹ Initial Order ¶¶ 116-124. We do not address and do not adopt the findings and conclusions in the Initial Order concerning the other factors.

⁵⁰ Initial Order ¶¶ 117-23.

Shuttle Express simply ignores those requirements and provides service as it chooses. The Commission's auto transportation rules are designed primarily to protect consumers and the travelling public. While the Commission continues to examine those rules and make revisions as necessary to better reflect the evolving marketplace, the Commission expects auto transportation companies to comply with the rules unless and until the Commission waives or modifies them.

45 WAC 480-30-140(3) does not specify repeated or willful violations of Commission regulations among the factors for determining whether a company will provide service to the Commission's satisfaction, but the rule provides that those factors are not exclusive. The court of appeals has held in these circumstances "that the Commission, when called upon to evaluate the future, may do so in any rational way that the evidence will support."⁵¹ The legislature has authorized the Commission to revoke an auto transportation company's certificate if that company "willfully violates or refuses to observe any of the commission's proper orders, rules, or regulations."⁵² Such conduct is *per se* unsatisfactory service. Shuttle Express has repeatedly and willfully violated Commission rules and regulations. The record evidence fully supports the conclusion that Shuttle Express has not provided, and will not provide, service to the satisfaction of the Commission within the meaning of RCW 81.68.040.

46 The Initial Order did not err in finding and concluding that Shuttle Express will not provide service to the Commission's satisfaction.

Different Service

47 The Commission has adopted nonexclusive factors it considers when determining whether an applicant for auto transportation authority proposes to provide the same service as the existing certificated carrier(s), including as relevant here, (1) whether the existing companies "are providing service to the full extent of their authority"; (2) "whether the type of service provided reasonably serves the market"; and (3) "[t]he type, means, and methods of service provided."⁵³ The Initial Order found that Shuttle Express is not providing service to the full extent of its authority or reasonably serving the market

⁵¹ *Pacific N.W. Transp. Servs., Inc. v. Washington Utils. & Transp. Comm'n*, 91 Wn. App. 589, 596, 959 P.2d 160 (1998).

⁵² RCW 81.68.130.

⁵³ WAC 480-30-140(2).

because of its reliance on independent contractors.⁵⁴ The Initial Order also found that the type, means, and methods by which Speedishuttle provides service are different than how Shuttle Express provisions its service based on features such as newer luxury vehicles, personal greeters, SpeediTV and Wi-Fi, and use of only company-owned vehicles and drivers to provide exclusively door-to-door service.⁵⁵

48 Shuttle Express challenges these findings as superficial distinctions without a difference that lack evidentiary support. Shuttle Express claims that their speciousness is exemplified by the Commission’s apparent “view that it cannot enforce or require that a carrier – once certificated – must maintain or perpetuate such promised distinctions.”⁵⁶ Shuttle Express contends, “At a minimum, Speedishuttle should be required to provide only a service of the type the Commission initially found was different than Shuttle Express’s, *i.e.*, by reservation only and with multi-lingual and greeter service provided to all passengers.”⁵⁷

49 Because we conclude that Shuttle Express is not providing, and will not provide, service to the Commission’s satisfaction, under RCW 81.68.040 we need not, and do not, determine whether some or all of the service Speedishuttle offers is the same as Shuttle Express’s service. We also need not, and do not, decide the extent to which Speedishuttle is adhering to its original business model. By finding that Shuttle Express is not providing and will not provide service to our satisfaction, whether Speedishuttle is serving only the customers it originally targeted is now moot. Speedishuttle is not limited in the auto transportation service it can provide under our decision but may compete head to head with Shuttle Express to the full extent it chooses to do so. We therefore vacate those provisions of the Initial Order.⁵⁸

50 We nevertheless note, as did the Initial Order, that some of Speedishuttle’s representations in its initial application have not been borne out in the company’s practices. For example, the Initial Order found the company failed to demonstrate that it specifically targets non-English speaking customers, which was one of several bases

⁵⁴ *E.g.*, Initial Order ¶¶ 102-07 & 111.

⁵⁵ *E.g.*, *id.* ¶¶ 84-101.

⁵⁶ Petition ¶ 32.

⁵⁷ *Id.* ¶ 38.

⁵⁸ Initial Order ¶¶ 81-112, 114, 162-68, and 182-86.

upon which the Commission concluded that Speedishuttle would provide different service.⁵⁹ While these portions of the order are vacated, the Commission will continue to monitor Speedishuttle's business practices to ensure it is providing service to the Commission's satisfaction.

Public Convenience and Necessity

- 51 A company may not provide auto transportation service until the Commission has granted it "a certificate declaring that public convenience and necessity require such operation."⁶⁰ Shuttle Express argues, "In an irregularity that has never been explained, the Commission has never expressly stated 'that public convenience and necessity requires' or ever required Speedishuttle's service. And even though this missing statutory prerequisite was brought to the Commission's attention, the Initial Order failed to make the required finding."⁶¹ This issue, however, is not before the Commission.
- 52 The current proceeding in Docket TC-143691 is on rehearing of Order 04, the Commission's original final order in this docket. In granting the petition for rehearing, we expressly limited the scope of the rehearing to "whether Speedishuttle is limiting the service it provides to the service and customer types described in the business model on which the Commission based its grant of authority."⁶² The Commission subsequently amended that limitation to "include on rehearing the issue of whether Shuttle Express will provide service to the Commission's satisfaction pursuant to RCW 81.68.040 and WAC 480-30-143(3)(a)."⁶³ The Commission did not agree to rehear whether the public convenience and necessity require Speedishuttle's service. Shuttle Express had the opportunity to raise that issue when seeking administrative review of Order 02, the original initial order overruling Shuttle Express's objection to Speedishuttle's application. Having failed to do so, Shuttle Express has waived that issue, and we do not consider it.
- 53 The Initial Order did not err by not addressing whether the public convenience and necessity require Speedishuttle's operations.

⁵⁹ Initial Order ¶¶ 87-89, 163 and 183.

⁶⁰ RCW 81.68.040.

⁶¹ Petition ¶ 34 (emphasis in original) (citation and footnote omitted).

⁶² Order 08 ¶ 25.

⁶³ Order 17 ¶ 19.

Speedishuttle Pricing

- 54 Shuttle Express’s complaint in Docket TC-160516 alleges that Speedishuttle is engaging in predatory pricing by offering its services at rates below its costs.⁶⁴ The Initial Order finds that “Shuttle Express failed to establish that Speedishuttle prices its service below cost or engages in predatory pricing.”⁶⁵ Shuttle Express challenges this and related findings as inconsistent with the record evidence and to the extent accurate, as “caused by the withholding and concealment of the data by Speedishuttle.”⁶⁶ We disagree.
- 55 No party disputes that Speedishuttle’s operations are not profitable and that it has yet to attract the passenger volumes needed to generate sufficient revenues to cover the average variable costs of its shared ride service.⁶⁷ These facts, however, are unremarkable for a company that only recently began providing service. Entering the auto transportation market is a capital-intensive undertaking, and we expect it will take a new company like Speedishuttle facing many established competitors a significant period of time to recover all of its costs and become profitable. Indeed, Shuttle Express “lost a great deal of money during its first years of operation.”⁶⁸
- 56 Shuttle Express nevertheless claims that Speedishuttle’s expenses and losses are far in excess of the amounts the Initial Order finds or Speedishuttle admits. The level of Speedishuttle’s losses after less than two years of operations is immaterial.⁶⁹ Whether

⁶⁴ Shuttle Express Petition for Rehearing and Formal Complaint ¶ 41.

