BEFORE THE

Washington Utilities and Transportation Commission

EVERGREEN TRAILS, INC., a Washington corporation, d/b/a Grayline of Seattle,	)	
Complainant,	)	No. TC-900407
v.	)	
SAN JUAN AIRLINES, INC., a Washington corporation, d/b/a SHUTTLE EXPRESS,	)	
Respondent.	)	

POST-HEARING BRIEF OF COMPLAINANT
GRAYLINE OF SEATTLE

Date: August 7, 1990

Due Date: August 7, 1990

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WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

EVERGREEN TRAILS, INC., a Washington corporation, d/b/a Grayline of Seattle, Complainant, v. SAN JUAN AIRLINES, INC., a Washington corporation, d/b/a SHUTTLE EXPRESS, Respondent.	No. TC-900407 POST-HEARING BRIEF OF COMPLAINANT GRAYLINE OF SEATTLE

I.

INTRODUCTION

At the outset, a brief comment on what this case is not about is in order. This case is not about a "grudge" or an ongoing "feud" between Grayline and Shuttle Express. No such grudge or feud exists. To cast the parties in such a light would be unfair to both parties and demeaning to the significance of the regulatory issues and enforcement policies presented to the Commission herein.

This case is not about elimination of the services of Shuttle Express. Grayline does not seek, by its complaint, to remove Shuttle Express from the market place.

Also, this case is not about "saving" Grayline from Shuttle Express in the market place. If Grayline were to circumvent and operate in defiance of the laws, rules, and regulations of both the Commission and the Port of Seattle, as the evidence herein establishes is the modus operandi of Shuttle Express, Grayline would not need to invest considerable time and money in investigating and presenting this complaint case, but instead could and would deal effectively with Shuttle Express in the market place.

Grayline, however, as it should and must as a regulated carrier, operates in compliance with the laws, rules, and regulations applicable to its operations. Grayline must, therefore, rely upon the Commission to regulate the carriers under its jurisdiction and to enforce the relevant rules and regulations and its orders and directives to the carriers it regulates. Without the Commission performing this role, the environment within which the regulated carriers operate will rapidly deteriorate to a mode of "self help -- catch me if you can" attitude among the carriers involved. The vacuum created by a lack of enforcement or follow through on its orders and directives by the Commission will be filled, but not necessarily with practices and attitudes beneficial to the long-term interests of the public.

What this case is about is Shuttle Express and how the Commission is going to regulate Shuttle Express and enforce its orders and directives when Shuttle Expresses chooses to ignore

or circumvent them. This case is about how Shuttle Express operated before seeking its certificate, and the operations maintained and proposed by Shuttle Express at the time it sought its certificate as compared with its method of operations subsequent to receiving its certificate.

II.

THE "ON-CALL" RESTRICTION

Central to these proceedings is a determination by this Commission as to the meaning of the words "on-call" within the context of Order M.V.C. No. 1809. Commissioner Pardini quickly got to the point in the following exchange with Mr. Sherrell, president of Shuttle Express:

> Question (by Commissioner Pardini): . . . I have one question only, and that deals with the phrase "on-call." Mr. Sherrell, has your definition of on-call always been the same or has it evolved from the time the original permit was issued until subsequent penalties and assessments and complaints were filed against you?
>
> Answer (by Mr. Sherrell): I'll swear on the Bible that its always been the same, that we could take our guests. I would like to say that the phone requirement is not that bad a deal, and I have -- you know, what the Commission has put on is not that bad, to require a phone call. I don't think that should be lifted.

(TR. 156-157). The record in these proceedings explains why Commissioner Pardini felt it necessary to ask this question and why the answer of Mr. Sherrell lacks credibility. The record herein demonstrates that Shuttle Express has managed to use the phrase "on-call" first as a shield when it sought to distinguish its service from that of other airporters for

purposes of RCW 81.68.040 and now as a sword as it tries to drive the competition out.

To establish the meaning of "on-call," one must review the facts confronting this Commission at the time Shuttle Express applied for operating authority in King County (hereinafter referred to as the "King County Case").

A. Federal Law - The ICC Exemption.

Shuttle Express, under the direction of Mr. Sherrell and without any Commission authority, began its airporter operations in September 1987. When questioned on this, Shuttle Express claimed an exemption from Commission authority under 49 USC 10526(a)(8)(A) and 49 CFR 1047.45, provisions of federal law which exempt from state regulation certain ground transportation that is in conjunction with interstate air movements. Specifically, the Interstate Commerce Commission (ICC) has determined that where there has been a prior or subsequent interstate air movement, the motor transportation of passengers between an airport and another point in the same state is an interstate movement, provided that there is prior through-ticketing or common arrangements between the motor carrier and the air carrier for continuous passage or interchange. Motor Transp. of Passengers Incidental to Air, 95 M.C.C. 526 (1964).

In 1988, Shuttle Express asked the ICC to evaluate its Sea-Tac operations under federal law. What is important to the current proceedings is the manner in which Shuttle Express represented its service to the ICC:

> To the extent that petitioner's ground operations are conducted in the manner described in its petition and reply -- i.e., on a through-ticket basis or pursuant to other common arrangements between it [San Juan Airlines] and the other airlines, after or before an interstate air movement, within a 25-mile radius of STIA. . . (emphasis added)

San Juan Air Services, Inc. d/b/a Shuttle Express, ICC Decision No. MC-C-30091 at p. 4 (1988).

It is physically impossible to have "hail the van," "walk-up" or "opportunity fare" passengers that qualify under the federal exemption. The words "through-ticketing" and "common arrangement" are irreconcilable with "hail the van," "walk-up" and "opportunity fares." In other words, the only passengers Shuttle Express could carry under the federal exemption were those that had made prior arrangements.

Mr. Sherrell himself recognized this:

> Question (by Mr. MacIver): And is it not true, sir, that from September of 1987 up to the time of hearing on your application for authority in King County, it was your position that Shuttle Express airporter operations were not subject to this Commission's regulations, because all passengers were served under prior or common arrangements with the airlines?
>
> Answer (by Mr. Sherrell): Yes.
>
> Question (by Mr. MacIver: In other words, it was your representation to this Commission that all Shuttle Express passengers had prearranged for your airporter service in conjunction with their air travel arrangements; is that correct?
>
> Answer (by Mr. Sherrell): Yes.