⁶⁵ Initial Order ¶ 125.

⁶⁶ Petition ¶ 39.

⁶⁷ Mr. Roemer explained on behalf of Speedishuttle that “average variable cost” in this context is the cost the company incurs to make the trip for which it receives fares, which essentially is the cost of operating the vehicle. Roemer, Exh. HJR-1T at 48:23 – 49:4. To be profitable on a per trip basis, Speedishuttle must have “[e]nough passengers at [its] tariffed fares to exceed the cost of providing that trip.” *Id.* at 49:8-10.

⁶⁸ *EASE v. Shuttle Express* at 3; see Wood, TR. at 349:23 – 350:4 (acknowledging that Shuttle Express was not profitable for several years after it began to provide service).

⁶⁹ We also agree with Speedishuttle that Shuttle Express largely fails to cite any record evidence to support its assertions and instead relies on supposition and extrapolation. Shuttle Express claims that it was unfairly denied access to much of Speedishuttle’s financial information, but the only error Shuttle Express specifies with respect to the Initial Order’s findings and conclusions on Shuttle Express’s predatory pricing complaint is that it is “actually supported by overwhelming evidence and admitted by Speedishuttle.” Petition ¶ 7 at 5. Shuttle Express did not expressly seek

Speedishuttle needs four passengers or six per trip to break even, we are not willing to second-guess Speedishuttle's business judgment at this time on how and when it will achieve the requisite passenger counts to achieve full cost recovery and profitability. As the Commission has previously explained,

The Commission does not guarantee profitability nor mandate that a carrier achieve an approved operating ratio when it approves tariff rates. The Commission merely affords a carrier the opportunity to achieve profitability. Operating losses do not prove that the carrier's pricing is predatory.

The Commission requires that rates bear a demonstrable relationship with costs. It allows a carrier the opportunity, when pricing its services, to consider charges for competitive non-regulated services, volumes of service, start-up costs, and other relevant factors.⁷⁰

57 We reject Shuttle Express's argument that offering service at rates that do not recover all costs is *per se* predatory pricing. As the Federal Trade Commission (FTC) explains, such a link exists only in very limited and rare circumstances:

Consumers are harmed only if below-cost pricing allows a dominant competitor to knock its rivals out of the market and then raise prices to above-market levels for a substantial time. A firm's independent decision to reduce prices to a level below its own costs does not necessarily injure competition, and, in fact, may simply reflect particularly vigorous competition. Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare. This strategy can only be successful if the short-run losses from pricing below cost will be made up for by much higher prices over a longer period of time after competitors leave the market. Although the

review of the ALJ's discovery and evidentiary rulings and thus has waived any challenge to those rulings.

⁷⁰ *EASE v. Shuttle Express* at 4.

FTC examines claims of predatory pricing carefully, courts, including the Supreme Court, have been skeptical of such claims.⁷¹

58 Those circumstances do not exist here. Shuttle Express, not Speedishuttle, is the larger, dominant provider of auto transportation services in Washington. Nor could Speedishuttle charge much higher prices than its current fares. The market for transportation services to and from the airport includes taxis, limousines, buses, light rail, transportation network companies (TNCs), and personal vehicles. Shuttle Express acknowledges that “[b]ecause of competition from unregulated ground transportation services, neither Shuttle Express nor Speedishuttle can stem their current losses with fare increases. The public will not pay more A fare increase would lead to less overall revenues, not more.”⁷² Speedishuttle thus could not raise its rates to recover losses from the allegedly improper below-cost pricing even if Shuttle Express exited the market.⁷³ Speedishuttle is not engaging, and cannot engage, in predatory pricing.

59 Shuttle Express nevertheless argues that Speedishuttle is “using below-cost pricing to capture 21-34% of the passengers Shuttle Express used to carry.”⁷⁴ No evidence supports a connection between the reduction in the number of passengers Shuttle Express carries and Speedishuttle’s rates. To the contrary, Mr. Marks testified on behalf of Shuttle Express that a variety of factors have caused that reduction, including lower gas prices, the availability of light rail, and the entry of Speedishuttle and TNCs into the market.⁷⁵ The record also reflects that Speedishuttle’s rates are comparable to, and in some cases higher than, Shuttle Express’s fares,⁷⁶ and the decline in Shuttle Express’s passenger volumes began long before Speedishuttle entered the market.⁷⁷ Shuttle Express did not

⁷¹ <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost>.

⁷² Kajanoff, Exh. PK-2T at 14:2-6; *accord* Roemer, Exh. HJR-1T at 51:22 – 52:2.

⁷³ As the Initial Order correctly observes, Commission oversight of Speedishuttle’s rates also would preclude it from engaging in the pricing behavior Shuttle Express alleges. Initial Order ¶ 129.

⁷⁴ Petition ¶ 52.

⁷⁵ Marks, Exh. WAM-1T at 4:6 – 5:5; Marks, TR. at 596:15 – 599:17.

⁷⁶ Roemer, Exh. HJR-1T at 52-53.

⁷⁷ *Id.* at 47. Even after Speedishuttle began operations, Shuttle Express experienced an 18 percent reduction in reservations in areas in which it does not compete with Speedishuttle. Kajanoff, Exh. PK-1T at 13:14-15.

fail to prove that Speedishuttle has yet to generate sufficient revenues to recover all of its costs. Rather, Shuttle Express failed to prove that Speedishuttle's rates "are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly."⁷⁸

60 The Initial Order did not err by finding and concluding that Shuttle Express failed to prove that Speedishuttle's fares are unlawful.

Public Interest

61 Shuttle Express contends that the Initial Order fails to address the public interest. According to Shuttle Express, "This proceeding raises important public interest issues, including whether county-wide door-to-door airport shuttle service is sustainable with two carriers splitting a shrinking market."⁷⁹ Shuttle Express does not include this issue among its assignments of error, but we nevertheless address the public interest impacts of our decision.

62 Shuttle Express correctly observes that the Commission must regulate in the public interest. Shuttle Express contends that auto transportation service is a natural monopoly that cannot survive competitive entry: "Because in the current market both carriers are now losing money this means that one or maybe both carriers must ultimately fail if the status quo is maintained," and "the public is already being harmed, by increased wait times, reduced efficiency, and higher operating costs per passenger."⁸⁰ We view the market and the public interest differently.

63 Door-to-door auto transportation service is not a unique or monopoly market but is part of a larger competitive market for transportation services to and from the airport. The decline in Shuttle Express's ridership over the last few years while airport usage has steadily increased demonstrates that the travelling public views the many alternative forms of transportation as substitutes for auto transportation service.⁸¹ Speedishuttle's

⁷⁸ RCW 81.04.110.

⁷⁹ Petition ¶ 75 (footnote omitted).

⁸⁰ Petition ¶ 77.

⁸¹ Indeed, Shuttle Express recently represented that it needed a waiver of Commission rules prohibiting the use of independent contractors because "unlicensed ride-share operators provide services that are largely indistinguishable from the Shuttle Express door-to-door auto transportation service," and "their fares are competitive with the regulated door-to-door operators,

entry into the market may have contributed to that decline, but the record evidence does not support a finding that this was the sole or even primary cause.⁸² Without such evidence, Shuttle Express cannot plausibly claim that a natural monopoly exists or that continuing to permit both Shuttle Express and Speedishuttle to offer auto transportation service necessarily will result in the failure of one or both companies.

64 We find that Speedishuttle's entry into the market is fully consistent with the public interest. We have concluded that Shuttle Express is not providing, and will not provide, service to the Commission's satisfaction. As the legislature envisioned, permitting another carrier to serve the same territory under such circumstances will create a greater incentive for Shuttle Express to improve its service. The Commission revised its rules governing auto transportation service in 2013, in part, to facilitate such competitive entry.⁸³ Whether or not they are indicative of a different service, the newer vehicles, features, and amenities Speedishuttle offers enhance the quality of auto transportation service offered to customers in King County. To the extent Shuttle Express must correspondingly raise the level of service it provides, including complying with Commission rules, in order to survive in the market, we view that outcome as beneficial to the public interest.

Remedies

65 The Initial Order assesses a penalty of \$120,000 against Shuttle Express for its 35,351 violations of former WAC 480-30-213.⁸⁴ Shuttle Express contends that it should not be penalized at all because it did not commit these violations but does not otherwise challenge the amount of the penalty or how the Initial Order calculates it. No other party takes issue with the penalty. Neither do we.

such as Shuttle Express." *In re Petition of Shuttle Express for Exemption from WAC 480-30-213 and WAC 480-30-456*, Docket TC-160819, Amended Petition for Limited and Conditional Exemption ¶ 11 (Sept. 6, 2016).

⁸² See, e.g., Kajanoff, TR. at 412:5 – 414:10 (testifying that Shuttle Express cannot know what portion of its gross revenue losses is attributable to Speedishuttle or any one of the many other competitors); accord Wood, TR. at 327:12 – 328:5.

⁸³ *In re Amending and Adopting Rules in WAC 480-30 Relating to Passenger Transportation Companies*, Docket TC-121328, General Order R-572 ¶¶ 25 & 33-34 (Aug. 22, 2013).

⁸⁴ Initial Order ¶ 147.

66 Having concluded for the third time that Shuttle Express has violated former WAC 480-30-213, in this instance a total of 35,351 times, we affirm and adopt the penalty of \$120,000 against Shuttle Express and the provisions in the Initial Order calculating that amount.⁸⁵

67 The Initial Order also requires Shuttle Express to submit a comprehensive compliance plan for Staff's review detailing how the company will comply with its legal obligations.⁸⁶ Shuttle Express does not challenge this aspect of the Initial Order. We believe such a plan would be useful and accordingly affirm and adopt this provision of the Initial Order.

FINDINGS OF FACT

68 The Commission affirms many of the findings of fact in the Initial Order. To minimize potential confusion, the Commission summarizes all of its findings of fact below:

- 69 (1) The Commission is an agency of the state of Washington vested by statute with the authority to regulate the rates, rules, regulations, and practices of auto transportation companies, and has jurisdiction over the parties and subject matter of this proceeding.
- 70 (2) In the two years prior to the date Speedishuttle filed its complaint in Docket TC-160257, Shuttle Express used independent contractors to provide auto transportation service on 35,351 occasions.
- 71 (3) Shuttle Express enters into agreements with hotel personnel to make reservations with Shuttle Express on behalf of hotel customers and, in exchange, receive a 10 percent commission. The form used for such agreements is not on file with the Commission.
- 72 (4) Shuttle Express combines its scheduled service with its door-to-door service.
- 73 (5) Shuttle Express makes stops on its scheduled routes that are not listed as flag stops in the company's tariff or time schedule.

⁸⁵ Initial Order ¶¶ 131-48.

⁸⁶ Initial Order ¶ 149.

- 74 (6) Shuttle Express made false representations at the Application hearing that it had
ceased using independent contractors.
- 75 (7) Shuttle Express has consistently relied on independent contractors to supplement
approximately 5 percent of its operations, and did so for more than a decade in
violation of Commission rules and orders.
- 76 (8) Shuttle Express has repeatedly and willfully violated Commission rules and
regulations.
- 77 (9) No record evidence supports a connection between the reduction in the number of
auto transportation passengers Shuttle Express carries and Speedishuttle's rates.
- 78 (10) Record evidence does not show that Speedishuttle is engaging in predatory
pricing of its auto transportation service.

CONCLUSIONS OF LAW

79 The Commission makes the following summary conclusions of law:

- 80 (1) Shuttle Express has waived any challenge to the discussion, findings, and
conclusions in the Initial Order that Shuttle Express did not expressly state in its
Petition in conformance with WAC 480-07-825.
- 81 (2) Shuttle Express violated WAC 480-30-213 each of the 35,351 times it used an
independent contractor to provide auto transportation service in the two years
preceding Speedishuttle's complaint.
- 82 (3) Shuttle Express's failure to obtain Commission approval of the company's form
of agreement to pay commissions to hotel personnel violates WAC 480-30-391.
- 83 (4) Shuttle Express should be required to submit to the Commission for approval the
company's form of agreement to pay commissions to hotel personnel.
- 84 (5) Shuttle Express may not combine door-to-door and scheduled service except
when it is unable to provide transportation at the time and place specified in the
reservation that the company has accepted for a given passenger.

- 85 (6) Shuttle Express should revise its tariff to remove language that is inconsistent with WAC 480-30-346(2)(d), as described in paragraphs 37 and 38, above, within 30 days of the effective date of this Order.
- 86 (7) Repeated or willful violations of Commission rules and regulations are grounds for the Commission to conclude that a company will not provide service to the Commission's satisfaction pursuant to RCW 81.68.040.
- 87 (8) Shuttle Express is not providing, and will not provide, service to the Commission's satisfaction pursuant to RCW 81.68.040 and WAC 480-30-140(3).
- 88 (9) Shuttle Express did not prove that Speedishuttle's rates are unlawful.
- 89 (10) Speedishuttle's entry as an auto transportation company into the market for transportation services to and from the airport is in the public interest.
- 90 (11) The Commission should penalize Shuttle Express \$120,000 for 35,351 violations of WAC 480-30-213. The \$120,000 penalty should be due within 30 days of the effective date of this Order.
- 91 (12) Shuttle Express should be required to complete and submit a compliance plan for Staff's review and approval, as described in paragraph 149 in the Initial Order, within 90 days of the effective date of this Order.

ORDER

THE COMMISSION ORDERS THAT:

- 92 (1) Speedishuttle Washington, LLC, d/b/a Speedishuttle Seattle is authorized to provide auto transportation service as described in its certificate.
- 93 (2) The Commission assesses a \$120,000 penalty against Shuttle Express, Inc., for 35,351 violations of former WAC 480-30-213.
- 94 (3) The \$120,000 penalty is due and payable no later than 30 days from the date of this Order.
- 95 (4) Shuttle Express, Inc., must conform its form of agreement to pay commissions to hotel personnel to the requirements set out in WAC 480-30-391 and submit the

form for such agreement with the Commission for approval within 30 days of the effective date of this Order.