(TR. 30-31). This is critical testimony for unless we are to assume that Shuttle Express and Mr. Sherrell were guilty of

misrepresentations at the time of Shuttle Express's petition to the ICC, at the time of the King County Case and again during these proceedings, it means that the operations of Shuttle Express that were before the Commission during the King County Case were, both by law and in practice, limited to taking passengers who had made prior arrangements for transport.

Shuttle Express will tell this Commission that it had advised the Commission during the King County Case of its intent to change its mode of operation by having introduced into evidence a proposed operating agreement with the Port that, by its terms, would have allowed walk-up passengers. (TR. 109-10). At the same time, Mr. Sherrell, under examination by counsel for Shuttle Express, was telling this Commission that Shuttle Express had no intention of changing its method of operation:

> Question (by Mr. MacIver): I am referring to page 205 of the transcript of the proceeding in which you were seeking authority. You had not received authority at this time but you were seeking it and you had described your arrangement of making -- handling your passengers and prior common arrangement with airlines. You were asked the following questions by your counsel, Mr. Wolf, question, "Mr. Sherrell, with respect to the operations that have taken place from September 1987 to present, can you tell us whether or not if this application is granted, you anticipate any change in the manner or methods of your operations?" Your answer to that question was no. Do you recall that, Mr. Sherrell? (emphasis added)
>
> Answer (by Mr. Sherrell). Yes, I do.

(TR. 31-32). Shuttle Express may even claim that it was already accepting "walk-up" passengers at the time of the King County Case. (TR. 113-15). That would be a most troubling concept since there could have been no legal basis in January 1989 (interstate or intrastate) for Shuttle Express to accept walk-ups. By raising these defenses, Shuttle Express is asking this Commission to now state that it was fully aware that Shuttle Express was, in January 1989, accepting walk-ups even though such would imply recognition and acceptance of illegal conduct by this Commission.

B. Shuttle Express's Characterization of Its Operations.

The fact is that, during the King County Case, Shuttle Express was trying to paint a very different picture:

> Question (by Mr. MacIver): Is it not true that in the King County case you further testified that people wanting your service from Sea-Tac would "make prior arrangements. If they were traveling out of Seattle, we would make arrangements on their return to pick them up"? Do you recall that?
>
> Answer (by Mr. Sherrell): I vaguely recall that there was a lot of testimony, but --
>
> Question (by Mr. MacIver): If you would like, I would specifically read the question and answer.
>
> Answer (by Mr. Sherrell): No.
>
> Question (by Mr. MacIver): If you can accept that subject to check, that's at page 208 of the transcript, I will move on.
>
> Answer (by Mr. Sherrell): I will accept that, yes, I will.
>
> Question (by Mr. MacIver): Mr. Sherrell, with respect to the Sea-Tac originations, you also testified that Shuttle Express had been "providing

that type of service with advance reservations to passengers arriving at Sea-Tac." Do you accept that you so testified at 108 of the transcript?

Answer (by Mr. Sherrell): Yes.

(TR. 33-34).

Mr. Sherrell further characterized Shuttle Express's proposed service as catering principally to local residents who would otherwise use their own cars to go to or from the airport -- not hotel guests.

> Question (by Mr. MacIver): Mr. Sherrell you further testified and represented in support of your application that the type of individual, the "major client" that Shuttle Express was proposing service would be the individual that would otherwise drive their own car to the airport; is that correct?
>
> Answer (by Mr. Sherrell): Oh, definitely, yes. . . .
>
> Question: And that would not be typically a hotel guest, would it, Mr. Sherrell?
>
> Answer: That specific, no, it would not, not driving a car. (emphasis added)

(TR. 43). This is the way "on-call" service was being described back in 1989 at a time when Shuttle Express was trying to differentiate itself from existing operators.

During the King County Case, Mr. Sherrell characterized his application for "on-call" service as one which imposed upon Shuttle Express heavy restrictions:

> Question (by Mr. Cederbaum): Do you want a certificate to be limited to on-call service?
>
> Answer (by Mr. Sherrell): Yes, as we stated, we did put some heavy restrictions on ourselves.

(TR. 107). Now, 18 months later, Shuttle Express will tell this Commission that "on-call" was merely another way of saying "unscheduled." Ignoring the fact that Shuttle Express in its King County Case could easily have asked for "unscheduled" authority if that is what it truly sought, the fact is that unscheduled authority would have placed no meaningful restrictions on Shuttle Express. It would have permitted Shuttle Express to operate a wide-open unrestricted airporter service for which it did not demonstrate a public need.

Shuttle Express now tells this Commission that it can live with the "prior telephone request" requirement as being the linchpin upon which it is determined whether they are satisfying the on-call restriction; it is "not that bad a deal." (TR. 157). Shuttle Express now tells this Commission that the prior telephone request requirement, as applied by Shuttle Express, is no impediment at all:

> Answer (by Mr. Sherrell): Impediment to us requiring a phone call? Actually, no, it is not. . .

(TR. 103). The fact is that through the evolution process, Shuttle Express has converted its "heavy restriction" into no impediment at all.

C. Public Need.

Furthermore, the defenses that Shuttle Express will raise ignore the fact that Shuttle Express did not demonstrate in the King County Case a public need for "walk-up," "hail the van" or "opportunity fare" service:

Question (by Mr. MacIver): Mr. Sherrell, in connection with your application for authority, Shuttle Express presented a number of public witnesses; is that correct?

Answer (by Mr. Sherrell): Yes (sic).

[colloquy between counsel and Judge Lundstrom]

Question (by Mr. MacIver): Mr. Sherrell, I'll repeat the question.

Answer (by Mr. Sherrell): I know the question. You don't need to if you don't want to. It's difficult for me to recall all the specifics of the testimony. However, as I recall that time, the Seattle Port agreement did not allow us to take up --

Question (by Mr. MacIver): Excuse me.

Answer (by Mr. Sherrell): Walk-up or hail the van---

Question (by Mr. MacIver): So your answer is to the best of your recollection not a single public witness testified as to a requirement for hail the van, walk up or demand type service from Shuttle Express as contrasted to service prearranged by reservation in vans?

Answer (by Mr. Sherrell): Yeah, they couldn't have, so I doubt if they would have testified that they would.

(TR. 37, 41). In the King Country Case, this Commission was presented with no showing of public need for "hail the van," "walk-up" or "opportunity fare" service. To suggest that witnesses were not called to show this because Shuttle Express was not yet providing that type of service is an astounding statement in the context of describing a hearing supposedly designed to show public need for <u>proposed future services</u> of Shuttle Express. Showing the need <u>before</u> offering the service is the way an applicant is to proceed with a request for operating authority.