- 96 (5) Shuttle Express, Inc., may not make stops on scheduled routes that are not listed as flag stops in its tariff and time schedule except when it is unable to provide transportation at the time and place specified in the reservation that the company has accepted for a given passenger.
- 97 (6) Shuttle Express, Inc. must file revisions to its tariff removing language that is inconsistent with WAC 480-30-346(2)(d), as described in paragraphs 37 and 38, above, within 30 days of the effective date of this Order.
- 98 (7) Shuttle Express, Inc., must complete and submit to Staff for review and approval a compliance plan for Commission Staff's review and approval, as described in paragraph 149 of the Initial Order within 90 days of the date of this Order.
- 99 (8) The Commission delegates to the Secretary the authority to approve parties' submissions in compliance with this Order.
- 100 (9) The Commission retains jurisdiction over the subject matters and parties to this proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective November 17, 2017.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

ANN E. RENDAHL, Commissioner

JAY M. BALASBAS, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

[Service Date March 19, 2014]

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET TC-120323
TRANSPORTATION COMMISSION,)	
)	ORDER 04
Complainant,)	
)	FINAL ORDER DENYING, IN PART,
v.)	AND GRANTING, IN PART,
)	PETITION FOR ADMINISTRATIVE
SHUTTLE EXPRESS, INC.,)	REVIEW AND ASSESSING
)	PENALTY
Respondent.)	
.....)	

BACKGROUND

- 1 Shuttle Express, Inc. (Shuttle Express or Company) is an automobile transportation company providing regulated share-ride door-to-door service in multi-passenger vans. Until recently, the Company operated what it calls “rescue service,” pursuant to which Shuttle Express dispatched independent contractors to provide customers with share-ride service to Seattle Tacoma International Airport (Airport) when the Company’s own drivers and equipment were not readily available to timely transport those customers.
- 2 On May 1, 2013, the regulatory staff (Staff)¹ of the Washington Utilities and Transportation Commission (Commission) filed a complaint against Shuttle Express alleging that between October 2010 and September 2011, the Company was operating an unlawful independent contractor program. Specifically, the complaint alleges, *inter alia*, that Shuttle Express violated WAC 480-30-213(2), WAC 480-30-456, and the final order in Docket TC-072228 on 5,715 occasions by relying on independent contractors to transport passengers, rather than using the Company’s own drivers.

¹ In formal proceedings, such as this, the Commission’s regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners’ policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

3 The Commission conducted an evidentiary hearing on the complaint on August 1,
2013. Staff filed its post-hearing brief on September 19, 2013. Shuttle Express filed
its post-hearing brief on September 20, 2013.

4 On November 1, 2013, the Commission entered Order 03, Initial Order (Initial
Order), concluding that Shuttle Express violated WAC 480-30-213(2), WAC 480-30-
456, and the final order in Docket TC-072228 on 5,715 occasions as alleged in the
complaint. The Initial Order required Shuttle Express to cease using independent
contractors to provide multi-stop service along its regulated routes and assessed a
penalty of \$120,000, suspending \$85,000 for three years conditioned on the
Company's strict compliance with the rules at issue in this docket, and requiring
payment of the remaining \$35,000 in three monthly installments.

5 On January 3, 2014, Shuttle Express filed a petition for administrative review of the
Initial Order (Petition).² The Company claims the following errors:

- The Initial Order failed to conclude that Staff did not carry its burden to prove that Shuttle Express' use of independent contractors violated any applicable law or Commission order because (a) those contractors operated their own limousines, not Shuttle Express vehicles; (b) the contractors were providing lawful limousine services; and (c) door-to-door ride share on an irregular basis has never been classified as Commission-regulated auto transportation service;
- The Initial Order failed to recognize that WAC 480-30-456 permits a company to use customer information to provide the requested service;
- The Initial Order failed to recognize significant differences between the independent contractor program at issue in Docket TC-072228 and the use of independent contractors challenged in this proceeding; and
- Even if the Company violated one or more of the legal requirements at issue in this docket, the Initial Order could or should not assess penalties for those violations because (a) any violations were not knowing or willful; (b) penalizing Shuttle Express for violation of an ambiguous rule would violate due process; (c) the Company should not be penalized for its good

² By Notice dated November 15, 2014, the Commission granted the Company's request for an extension of time to file its petition until January 3, 2014.

faith efforts to better serve the public interest; (d) the Commission should stay enforcement of the rules at issue here pending consideration of a long-term waiver or exemption petition Shuttle Express would file; and (e) any penalties the Commission assesses should be smaller, and the Company should have additional time to pay them.

6 On January 13, 2014, Staff filed its answer to the Petition (Answer), urging the Commission to uphold the Initial Order on the following grounds:

- For purposes of WAC 480-30-213(2), Shuttle Express “operated” the limousines and town cars it dispatched for share-ride transportation;
- When the Company outsourced share-ride service to independent contractors, those independent contractors provided service the Commission regulates;
- Because Shuttle Express failed to keep its commitment to comply with all Commission rules, the Initial Order correctly held that the Company violated the final order in Docket TC-072228;
- Shuttle Express knew or should have known its latest independent contractor program was unlawful and thus its conduct was willful;
- WAC 480-30-213(2) is not vague and thus penalizing the Company for violation of that rule does not violate due process;
- The Initial Order correctly concluded that Shuttle Express violated WAC 480-30-456 because the Company improperly released customer information to independent contractors for a service the customers did not request; and
- The Company has failed to justify any reduction to, or stay of, the penalties assessed in the Initial Order.

DISCUSSION

7 We agree with the findings and conclusions in the Initial Order that Shuttle Express violated WAC 480-30-213 and Order 01 in Docket TC-072228 on 5,715 occasions by using independent contractors to provide a portion of the Company’s regulated auto transportation service, and we deny the Petition in part as to those claims. We grant

the Petition in part as to the challenge to the Initial Order's conclusion that Shuttle Express violated WAC 480-30-456, finding that the Company used customer information to provide the service the customers requested. Finally, we reduce the assessed penalty for the Company's violations to \$60,000 but require Shuttle Express to pay the entire amount of that penalty within 30 days of the date of this order.

Violations of WAC 480-30-213(2)

- 8 WAC 480-30-213(2) requires that "[t]he driver of a vehicle operated by a passenger transportation company must be the certificate holder or an employee of the certificate holder." The Initial Order concluded that Shuttle Express violated this rule by using independent contractors, rather than Company employees, for its "rescue service." Shuttle Express contends this conclusion is erroneous because the Company did not "operate" the limousines or town cars the independent contractors used to provide the service. According to Shuttle Express, the ordinary meaning of "operate" in this context is either "drive" or "manage," and the Company neither drove the limousines nor managed the business of the independent contractors who did. We disagree with Shuttle Express on both the law and the facts.
- 9 Shuttle Express' legal interpretation of "operated" in WAC 480-30-213(2) ignores the 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 obligations to serve the public. The language in the Commission's rules must be interpreted in this context.
- 10 We agree with Staff that "[t]he definition of 'operate' as a transitive verb is 'to control or direct the functioning of.'"³ The Commission uses the word "operate" throughout the rules in WAC ch. 480-30. For example, "[a]ll motor vehicles *operated* under the provisions of this chapter are at all times subject to inspection by the commission,"⁴ and "[a] company must ensure that all motor vehicles *operated* in the transportation of passengers are properly identified."⁵ In each instance, the rule governs vehicles that the certificated entity controls or directs the functioning of for the purpose of providing regulated auto transportation service.

³ Staff Answer ¶ 21 (quoting Webster's II New College Dictionary (1995)).

⁴ WAC 480-30-221(5) (emphasis added).

⁵ WAC 480-30-231(1) (emphasis added).

11 Consistent with the other rules in this chapter, WAC 480-30-213(2) requires that the driver of a vehicle that a passenger transportation company operates, *i.e.*, controls or directs the functioning of to provide regulated service, must be the certificate holder or an employee of the certificate holder. Similarly, WAC 480-30-213(1) requires that “[t]he vehicles operated by a passenger transportation company must be owned by or leased to the certificate holder” – in other words, a certificated company must own or lease any vehicle the company controls or directs the functioning of to provide regulated service. WAC 480-30-213 thus cannot be interpreted to allow a certificated company to use non-employee drivers of non-company vehicles to transport passengers, as Shuttle Express argues, because neither the statute nor the Commission’s rules authorize an entity without a CPCN to provide auto transportation service, and only a certificated company can own and drive the vehicles used to transport passengers.

12 Shuttle Express’ factual argument is equally flawed. The Company claims that it “presented overwhelming evidence that it does not manage the independent contractors’ businesses . . . to the extent that Shuttle Express could be deemed the operator of the rescue rides in this case.”⁶ 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”:

- Shuttle Express exclusively communicated with the customers in advance, including taking reservations for auto transportation service and informing the customers when an independent contractor would be providing that service;⁷
- Shuttle Express dispatched the limousines to the customer locations;⁸
- Shuttle Express set the fares the independent contractors could charge, limiting them to the Company’s tariffed rates and charges;⁹

⁶ Shuttle Express Petition ¶ 20.

⁷ *E.g.*, TR 79:11 through 80:7 (Ray).

⁸ *E.g.*, TR 48:3-24 & 51:23 through 52:3 (Nelson).

⁹ Exh. BY-1 (Staff Investigation Report), Appendix D (Shuttle Express Independent Contractor Agreement) § 11(b).

- Shuttle Express received 34 percent of the customer fares that the Company or the independent contractors collected for the service;¹⁰
- 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;¹¹
- Shuttle Express retained and exercised the right to inspect the independent contractors' vehicles;¹²
- Shuttle Express required the independent contractors to adhere to the Company's behavioral safety standards;¹³
- Shuttle Express required each of the independent contractors' vehicles to be equipped with a camera to enable the Company to monitor their driving while providing "rescue service";¹⁴
- Shuttle Express required the independent contractors to maintain driver and vehicle licensing, permitting, registration, insurance, and certification requirements;¹⁵
- Shuttle Express required independent contractors to complete an "orientation" course on Company operations, policies, and procedures;¹⁶ and
- Shuttle Express prohibited the independent contractors from soliciting additional business from "rescue service" customers.¹⁷

¹⁰ Exh. BY-1, Appendix D at Appendix C (Fees and Charges Paid to Company).

¹¹ Exh. SE-7 (Shuttle Express Certificate of Liability Insurance Covering Independent Contractors).

¹² Exh. BY-1, Appendix D § 8(e); TR 54:14 through 55:12 (Deangelo).

¹³ *Id.* § 9.

¹⁴ *Id.* § 9(d).

¹⁵ *Id.* §§ 5(a), 6 & 8; TR 55:13 through 56:14 (Deangelo).

¹⁶ *Id.* § 5(c).

¹⁷ *Id.* at 5, § 5(h)(1).

Shuttle Express, not the independent contractors, controlled or directed the functioning of the vehicles used to transport “rescue service” customers to and from the Airport.¹⁸

- 13 The Company nevertheless contends that the “rescue service” the independent contractors provided meets the definition of limousine service, which those contractors were authorized to provide. Shuttle Express misses the point. The independent contractors were providing “rescue service” on behalf of Shuttle Express, not independently. Customers contacted Shuttle Express for auto transportation service, and Shuttle Express provided that service, primarily in its own vans but also by using independent contractors. Whether the “rescue service” standing alone would be a limousine service is irrelevant. The record evidence unequivocally demonstrates that the “rescue service” was an integral part of the auto transportation service the Company is certificated to provide, and we consider it as such.
- 14 Shuttle Express operated the limousines and town cars used by independent contractors to provide the Company’s “rescue service” within the plain meaning of WAC 480-30-213(2). Because the drivers of those vehicles were not Shuttle Express employees, the Company violated that rule on 5,715 occasions between October 2010 and September 2011.

Violations of WAC 480-30-456

- 15 WAC 480-30-456 prohibits “[a]ny sale or release of customer information without the written permission of the customer” and defines “customer information” to include “the customer’s name, address, and telephone number.” The Initial Order concluded that by releasing customer information to the independent contractors to enable them to provide “rescue service,” Shuttle Express violated this rule. Shuttle Express disputes that conclusion because the rule also states that companies may use customer information for “[p]roviding and billing for services the customer requests,” and the Company provided customer information to the independent contractors to enable them to provide the service to the Airport the customers requested. We agree.

¹⁸ Shuttle Express identifies 17 “operating factors” it alleges are “related to the key issue of whether Shuttle Express ‘operated’ the vehicles,” only two of which, the Company claims, indicate any exercise of its “power or influence over the independent contractors relative to their overall operations.” Shuttle Express Petition ¶ 22. The appropriate inquiry, however, is whether Shuttle Express controlled or directed the functioning of the independent contractors’ vehicles *to provide auto transportation service*, not the extent to which the Company managed the independent contractors’ business as a whole.

- 16 Having found that Shuttle Express provided its regulated auto transportation service by using independent contractors in addition to its own employee-driven vans, we conclude that the Company was using customer information to provide that service. Shuttle Express dispatched the independent contractors to the customer locations, which required the Company to provide those independent contractors with the name, address, and telephone number of the customer to be picked up, just as Shuttle Express provides customer information to its employee drivers. Such use of customer information is precisely what the rule authorizes.
- 17 Staff argues that Shuttle Express “released” customer information without written consent under WAC 480-30-456(3), rather than “using” it to provide service pursuant to WAC 480-30-456(2). That would be correct if Shuttle Express had provided the information to a third party for a purpose other than providing the regulated service the customer requested. Those are not the circumstances presented here.¹⁹
- 18 Staff also contends that Shuttle Express did not use the customer information consistent with the rule’s requirement because the service provided was not the service the customers requested. Again, this argument conflicts with the basis for our conclusion that the Company violated WAC 480-30-213(2). Shuttle Express used independent contractors to provide the Company’s “rescue service,” which was part of the auto transportation services the Commission has authorized Shuttle Express to provide. It is irrelevant for purposes of WAC 480-30-456 that some customers were taken to the Airport in limousines owned and driven by independent contractors, rather than in Shuttle Express vans. In either circumstance, Shuttle Express provided the service. The customers requested share-ride service from Shuttle Express, and that is the service they received.
- 19 We conclude that Shuttle Express did not violate WAC 480-30-456 by providing customer information to the independent contractors that the Company arranged to provide its “rescue service.”

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.