By Shuttle Express's own admission, there was no evidence before this Commission during the King County Case to support a finding of public need for "hail the van," "walk-up" or "opportunity fare" service. Accordingly, any defense that Shuttle Express may present suggesting it can now solicit and serve such passengers under its "on-call" authority should be rejected in that it suggests this Commission granted authority for a service as to which the applicant showed no public need.

D. Summary of the Record.

What the record clearly shows is that during the King County Case:

1. This Commission was confronted by a carrier that claimed both before this Commission and the ICC that it was operating under a federal law that prohibited "walk-up," "hail the van" and "opportunity fare" service.

2. This Commission was told by Shuttle Express that all of its customers had "prearranged" their service.

3. This Commission was provided with evidence by Shuttle Express characterizing its service in a manner calculated to enable the Commission to overcome the prohibition against duplicating authority.

4. This Commission was told by Shuttle Express that it had no intention of changing its "manner or methods of operation."

5. This Commission was not presented with any evidence of public need for "walk-up," "hail the van" or "opportunity fare" service.

The November 15, 1989 letter from the Commission to Mr. Sherrell should therefore have come as no surprise to Shuttle Express:

> Thus, "walk-up," "hail the van" or "opportunity fare" service was not included in the authority granted to Shuttle Express. The Commission believed that the on-call restriction accurately characterized the record evidence as to public need, existing carriers' failure to serve, and operations maintained and proposed by Shuttle Express.

(Exhibit 1).

What Shuttle Express fails to recognize is that phrases such as "on-call" must be defined in the context with which they were first used rather than in a manner that meets the needs of the moment. The fact is that the "on-call" restriction, as used by this Commission in the context of Order M.V.C. No. 1809, requires that Shuttle Express only accept passengers who have made prior arrangements for transport.

III.

THE EVOLUTION OF THE "ON-CALL" RESTRICTION

Although the service date for Order M.V.C. No. 1809 was April 21, 1989, the actual certificate was not issued to Shuttle Express until November 22, 1989. (TR. 119-20). This delay resulted from Shuttle Express's failure to comply with the Commission's insurance and tariff requirements until almost

the end of 1989. Shuttle Express, however, was much quicker in its ability to start the evolution of the "on-call" restriction.

Testifying in October 1989 in Docket D-2566 in opposition to an application for authority by Lloyd's Connection (hereinafter referred to as the "Lloyd's Connection Case"), Mr. Sherrell was quick to describe the "on-call" restriction in a manner that served the then-existing needs of Shuttle Express - keeping a potential competitor out of the market:

> Question (by Mr. MacIver): . . . I am now referring you to the Lloyds Connection case where you now state as follows, on page 1221 of the transcript. In that case, is it not true that you now are testifying in October of 1989 that it is now proper for Shuttle Express to accept walk-up, on demand passengers, do you recall that?
>
> Answer (by Mr. Sherrell): Yes, I do.

(TR. 68). Even Mr. Sherrell could not avoid acknowledging the inconsistency between this position and the position taken in the King County Case:

> Answer (by Mr. Sherrell): Yeah, there's inconsistency. Well there's differences. Inconsistency is a word that I don't think I can define that to, but there is a difference in what I stated, yes.

(TR. 69). It was Mr. Sherrell's testimony in the Lloyd's Connection Case that led to the series of letters admitted as Exhibit 1 in this proceeding. In response to Secretary Curl's November 15, 1989 letter referred to above, the evolving position of Shuttle Express was revealed at page 6 in the

November 21, 1989 response from counsel for Shuttle Express, Mr. Wolf:

> Shuttle Express operates only in response to a passenger's call for service. Those calls for service, however, are not limited to only telephone calls. Passengers may call for the service by waving down a van or by walking up and orally requesting service.

(Exhibit 1). Between Mr. Sherrell's testimony in January 1989 and Mr. Wolf's letter of November 21, 1989, the words "on-call" had evolved from "prior arrangement" to "wave, walk-up and ride."

In this particular instance, Shuttle Express was quick to have their deeds match their words. For in fact, Shuttle Express was already transporting "walk-up," "hail the van" and "opportunity fare" passengers. In the Commission's December 8, 1989 response to Mr. Wolf, the Commission's position was made very clear:

> The Commission is in receipt of your letter of November 21, 1989. Please be advised that the Commission's position remains as stated in its letter of November 15, 1989. Any operations performed by Shuttle Express contrary to the terms of your client's certificate as explained in Commission's letter <u>are performed at the peril of Shuttle Express</u>. (emphasis added)

(Exhibit 1). What constitutes a basis for these proceedings is that Shuttle Express in fact decided to operate at its own peril; it has never ceased carrying "walk-up," "hail the van," and "opportunity fare" passengers. Equally troubling is the fact that Shuttle Express attempted to cover-up that fact.

A. <u>An Old Familiar Pattern</u>

The pattern of Shuttle Express over the past two years is repetitive and predictable; propose one thing to the Commission -- do whatever suits the needs of Shuttle Express at the moment -- after enforcement action or complaints, attempt to circumvent rather than comply with the law, while professing a willingness to comply. Commissioner Pardini warned Shuttle Express about such behavior in the King County Case:

> This applicant has displayed more than a casual disregard for the laws regarding public transportation in this state....after having been in operation for over a year, he presented an application to this Commission as though it was an afterthought.
>
> . . . These factors lead to serious questions as to whether or not the applicant is fit, willing, and able to operate within a regulated environment.
>
> . . . attempts to pick and choose those parts of the law that apply to them and other parts of the law that do not apply to them will not be condoned or accepted. (emphasis added)

Separate concurring opinion of A.J. Pardini, Commissioner, Order M.V.C. No. 1809, p. 32. Similarly, the Commission again admonished Shuttle Express in its November 15 letter:

> In its Order M.V.C. No. 1809, the Commission expressed serious reservations concerning your past illegal and inappropriate operations. The Commission will not tolerate similar activity in the future.

(Exhibit 1). Shuttle Express would now have the Commission believe that it has seen the error of its ways and now operates in full compliance with the Commission's orders and its November 15 letter:

Question (by Mr. Wolf): Again, sir, regardless of what you thought it meant, regardless of why you applied and how you applied, regardless of how you may personally believe here today what on-call means, is it your testimony here, sir, that you are conforming your operations to the interpretation placed on that terminology in your permit as found in the November 15, 1989 letter?

Answer (by Mr. Sherrell): Yes, and I always will.