Violation of Order 01 in Docket TC-072228

- 20 Docket TC-072228 was another complaint proceeding that Staff brought against Shuttle Express for using independent contractors in violation of WAC 480-30-213. Order 01 in that docket approved a settlement agreement between the Company and Staff in which Shuttle Express committed to “comply with all applicable rules and statutes enforced by the Commission, including those at issue in this proceeding.”²⁰ The Initial Order concluded that “Shuttle Express knowingly returned to using independent contractors in violation of Commission rule and in violation of the terms of the July 2008 settlement agreement” and thus violated Order 01 in Docket TC-072228 on 5,715 occasions.²¹ Shuttle Express claims this conclusion was erroneous because “the independent contractor driver program in 2007 was vastly different in nature, scope, and purpose from the current rescue program.”²² Those differences are irrelevant.
- 21 The settlement agreement approved in Order 01 does not state that Shuttle Express only agreed not to engage in the same independent contractor program it conceded was a violation of WAC 480-30-213. Rather, that agreement requires Shuttle Express to comply with *all* applicable Commission rules. In the context of finding the settlement agreement to be in the public interest, the Order characterized this obligation more specifically as a “pledge[] to comply with WAC 480-30-213 on a prospective basis.”²³ Our conclusion that Shuttle Express once again violated that rule necessarily results in violations of the Company’s commitment to comply with the rule. The independent contractor program that resulted in the 2007 violation was different than the independent contractor program at issue in this proceeding, but the rule is the same. *Any* subsequent violation of WAC 480-30-213 by Shuttle Express after Order 01 became final is a violation of that order.
- 22 Shuttle Express contests the plain language of the settlement agreement and the Commission order approving that agreement by asserting that Order 01 was “narrowly drawn” and “expressly adopted Shuttle Express’ reservation of rights to defend against any future claims based on different facts.” Order 01, however, was no more narrowly drawn than the settlement agreement itself, and the “reservation of

²⁰ *UTC v. Shuttle Express*, Docket TC-072228, Order 01, Appendix ¶ 9.

²¹ Initial Order ¶ 33.

²² Shuttle Express Petition ¶ 39.

²³ Docket TC-072228, Order 01 ¶ 16.

rights” on which Shuttle Express relies bears no relationship whatsoever to the Company’s commitment not to violate WAC 480-30-213.

- 23 Quoted in context, the settlement agreement language to which Shuttle Express refers provides as follows:

This Agreement does not preclude the Commission from pursuing penalties for violations of Commission rules and statutes unrelated to the subject matter of this Agreement at any time or for violations of any rules or statutes at issue in this proceeding with respect to independent contractor drivers not identified in Staff’s investigation, or that occurred before June 16, 2007, the date Shuttle began operating the program, or after December 31, 2007, the date Shuttle terminated the program (“Unrelated Claims”). *Nor does this agreement preclude Shuttle from asserting any defenses that it may have as to any unrelated claims.*²⁴

- 24 Shuttle Express’ “reservation of rights” to assert defenses is a corollary to Staff’s reservation of its ability to pursue claims other than those addressed in the settlement. Staff exercised that ability in bringing this complaint making allegations other than the claims resolved in Docket TC-072228. Also consistent with paragraph 10 of the settlement agreement, neither Staff nor the Commission precluded Shuttle Express from asserting its defenses to the complaint. Shuttle Express’ “reservation of rights” has no other applicability to this proceeding.

- 25 In its settlement agreement with Staff resolving the disputed issues in Docket TC-072228, Shuttle Express committed not to violate WAC 480-30-213. Order 01 adopted that commitment. Because Shuttle Express violated WAC 480-30-213(2) by operating the “rescue service” at issue in this proceeding, the Company violated Order 01 on 5,715 occasions between October 2010 and September 2011.

Penalties

- 26 The Initial Order examined the Company’s violations using the factors in the Commission’s enforcement policy statement and assessed a penalty of \$120,000, suspending all but \$35,000 of that amount conditioned on Shuttle Express not using independent contractors to provide regulated service for three years.²⁵ The Company

²⁴ Docket TC-072228, Order 01, Appendix ¶ 10 (emphasis added).

²⁵ Initial Order ¶¶ 34-59.

argues that even if the Commission upholds some or all of the Initial Order, the Commission cannot and should not assess any penalties. We disagree, although we revise the penalty assessed in the Initial Order.

Willfulness

- 27 Shuttle Express first contends that it was operating its “rescue service” in good faith and that any violations were not blatant, willful, or knowing as the Initial Order characterizes them. The record evidence supports the Initial Order’s findings.
- 28 Shuttle Express has been discussing independent contract programs with Staff since 2004. The Company’s president sent letters to the Commission in August 2004 and February 2005 proposing to hire independent contractors as drivers of the vehicles used to provide auto transportation service, to which Staff responded that such a program would be unlawful.²⁶ In 2006, Shuttle Express proposed a rule that would have allowed the Company to use a sub-carrier to perform the Company’s regulated auto transportation services, which the Commission rejected as inconsistent with RCW ch. 81.68.²⁷ One year later, Staff discovered that Shuttle Express had expanded its operations by contracting with independent contractors to provide regulated auto transportation services, which resulted in Order 01 in Docket TC-072228.²⁸
- 29 Shuttle Express knew Staff’s views on the use of independent contractors to provide regulated auto transportation service. The Company agreed in Docket TC-072228 that such use is a violation of WAC 480-30-213 and pledged not to violate that rule again. The only substantial operational difference between the independent contractor program addressed in that proceeding and the “rescue service” at issue here is that the Company provided “rescue service” on an *ad hoc* basis, rather than a regular schedule.²⁹ The contention that Shuttle Express did not know its “rescue service” violated WAC 480-30-213 is not credible.

²⁶ Exh. BY-2 (Staff Investigation Report in Docket TC-072228) at 5-6.

²⁷ *Id.* at 6 & Appendix H.

²⁸ *Id.* at 7.

²⁹ Paragraph 22 of the Shuttle Express Petition includes a chart alleging multiple differences between the two programs, but even to the extent the chart accurately reflects the record, those differences are insignificant. Both programs used independent contractors to provide the Company’s regulated auto transportation service.

- 30 A prudent company would have consulted with Staff, and if necessary sought a ruling from the Commission, on the permissibility of the “rescue service” before initiating it, or at least when the Company became aware of Staff and the Commission’s concerns. Shuttle Express chose not to do so, despite the long history of the Commission and Staff rejecting the Company’s attempts to use independent contractors to provide regulated service. The clear implication is that, not having received the answer it wanted in the past, Shuttle Express decided to continue the program without asking, believing that seeking forgiveness would be preferable to requesting permission. Indeed, that was precisely the Company’s calculus when it began operating the program at issue in Docket TC-072228. Jimmy Sherrell, the Company’s president, testified that “I chose to put it in place, hoping that it would be ignored, and it wasn’t, so I paid a fine and I discontinued the service.”³⁰
- 31 Shuttle Express obviously took the same approach with its “rescue service.” Mr. Sherrell conceded during the hearing that the “rescue service” violates WAC 480-30-213, but argued that the Company was “forced” to commit that violation to serve a public need.³¹ “So because we are forced to violate part of the Commission rules, which we’ve been doing for 25 years, I think it’s an oversight of the Commission, of not knowing how to regulate us.”³² This attitude demonstrates a fundamental misconception of Shuttle Express’ obligations as a regulated company.
- 32 The legislature has charged the Commission in RCW ch. 81.68 with regulating auto transportation service providers in the public interest. With the participation of the industry, the Commission has promulgated rules to implement the statute. Auto transportation companies must comply with that statute and those rules. If Shuttle Express believes legal regulations are unnecessarily constraining, it is incumbent on the Company to ask the Commission or the legislature to change those regulations. Ignoring and violating the law is not acceptable.

³⁰ TR 130:2-4.