(TR. 147). Shuttle Express will tell this Commission of the extraordinary measures it has taken to comply with the November 15 letter: consultations with legal counsel (TR. 122-23); changes in the driver's information manual (TR. 125); new instruction to the dispatchers (TR. 125); a new training film (TR. 132).

Shuttle Express will even tell this Commission that it is not taking "walk-up," "hail the van" or "opportunity fare" passengers and that it has not done so since receipt of the Exhibit 1 letters:

Question (by Mr. MacIver): It is your testimony that you have not accepted walk-up, hail-the-van or on-demand fares even (sic) after receipt of these [Exhibit 1] letters?

Answer (by Mr. Sherrell): That is correct.

(TR. 72). The facts as well as the statements of Mr. Sherrell himself tell quite a different story.

B. The Telephone Game.

Secretary Curl's November 15 letter advised Shuttle Express as follows:

The Commission Order No. 1809 in that docket clearly indicated that the on-call restriction allowed Shuttle Express to transport, on an unscheduled

> basis, only those passengers who have made a telephone request for service prior to boarding a Shuttle Express motor vehicle.

(Exhibit 1). The manner in which Shuttle Express responded to this can be seen from an exchange between Mr. Sherrell and his counsel:

> Question (by Mr. Wolf): Is there anything in that correspondence [November 15 letter] that tells you how much prior to the boarding the telephone request must be made?
>
> Answer (by Mr. Sherrell): No.
>
> Question: Is there anything in that correspondence that suggests where the telephone must be located?
>
> Answer (by Mr. Sherrell): No.

(TR. 121).

To Shuttle Express, it became a game of figuring out new and different ways of using the telephone so that one way or another, Shuttle Express passengers could make a perfunctory telephone call contemporaneously with receiving service. One can almost envision Mr. Sherrell saying:

> If they want a telephone, we'll give them a telephone; they did not tell us where it had to be or when it had to be used; yes, we'll show the Commission telephones if that's what they want. We'll put them on the curbs; we'll even use the telephones inside the vans.

C. <u>Installation of "Curbside" Automatic Dial Telephones At Airport</u>

Within one month of Secretary Curl's letter, Shuttle Express had persuaded the Port of Seattle to allow Shuttle Express to install three automatic dial phones next to its three loading areas at Sea-Tac.

Question (by Mr. MacIver): Would you accept subject to check, Mr. Holbrook will confirm this in the morning, Mr. Sherrell, but that you had those phones installed in December of 1989?

Answer (by Mr. Sherrell): Yes, installation was in December, yes.

Question (by Mr. MacIver): Which was approximately one month after receiving the letter from the Commission concerning your manner and method of operating?

Answer (by Mr. Sherrell): Yes.

(TR. 79). The use of those telephones in the context of complying with, or more accurately circumventing, the November 15 letter was made clear during Mr. Sherrell's testimony in response to questions from his own counsel as to the manner in which Shuttle Express takes passengers arriving at Sea-Tac:

Answer (by Mr. Sherrell): We require all of our guests to phone us on the telephone and we take the reservation and write it on our board.

Question (by Mr. Wolf): Okay. So when the passenger comes into the airport, are there a number of telephones that are available to that passenger?

Answer (by Mr. Sherrell): Yes, there are.

Question (by Mr. Wolf): And where are they located?

Answer (by Mr. Sherrell): ... or they can go curbside and use the Shuttle Express direct line from there.

. . .

Question (by Mr. Wolf): And is the passenger at that time requesting service?

Answer (by Mr. Sherrell): Yes.

Question (by Mr. Wolf): Is the passenger utilizing a telephone to do it?

Answer (by Mr. Sherrell): Yes.

(TR. 137-38). As Mr. Sherrell had already testified, the Commission's November 15, 1989 letter did not say where the telephones had to be. Nor did the Commission's letter say how long before boarding the van the telephone call had to be made:

> Question (by Mr. MacIver): You also testified in that same proceeding [May 22, 1990 testimony in connection with the application by Shuttle Express for authority in Pierce County, Docket D-2589] as follows in response to another question by me. "But it is your opinion that you have satisfied the on-call restriction if a passenger without a prior reservation uses one of the direct dial phones on the sidewalk at the airport to call Shuttle Express and immediately thereafter boards a van? Answer: Yes, definitely."
>
> Answer (by Mr. Sherrell): Yes, definitely.
>
> Question (by Mr. MacIver): All right, And, Mr. Sherrell, this is a prior reservation under your current mode of operation at the airport, a call that's made literally seconds before the person boards the van?
>
> Answer (by Mr. Sherrell): Oh, definitely, you have a lot of incoming flights, Their only opportunity is when they get off an airplane, You bet.
>
> Question (by Mr. MacIver): So in your opinion you are complying with your on-call restriction, if this prior reservation for your service occurs literally two seconds before the service is provided?
>
> Answer (by Mr. Sherrell): That's straight service to the guest in the city, yes.
>
> Question (by Mr. MacIver): Is your answer yes?
>
> Answer (by Mr. Sherrell): Yes.

(TR. 85-86). In fact, Shuttle Express had instructed its drivers on a precise procedure to convert "walk-up" passengers into passengers who had made a "telephone request for

service." Exhibit 2, which is an amendment to the Shuttle Express Drivers Manual (written in February 1990 personally by Mr. Sherrell (TR. 161)) spelled it out clearly:

> Through an interpretation by the Assistant Attorney General's office we are "REQUIRED" to have "All" walk up guests (guest at the Port who has not phoned in reservation) call dispatch to make reservations. (emphasis added)
>
> Ask your walk up guest: (emphasis added)
>
> Did you ride to the Airport with us and make a return reservation?"
>
> .... When a "walk up" guest has not made a reservation, ASSIST the necessary phone call by: (emphasis added)
>
> Lifting receiver and "you" talking first to "Dispatch" stating "walk-up PAX & destination." Then pass phone to "Guest" who "merely" gives their name. (emphasis **NOT** added)

(Exhibit 2). A pictorial description photographed by Mr. Ferleman of this procedure in action is found at Exhibits 6 - 12. This amendment to the Shuttle Express drivers manual is definitely not an attempt to comply with the November 15 letter; it is, quite plainly, instructions on how to circumvent it.

What is impossible to believe is that Shuttle Express has the temerity to characterize this scheme as being equivalent to prior arrangement service:

> Question (By Mr. MacIver): Mr. Sherrell, I am asking you from a practical standpoint now, out in the real world, is there any real distinction between me just walking up to your van without a reservation, climbing aboard and leaving the airport, versus walking up to your van and following this procedure and five seconds later I'm on your

van and leaving the airport? What distinction really is there between this passenger and the other passenger who just gets on your van?

Answer (by Mr. Sherrell): The passenger makes a phone call, makes a reservation. Whether you make it one second or one hour or one day, you're still calling reservations and making a reservation.

(TR. 100). The integrity of this Commission demands that a willingness to so abuse the dictates of the Commission be dealt with firmly and decisively.

D. Let the Drivers Make the Call

Shuttle Express, in order to further circumvent the dictates of this Commission, even allows its own drivers to make the obligatory telephone call. Discussed above is the instructions in the Drivers Manual telling the driver to originate the call and then "pass" the phone to the passenger who "merely" gives only his/her name. In fact, Shuttle Express is letting the drivers do everything, even going so far as conducting the entire transaction on the radio phones in the vans:

Question (by Mr. MacIver): All right. Mr. Sherrell, in the Pierce County case at page 41, beginning at line 24, you were asked a question by Mr. Wolf and the following occurred:

"Question: If you were called in by a concierge for say two or three passengers and you come from the facility and meantime another passenger has come up to the concierge and asked for service at the passenger, will you take that passenger?

Answer: "Yes.

Question: And that passenger, however, must request your service, isn't that correct?

"Answer: Yes.

Question: Is it your understanding, what do you do with respect to calling in a reservation for a passenger like that?

Question (sic): We have the driver make the reservation for the individual person.

Do you recall that testimony?

Answer (by Mr. Sherrell): Yes, I do. (emphasis added)

(TR. 73-74). In other testimony given by Mr. Sherrell in response to questions from counsel for Shuttle Express during the Pierce County case, the use of this procedure to convert "hail the van" passengers was spelled out:

Question (by Mr. MacIver): Mr. Sherrell, is it not correct that on page 48 of that transcript [Pierce County Case] or during that hearing, you testified as follows with respect to someone waving down the van:

Question [by Mr. Wolf]: Are there also passengers going from the airport that request your service by waving down a van?

Answer: Yes, they do.

Question: In those instances how -- what do you could (sic)?

Answer: Currently we are requiring each person to use a telephone call to the office.

Question: Can those passengers also utilize radio phones in your vans to make a reservation?

Answer: Yes, they can.

Question: And can the drivers also do that for them?

Answer: Yes, he can.

Do you recall that testimony?

Answer (by Mr. Sherrell): Could you give me the exact date of that?

Question (by Mr. MacIver): Yes. <u>That was your testimony on February 14, 1990</u>. Do you recall that testimony?

Answer (by Mr. Sherrell): Yes. (emphasis added)

(TR. 76-77). Shuttle Express will tell this Commission that it has ceased this practice. The testimony of Mr. Lonheim belies this assertion:

Question (by Mr. MacIver): And the driver did not use a telephone concerning your trip before you entered the van?

Answer (by Mr. Lonheim): No.

Question (by Mr. MacIver): The driver reported on the driver's radio the fact that you were riding the van to the airport; is that correct?

Answer (by Mr. Lonheim): Correct.

Question (by Mr. MacIver): Did you talk on the radio at any time?

Answer (by Mr. Lonheim): No.

(TR. 320). It is clear that since applying for and receiving its certificate with the on-call restriction and the Commission's November 15, 1989 letter, Shuttle Express has responded by devising one scheme after another to circumvent, rather than comply with, the dictates of the Commission. Nevertheless, Mr. Sherrell is still willing, under oath, to testify that he is and always will comply with the Commission's directives. (TR. 147). This simply proves that the past efforts of the Commission have been to no avail.

E. Shuttle Express Makes It Financially Necessary For Its Drivers to Break the Law.

One of the most illuminating pieces of testimony that was entered into the record in these proceedings is the evidence describing the compensation system that has recently been implemented by Shuttle Express. During the King County Case, in response to questions from Mr. Wolf, Mr. Sherrell took care to tell the Commission that Shuttle Express had adopted a compensation system which provided no driver incentive to solicit passengers:

> Question (by Mr. MacIver): Mr. Sherrell, with respect to your driving compensation, in January of 1989 in the King County case, you testified that your drivers were paid as follows: "base -- it's basically 5.50 an hour, plus they get two percent of gross.
>
> "Question [by Mr. Wolf]: They get two percent of gross generated by Shuttle Express or generated by their own activities?
>
> "Answer: Generated by Shuttle Express.
>
> "Question: So they share a pool of two percent of the gross revenue of Shuttle Express?
>
> "Answer: Yes.
>
> "Question: There's no relationship to how many passengers any particular driver has transported during any particular time?
>
> "Answer: No, there is not." (emphasis added)
>
> Do you recall that testimony, Mr. Sherrell, January of '89 in your application for authority?
>
> Answer (by Mr. Sherrell): Yeah, but it sounds like the wrong -- that's not the way we were operating.

(TR. 48). During the King County Case, this Commission was told, in the most direct terms, that Shuttle Express was not

providing a financial incentive to its drivers to solicit and transport opportunity fares. Mr. Sherrell is now suggesting that his previous testimony may not have been correct.

The fact is that the compensation system that is now in place is one which any rational person would recognize as an inducement or invitation - a system that rewards drivers who take "walk-up," "hail the van" and "opportunity fare" passengers. Under the existing system, drivers receive 30% of the revenues that they personally generate. As originally disclosed in the Pierce County Case:

> Question (by Mr. MacIver): Mr. Sherrell, I am now referring to your testimony in the Docket No. 2589, the proceeding in Pierce County where you were seeking to extend your authority. Let me read you a question and answer that was put to you by me and your answer, see if this is accurate.
>
> "Question (by MacIver): How do you pay your drivers, Mr. Sherrell?
>
> "Answer: We have a guaranteed wage of 4.40 an hour or <u>30 percent of gross revenues from that specific driver for the day</u>, whichever is greater.
>
> "Question: So your drivers -- so you pay your drivers either a flat hourly rate or a commission based on revenues transported?
>
> "Answer: Yes, correct.
>
> "Question: Revenues from passengers transported?
>
> "Answer: Correct."
>
> Is that how you pay your drivers today, Mr. Sherrell?
>
> [colloquy between lawyers and Judge Lundstrom]

Answer (by Mr. Sherrell): Yes, it is. (emphasis added)

(TR. 53-57).