³¹ TR 43:8-12 & 135:6-13. The Company now disputes this concession, contending that its Answer denied the allegations in the complaint and that the cited passage refers to the 2007 independent contractor program, not the program at issue in this proceeding. Shuttle Express Petition at 5 n.7. This argument lacks merit. A denial in an answer does not preclude a party from subsequently conceding a point, and Mr. Sherrell twice stated that the Company’s “rescue service” violates or is inconsistent with Commission rules. The transcript speaks for itself and does not support the Company’s interpretation. We nevertheless rely on this concession only in the context of assessing the Company’s willfulness, not to determine liability for the violations.

³² TR 43:10-19.

33 No one “forced” Shuttle Express to violate WAC 80-30-213 and Order 01 in Docket TC-072228. The Company chose to do so. The record evidence supports our finding that Shuttle Express deliberately disregarded the rule because the Company believed that compliance would have hampered its ability to provide regulated service the way Shuttle Express wanted to provide it. The problem is not, as Mr. Sherrell stated, that the Commission does not know how to regulate auto transportation services – it does. The Commission has been regulating transportation companies and services for over 100 years. And where the Commission’s regulations can be improved, the law establishes processes by which companies can petition for changes in those regulations.³³ The 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.

34 Shuttle Express did not demonstrate good faith in operating its “rescue service.” The Company’s violation of WAC 480-30-213 was deliberate, knowing, and willful and should be penalized accordingly.

Due Process

35 Shuttle Express contends that “the Commission’s statutes, rules, and order do not define the term ‘operated by,’ in the context of rescue service” and thus are too vague to provide the Company with sufficient notice that using independent contractors in these circumstances is unlawful.³⁴ Accordingly, Shuttle Express asserts, penalizing the Company for its reasonable interpretation of the regulations would be the equivalent of administrative “Russian Roulette,” which due process prohibits. This position is not even facially plausible.

36 Shuttle Express knew that WAC 480-30-213 prohibits the Company from using independent contractors to provide regulated auto transportation service. Mr. Sherrell conceded as much during the hearing. That rule, moreover, is not vague but as discussed above, uses the word “operated” according to its plain meaning and consistent with the use of that term throughout WAC ch. 480-30. For the last ten years, the Commission and Staff have relied on this rule and RCW ch. 81.68 to reject the Company’s repeated attempts to use independent contractors to provide regulated service. The rule provides adequate notice of the prohibited conduct at issue in this proceeding. The Company alone was playing any game of administrative “Russian

³³ RCW 34.05.330; WAC 480-07-240.

³⁴ Shuttle Express Petition ¶ 63.

Roulette,” and Shuttle Express used its own Derringer. Penalizing the Company for its knowing violation of WAC 480-30-213 and Order 01 in Docket TC-072228 is fully consistent with constitutional due process.

Nature of the Violation

- 37 Shuttle Express contends that the violations at issue concern a “technical regulatory issue,” rather than safety,³⁵ because the Department of Licensing (DOL) and the Company itself monitor the independent contractors for safety compliance, and Staff concedes that “rescue service” provided on a single-stop basis complies with Commission regulations. On the other hand, the Company asserts, customers benefit from the service, which “makes share ride door to door service possible at a viable cost and price to airport passengers.”³⁶ Shuttle Express raises the specter that “[i]f the Commission penalizes and/or bars rescue service, Shuttle Express may well cease to be viable,” which “would directly harm the travelling public and also increase traffic, pollution, and congestion at the airport.”³⁷ Again, Shuttle Express misunderstands the Commission’s regulatory responsibilities.
- 38 The Commission rules in Part 5 of WAC ch. 480-30, including WAC 480-30-213, are designed to protect the safety of the passengers to whom Shuttle Express and other auto transportation companies provide service. 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.

³⁵ *Id.* ¶ 69.

³⁶ *Id.* ¶ 72.

³⁷ *Id.*

39 We do not find credible the Company's claims that it will cease to be a viable enterprise if it cannot provide "rescue service" as it was configured. No record evidence supports such a conclusion. Nor is there any indication that Shuttle Express has seriously explored alternatives to that service.³⁸ Indeed, the Company refused even to discuss such options with Staff in response to the ALJ's request for post-hearing briefing on that subject. Shuttle Express has consistently insisted on providing "rescue service" as the Company chooses. Accepting that Shuttle Express cannot use independent contractors to provide any portion of its regulated auto transportation service should provide the Company with sufficient incentive to work with Staff to develop a service guarantee program that passes regulatory muster.³⁹

Request for Stay

40 Shuttle Express requests that the Commission not impose any penalties and that we stay enforcement of WAC 480-30-213 to enable the Company to seek a permanent exemption from that rule. "Shuttle Express does not believe any other carrier operates or could operate a rescue service like that described in the record in this case," and accordingly statutory changes or a rulemaking would unnecessarily "consume great time and resources."⁴⁰ The Company argues that "[a]llowing rescue service to continue pending an exemption petition would best serve the overall public interest. In 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."⁴¹

³⁸ A Shuttle Express witness testified that there were service quality issues with limiting "rescue service" to single stop limousines or taxis, but there was no testimony that the Company had undertaken a thorough examination of how to ensure customers receive the service they request other than by using "rescue service" as the Company operated it.

³⁹ While we do not prejudge the issue, we have serious doubts that requesting a permanent exemption from WAC 480-30-213 is a viable option. The Commission rarely, if ever, grants permanent exemptions from its rules. Amending the rule is the more appropriate approach in such circumstances. Staff has also raised concerns that the statute prohibits "rescue service" as it was provided. If so, any rule waiver would be ineffective. As we have discussed above, moreover, the Commission also would need to waive other rules in WAC ch. 480-30 to allow uncertificated entities to provide regulated auto transportation services, which we are unlikely to do, particularly if the result is abdicating the Commission's oversight of vehicle and driver safety requirements.

⁴⁰ *Id.* ¶ 79.

⁴¹ *Id.* ¶ 85 (emphasis in original).

41 We will not stay enforcement of WAC 480-30-213. Indeed, the Company cites no authority by which we could forbear from legislatively mandated regulation even if we were inclined to do so, which we are not. Staff and the Company have been discussing the use of independent contractors for 10 years, and Shuttle Express has had ample opportunity during that time to explore means of either complying with or changing the applicable regulations. The briefing the administrative law judge (ALJ) authorized in this proceeding encouraged the parties to discuss how the Company could operate its “rescue service” consistent with existing regulations or at least begin to take steps to make necessary changes to the law.⁴² Shuttle Express declined that option, preferring to advocate that its “rescue service” is lawful as currently structured. That was the Company’s choice to make, but Shuttle Express must now accept the consequences of that choice.

42 The Commission, moreover, will not bargain with the Company for its commitment to be “more proactive in seeking regulatory guidance and permissions when it modifies its operations.” We expect every regulated company to work with the Commission and its Staff to ensure compliance with applicable statutes and rules. Shuttle Express has repeatedly refused to do so,⁴³ and permitting the Company to continue to violate Commission rules would only encourage such behavior. We find that enforcing compliance with Commission rules and assessing a penalty for the Company’s past violations is a more appropriate means of both encouraging Shuttle Express to recognize and comply with its regulatory obligations and punishing the Company for its unacceptable prior conduct.