Shuttle Express will tell this Commission that the new system was adopted in order to encourage driver efficiency - to give them an incentive to find the shortest routes. (TR. 115-116). The testimony of Mr. Ferleman and Mr. Lonheim together with the continuing violations of Port of Seattle regulations that were testified to by Mr. Holbrook expose this pay scheme for what it is - a system that encourages drivers to solicit:

> Question (by Mr. MacIver): Mr. Sherrell . . . your incentive payment of 30 percent of fare is hauled, would indeed give your drivers an incentive to accept walk-up, hail the van type fares, would it not?
>
> Answer (by Mr. Sherrell): That specific question, yes.

(TR. 62). Yet Mr. Sherrell will tell this Commission that solicitation is "atrocious and abusive." (TR. 145).

Shuttle Express drivers, however, have no choice. If they are to earn more than what is essentially minimum wage, they must solicit opportunity fares. In the Commission's November 15, letter, Shuttle Express was put on notice that:

> . . .on-call restriction was also a significant factor in the Commission's denial of a Petition for Reconsideration submitted by Evergreen Trails, Inc., d/b/a Grayline of Seattle in Docket No. D-2566. Grayline's Petition was based, in part, on its concern that Shuttle Express was "skimming" Grayline's passengers from downtown Seattle hotels. The Commission believed that the on-call restriction

contained in your authority would provide some protection to Grayline against such activity by Shuttle Express (Order M.V.C. No. 1834).

All the theoretical protection in the world will be of no value when the Shuttle Express drivers are financially required to circumvent or ignore the on-call restriction in order to make a living. That is what Shuttle Express has done.

F. Shuttle Express Continues to Solicit and Transport All Opportunity Fares Without Regard to Its Certificate Restrictions or the Port of Seattle's Regulations.

The testimony of Mr. Sherrell together with the testimonies of Messrs. Holbrook, Moss, Ferleman, and Lonheim establish, without question, that Shuttle Express is operating its airporter service on a wide open basis. Shuttle Express drivers solicit and serve any and all opportunity fares at will. The fact that, under Shuttle Express's "30 percent of fares" driver compensation plan, drivers are invited to earn the equivalent of an hour's wage with each fare transported between Sea-Tac and a Seattle hotel, for example, explains the extremely aggressive behavior of the drivers at the airport as described by Mr. Holbrook, the Assistant Director of Aviation Operations for the Seattle Tacoma International Airport. Mr. Holbrook is responsible for overseeing and administering, among other things, ground transportation at the airport. (TR. 211).

The Port enforcement personnel, under Mr. Holbrook's supervision, monitor the operations of ground transportation companies and spot check their activities for compliance with

the Port's laws, rules, and regulations and concession agreements with the operators. (TR. 211-212).

Exhibit 13 herein consists of copies of violation notifications sent by the Port of Seattle to Shuttle Express during 1989 and the first four months of 1990. Exhibit 14 herein, a copy of which is attached to this brief as Attachment A, is a summary of those violations which was reviewed by and accepted by Mr. Holbrook as being accurate. (TR. 230). Mr. Holbrook, under questioning from Commission Casad, also testified that Shuttle Express had been cited by the Port police officers for legal infractions in addition to the above violations of the Concession Agreement. (TR. 299).

Representative types of violations the Port of Seattle has cited Shuttle Express for over the past one and one-half years are:

1. March 10, 1989 Notice:

    Repeatedly picked up passengers in zones other than those designated for Shuttle Express.

2. April 18, 1989 Notice:

    Cruising the lower drive and not picking up passengers.

3. May 25, 1989 Notice:

    Driver . . . was observed running after and loading passengers out of his/her zone. When approached by a Port of Seattle employee . . . refused to load in his/her zone which was open.

4. July 24, 1989 Notice:

> Driver . . . was observed entering terminal; . . . drivers refused to cooperate when told by Port personnel they were causing a congestion problem.

5. July 27, 1989 Notice:

> Picking up a passenger . . . dispatched for a taxicab.

6. August 24, 1989 Notice:

> Driver stated "he could care less where his zone is and that he will stop where he wants."

7. December 5, 1989 Notice:

> On November 27 . . . driver observed soliciting passengers . . . he approached a woman . . . he asked a Port of Seattle Ground Transportation Controller if she needed a ride . . . he also asked a gentlemen . . . to approach two men who were waiting for a taxi cab. . . . On November 26, driver observed soliciting. . . . he asked all those walking by if they needed a ride.

8. March 16, 1990 Notice:

> Picked up passenger when the passenger hailed the van; parked in zone . . . for over 20 minutes. . . . did not load passengers.

Cruising, parking vans at the curb without a request for a passenger, leaving the van unattended and entering the terminal, and the loading of passengers outside of designated loading areas are all methods of solicitation of "walk-up," "hail the van" and "opportunity fares" passengers. The solicitation and transportation of such passengers is in violation of both Shuttle Express's certificate and the Port of Seattle's regulations and Concession Agreement.

The unabated and aggressive solicitation activities of the Shuttle Express drivers at the airport, which is undoubtedly induced in large part by the "incentive payment plan," makes the following testimony of Mr. Sherrell difficult to believe:

> Question (by Mr. Wolf): Mr. Sherrell, what is your attitude with regard to compliance with that provision of the Port Agreement regarding solicitation? <u>What's your attitude on solicitation</u>?
>
> Answer (by Mr. Sherrell): I've seen solicitation in California. <u>I think its atrocious and abusive and I do not endorse solicitation</u>. (emphasis added)

(TR. 144-145).

In February 1990, investigators Moss and Halstead of the WUTC observed Shuttle Express operations at the airport during parts of two days. The investigation was limited to looking for situations where people would "flag-down vans." (TR. 432). Several citations were issued to Shuttle Express by the Commission as a result of this limited investigation. Significantly, however, many more potential violations were observed which were not reported by the investigators:

> Question (by Mr. MacIver): And would you tell us <u>what you observed in connection with those flag downs</u>?
>
> Answer (by Mr. Moss): <u>Its rather common</u>. <u>We observed it throughout our whole investigation</u>, where people would be at the curb and they would see the Shuttle . . . one of the buses coming by . . . and <u>they would wave at them, and the bus would pull in and they would get on after a discussion with the driver</u>.
>
> Question: And you say <u>you saw this as a common occurrence with respect specifically now to Shuttle Express</u>?

Answer: Yes, sir.

Question: And you didn't cite those instances because you couldn't substantiate whether those passengers had a prior reservation or not?

Answer: No, sir, without following and pulling over the bus and interviewing the passenger, I couldn't do that.

(TR. 434).

Mr. Ferleman, a private investigator retained on behalf of Grayline, observed Shuttle Express's operations at the airport on March 29, April 3, and June 23, 1990. Mr. Ferleman summarized what he observed as follows:

Answer (by Mr. Ferleman): Well, I observed vans cruising by on pretty much a continuous basis, usually with their lights blinking and driving at pretty much of a walking pace. I observed vans pulling up and parking when no passengers or prospective customers were visible. I saw drivers getting out of the vans, standing around with their door open. I saw them approach passengers and solicit them. I saw the drivers making phone calls for passengers or directing the passengers to the telephones. I was approached and solicited myself.

(TR. 175-176). Shuttle Express drivers also told Mr. Ferleman that use of the curbside phones at the airport was "just a formality". (TR. 180). Mr. Ferleman also encountered a Shuttle Express driver who misrepresented to him both the price and schedule of Grayline's airporter service. (TR. 184).

Exhibits 6-12 herein are pictures taken by Mr. Ferleman on June 23, 1990. These pictures depict the location of the curbside phones at the loading zones of Shuttle Express and the use of a curbside phone by a Shuttle Express driver on behalf of an operative of Mr. Ferleman who had not

made a prior reservation, telephone or otherwise, with Shuttle Express before boarding a van destined for a Seattle hotel.

The final investigator, Mr. Lonheim, is an employee of Westours, a company affiliated with Grayline. (TR 315). Mr. Lonheim was asked to spot check Shuttle Express's practices at two Seattle hotels on June 11, 1990. The hotels were the Westin and the Stouffer Madison hotels which are served by Grayline. (TR 316).

Shuttle Express took Mr. Lonheim from the Westin on June 11, 1990 to the airport with no reservation and without even asking for his name:

> Question (by Mr. MacIver): After you walked up to the Shuttle Express Driver and requested information concerning service, would you describe in your own language what happened?
>
> Answer (by Mr. Lonheim): I went up and said, are you going to the airport? The driver said yes. I said, can I go? He said yes. I got aboard, went to the airport.
>
> Question: Did you make a telephone call before riding the van to the airport . . . .
>
> Answer: No.
>
> Question: Did the driver make a telephone call before you boarded --
>
> Answer: No.
>
> Question: Did the driver use his or her radio after -- before or after you were on the van to report you were riding to the airport?
>
> Answer: Not prior. Might have after I was on, but I was sitting in the back and didn't hear anything.
>
> Question: Did you even give the driver your name?

Answer: No.

(TR 318). At the Stouffer Madison, Mr. Lonheim also was taken to the airport on June 11, 1990 without a prior telephone reservation. The driver simply reported on his radio in the van that Mr. Lonheim was riding to the airport. (TR 319-320).

In summary, the manner and method in which Shuttle Express has conducted its airporter service after its application proceeding bears slight resemblance to the operations of Shuttle Express proposed by Mr. Sherrell in the King County Case. Also, the current operations of Shuttle Express bears little resemblance to the public testimony in the King County Case, where all but three of the public witnesses were local residents supporting a door-to-door airporter service as an alternative to taking their own cars to the airport. All public witnesses testified to a need to make prior arrangements for the service of Shuttle Express; Mr. Sherrell testified that Shuttle Express requested 24-hour advance reservations from the customer, so the vehicles could be dispatched properly. (TR. 35-36).

It is respectfully submitted that while the Commission in good faith believed the on-call restriction which was proposed by Shuttle Express would enable Shuttle Express to provide the service supported by the public in its application proceeding, and, at the same time, afford necessary protection from unwarranted duplicating services and resulting diversion of traffic from existing airporters, Shuttle Express has proven the Commission wrong!

The Commission has repeatedly noted Shuttle Express's pattern of violations and lack of candor in its dealings with the Commission and warned Shuttle Express to cease and desist from such activities in (1) its classification order, (2) its order granting authority to Shuttle Express, (3) Commissioner Pardini's concurring opinion to the Commission's order granting authority to Shuttle Express, (4) its November 15, 1989 letter to Shuttle Express, (5) its December 8, 1989 letter to Mr. Wolf, and (6) in citations to Shuttle Express for operations in violation of its certificate restrictions. Since its inception in September of 1987, however, Shuttle Express's response to each effort by the Commission to encourage compliance has been either (1) to ignore the Commission or (2) attempt to circumvent rather than comply with the Commission's directives. Shuttle Express has never been "candid and forthcoming in its dealings with the Commission" as directed in Order M.V.C. No. 1809 when authority was granted it! If there is to be a rule, there must be some point at which failure to comply can no longer be corrected.

IV.

SHUTTLE EXPRESS'S IMPACT ON GRAYLINE AIRPORTER

There is no serious dispute in this record that the current manner and method in which the Shuttle Express airporter operations are being conducted has transformed Grayline's airporter service from a modestly profitable, yet

reasonably priced hotel airporter service, to a losing operation, despite fare increases of 20 percent since January 1989.

Grayline's airporter traffic has dropped in absolute terms since the 1986 - 1987 period before Shuttle Express commenced operation. (See Exhibit Nos. 19 and 25.) This decline in traffic is even more dramatic when compared with the increase in the airport's passenger traffic over the same period. (See Exhibit Nos. 22, 23, and 24).

In 1986 and 1987, Grayline's airporter service was reasonably profitable. In 1988 the airporter lost money. Rates were increased 10 percent on January 1, 1989, and 1989 was basically a break-even year. Rates for the airporter were again adjusted upward in January 1990. Based on the first six months of 1990, the Grayline airporter will nevertheless lose money this year. (See Exhibit Nos. 20 and 21). The bottom line is that since Shuttle Express commenced operations in the fall of 1987, the Grayline airporter has lost money despite a 20 percent increase in rates (from $5.00 to $6.00) since January 1, 1989. (TR. 329-332).

In addition to an increase in rates to offset, in part, the increasing imbalance between the Grayline airporter's costs and revenues, Grayline commits about $100,000 per year (about 5 percent of its gross revenues) to advertising at the airport, at hotels and in in-flight magazines. (TR. 390-391).

As Mr. Barr pointed out, users of airporter service are a very difficult group to market ones services to. (TR. 390).

A user of this type of service, without an advance reservation, will normally spontaneously choose a service. (TR. 390). This fact, in light of the known activities of Shuttle Express both in and outside of the baggage claim area at the airport, explains why the Grayline airporter has been most dramatically impacted at the airport, where all potential traffic is funneled through one point, as contrasted to the hotels. Exhibit 27, a study of the Grayline airporter's very substantial decline in traffic originating at the airport, is attached hereto as Attachment B for immediate reference.