⁴² Shuttle Express repeatedly complains that the ALJ improperly struck most of the post-hearing brief the Company filed. *E.g., id.* ¶ 3. To the extent Shuttle Express seeks reversal of that action, we deny the request. The ALJ sought briefing for the limited purpose of addressing “the options and prospects for resolving the apparent conflict between WAC 480-39-213(2) and the operational demands of providing door-to-door airport shuttle service.” Notice Requiring Post-Hearing Briefing (Aug. 5, 2013). The Company’s brief primarily argued the merits of its legal position, which was outside of the scope of the requested briefing. The ALJ, therefore, properly struck and refused to consider that part of the brief.

⁴³ In addition to implementing independent contractor programs, the Initial Order correctly observes that the Company also unilaterally increased the size of its vans without first seeking to remove the vehicle capacity restrictions in its certificate. Initial Order ¶ 49. Shuttle Express attempts to distinguish that case as a voluntary proceeding to ensure the Company was operating legally, which “is hardly proof of ‘disregard’ of Commission laws.” Shuttle Express Petition at 27 n.18. Shuttle Express misses the point. The Company initiated that proceeding at Staff’s request long after Shuttle Express had purchased and begun operating the larger vehicles in violation of its certificate. Such conduct further demonstrates the Company’s improper approach that the law should conform to Shuttle Express’ business operations, rather than the reverse.

Penalty Amount and Payment Schedule

- 43 Shuttle Express contends that the \$120,000 penalty assessed in the Initial Order is excessive because “no fine of the magnitude of the Initial Order has ever been levied against a transportation company for alleged violations that did not endanger public safety, did not adversely impact the public interest, and did not result in customer complaints.”⁴⁴ The Company also asserts that the assessed penalty is disproportionate to its benevolent violations when compared to the far lower penalties assessed against another transportation company for violations that resulted in harm to the public. “Shuttle Express suggests the amount of \$60,000, with all [but] \$20,000 suspended would be more reasonable,” and the Company requests that payments of the non-suspended portion not begin until July 2014.⁴⁵
- 44 The Initial Order properly considered the factors the Commission reviews when determining an appropriate remedy for violations of statutes and rules, and we largely agree with that analysis.⁴⁶ We nevertheless modify the penalty assessment.
- 45 We understand the business needs that underlie the Company’s “rescue service” and agree that Shuttle Express should provide regulated auto transportation service in a manner that ensures customers receive the service to which they are entitled. However, we cannot condone the Company’s conduct in deliberately flouting a Commission rule, Commission order, and the Company’s own commitment to comply with applicable law. Accordingly, the penalty we assess should provide a sufficient incentive for Shuttle Express to modify its behavior to meet, rather than evade, its regulatory obligations. The Company suggests a penalty of \$60,000 with all but \$20,000 of that amount suspended. We accept the former recommendation but not the latter.
- 46 In Docket TC-072228, Shuttle Express agreed to pay \$9,500 as a penalty for violating WAC 480-30-213, calculated as \$100 for each of the 95 violations. A penalty based on that same calculation in this case would be excessive, but the \$60,000 the Company recommends is approximately \$10 for each of the 5,715 occasions on which Shuttle Express violated the rule and the prior order. We find that this amount is sufficient to encourage compliance and punish the violations.

⁴⁴ Shuttle Express Petition ¶ 80.

⁴⁵ *Id.* ¶ 82.

⁴⁶ Initial Order ¶¶ 40-54.

47 However, we will not suspend any portion of that penalty amount. Suspended penalties are most effective in circumstances when the threat of having to pay a substantial amount is sufficient to ensure regulatory compliance. Such circumstances are not present in this case. This is the second time Shuttle Express has violated WAC 480-30-213, and the Company has repeatedly demonstrated that it believes it may ignore the law when regulation conflicts with how Shuttle Express wants to operate its business. We find that imposing the full penalty amount is the most effective way to discourage such conduct in the future.

48 Nor will we permit Shuttle Express to pay the penalty in installments or delay payment until July, as the Company requests. We do not penalize rule and order violations at the violator's convenience. The record, moreover, is devoid of any evidence that Shuttle Express cannot pay the entire \$60,000 penalty now or that such a payment would threaten the viability of a company with over \$13 million in annual revenues.⁴⁷ A penalty should result in financial discomfort, particularly for a repeat offender, and we believe that requiring the Company immediately to pay \$60,000 sends the appropriate message to Shuttle Express that the Commission will not tolerate flouting of its rules and orders.

FINDINGS AND CONCLUSIONS

49 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, and practices of public service companies, including automobile transportation companies, and has jurisdiction over the parties and subject matter of this proceeding.

⁴⁷ Shuttle Express asserts that “[t]here is no support in the record for the finding that the penalty in the Initial Order would not jeopardize the Company’s long-term financial security. Considering the company’s attorney fees for this and related proceedings, the case has been very costly to the company.” Shuttle Express Petition at 35 n.21 (citation omitted). Shuttle Express has it backwards. There is no evidence that a substantial penalty would jeopardize the Company’s financial health in light of the magnitude of its annual revenues. Nor is the amount Shuttle Express has paid in attorneys fees included in the record, much less germane. The Company chose to litigate this case, and paying attorneys fees to do so is solely the responsibility of Shuttle Express. We do not consider such fees to be a relevant factor in determining the appropriate penalty to assess.

- 50 (2) Shuttle Express, Inc., is an auto transportation company and holds certificate of public convenience and necessity C-975 to transport passengers.
- 51 (3) Between October 2010 and September 2011, Shuttle Express, Inc., relied on independent contractors to provide a portion of the regulated automobile transportation service the Company is authorized to provide.
- 52 (4) Shuttle Express, Inc., knowingly and willfully violated WAC 480-30-213(2) on 5,715 occasions by relying on independent contractors to provide multi-stop service along its regulated routes between October 2010 and September 2011.
- 53 (5) Shuttle Express, Inc., provided independent contractors with the names, addresses, and telephone numbers of certain customers to enable those independent contractors to provide those customers with the service they had requested from Shuttle Express, Inc.
- 54 (6) Shuttle Express, Inc., did not violate WAC 480-30-456 by disclosing customer information to independent contractors to provide the service those customers requested.
- 55 (7) On July 11, 2008, the Commission entered Order 01 in Docket TC-072228 approving a settlement agreement in which Shuttle Express, Inc., committed to comply with all applicable statutes and Commission rules, including WAC 480-30-213.
- 56 (8) Shuttle Express, Inc., knowingly and willfully violated Order 01 in Docket TC-072228 on 5,715 occasions by operating an independent contractor program in violation of WAC 480-30-213(2).
- 57 (9) Shuttle Express, Inc., should pay a penalty of \$60,000 for knowingly and willfully violating WAC 480-30-213(2) and Order 01 in Docket TC-072228.

ORDER

THE COMMISSION ORDERS that

- 58 (1) The Petition for Review of Initial Order of Shuttle Express, Inc., is DENIED in part and GRANTED in part, as discussed in the body of this Order.

- 59 (2) Shuttle Express, Inc., shall not use independent contractors to provide its
“rescue service” or any other automobile transportation service the
Commission regulates.
- 60 (3) Shuttle Express, Inc., is assessed a penalty of \$60,000 for 5,715 violations of
WAC 480-30-213(2) and Commission Order 01 in Docket TC-072228, and
that penalty is due and payable within 30 days after the date of this Order.
- 61 (4) The Commission retains jurisdiction over the subject matter in, and parties to,
this docket to enforce the terms of this Order.

Dated at Olympia, Washington, and effective March 19, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.