Chairman Nelson questioned Mr. Barr on why, given Grayline's service priced at $6.00, it was nevertheless losing substantial traffic to the $12.00 service of Shuttle Express. (TR. 389-390). As Mr. Barr explained, advance marketing of opportunity fares is difficult and often ineffective. Mr. Barr also testified that the Grayline airporter does not have employees "soliciting traffic off the sidewalks at the airport." The Grayline airporter does not cruise along the lower concourse at the airport, nor do they load and unload passengers outside of the zones assigned to them by the airport. (TR. 405). The Grayline airporter strictly abides by the terms of its WUTC certificate, its Concession Agreement and the rules and regulations of the Port of Seattle. (TR. 406). The Grayline airporter has not received one single citation

from the airport since 1985, when present management took over the airporter service. (TR. 406).

It is precisely these types of activities on the part of Shuttle Express, however, which is in fact diverting the Grayline airporter's sole source of traffic, i.e., opportunity - on-demand fares traveling between the airport and hotels in Seattle. This type of traffic is uniquely vulnerable to diversion at the airport, because it is all funneled onto the lower departure concourse out of a few centrally located doors.

Shuttle Express drivers, motivated with a commission of $4.00 or more for each "fare" coaxed into a Shuttle Express van, are continuously and aggressively soliciting these fares all along the lower concourse at the airport, despite the restriction in Shuttle Express's certificate prohibiting the transportation of walk-up and hail the van fares, i.e., on demand traffic. (See Exhibit Nos. 1 and 3). It is very important to understand that no amount of marketing can overcome the damage that can be inflicted upon an operator which is following the rules by another operator who takes advantage of that fact by not following the rules.

Similarly, Commissioner Pardini inquired as to why the Grayline airporter could not counter Shuttle Express with more frequent schedules and smaller vans. (TR. 398 - 399). First, unless Grayline "takes off its gloves" and matches Shuttle Express's behavior on the sidewalks at the airport, such

counter measures will have little, if any, impact. Shuttle Express, quite simply, is soliciting and taking the Grayline airporter's potential traffic before the individuals involved even have an opportunity to proceed to Grayline's area of the lower concourse. Once the fare is in a Shuttle Express van and leaving the airport, the size of the Grayline airporter's equipment and the frequency of its schedules are meaningless.

Second, when wondering why the Grayline airporter does not change its operations to substantially mirror Shuttle Express's, one must be mindful of the fact that Shuttle Express is not conducting a financially viable operation. Taxicabs already provide an on demand service substantially identical to the Shuttle Express service between the airport and Seattle hotels at a fare of approximately $24 with modest, if any, profit. Thus, it is not surprising that Shuttle Express has not achieved economic viability by providing a taxicab-type service for $12.00!

Thus, the Grayline airporter is confronted here with an operator which is operating unlawfully, and, in addition, with an operator willing to operate at very substantial losses in an effort to "buy" market share. It is not reasonable to expect the Grayline airporter to operate outside the law and/or to operate at large losses in an effort to copy Shuttle Express's manner and methods of operating at the airport.

Third, as Mr. Barr pointed out, the Port of Seattle's Concession Agreement requires the Grayline airporter to operate

47 passenger vehicles a minimum of 18 hours per day with schedules of at least every one-half hour. (TR. 399). The Grayline airporter in fact operates daily schedules every 20 minutes to one-half hour between the hours of 5:30 a.m. and 11:40 p.m. which is more than required by the Port of Seattle. (TR. 348).

Grayline has tried 15 minute schedules in the past. (TR. 400). Running additional schedules, however, without adequate ridership, simply increases miles operated and costs with an ultimate impact on rates contrary to the public interest.

The Grayline airporter provides an efficient, reliable, and reasonably priced airporter service between Sea-Tac and hotels in Seattle. Its operation is limited to this specific service by its WUTC certificate. Even before Shuttle Express, the Grayline airporter experienced competition for this limited traffic from three other transportation modes available to the public: taxis, limousines, and public transportation. (TR. 391).

Grayline has in the past and is currently providing a "very economical alternative" to the public to travel between Sea-Tac and hotels in Seattle. (TR. 354). It cannot, however, replace traffic lost to other modes of transportation with traffic from any other source. This is why an operator such as Shuttle Express which is unwilling to operate in accordance with the law, and, in addition, is willing to operate at

substantially below cost to buy market share, can wreak havoc on a limited specialized transportation service such as that offered by the the Grayline airporter.

Given the facts that the Grayline airporter, within the constraints of its operating authority and its Concession Agreement, and within the realm of economic realities, cannot react freely to the situation created by Shuttle Express, Mr. Barr candidly advised the Commission herein that if the Commission does not grant the relief sought herein, the Grayline airporter's operations will be terminated. (TR. 340). This would cause the layoff of approximately 25 drivers and 5 to 10 support staff, for a total of 30 to 35 people. (TR. 388). Mr. Barr was quick to point out, however, that this is definitely not the result desired by his company. (TR. 342). Given the opportunity to operate in a fairly administered regulatory environment, the Grayline airporter will continue its service to the public.

V.
REMEDY

The Commission, for over two years now, has extended to Shuttle Express every opportunity to demonstrate that it is fit, willing, and able to operate in a regulated environment. Shuttle Express has failed to appropriately respond to the Commission's patience and the numerous opportunities provided to demonstrate it is capable or even willing to make a good faith attempt to comply with the restrictions in its

certificate and with the rules and regulations of both this Commission and the Port of Seattle. As stated above, if there is to be a rule, there must be a point in time at which failure to comply therewith can no longer be corrected. It is respectfully submitted that point in time with respect to Shuttle Express has arrived.

Under RCW 81.04.110, the Commission, upon a complaint and after notice and hearing, has the power to correct any practices shown to be "unreasonable, unremunerative, discriminatory, illegal, unfair, or intending to oppress the complainant." Under RCW 81.04.210, the Commission, after notice and hearing may, "rescind, alter, or amend any order" previously issued by it. Also, under RCW 81.68.030, the Commission has the power to revoke, alter or amend any certificate issued by it to an auto transportation company upon a finding that such certificate holder "willfully violates or refuses to observe any of its proper orders, rules, or regulations." (emphasis added)

It is beyond the realm of legitimate controversy that Shuttle Express, since receiving operating authority, has consistently ignored the on-call restriction in its certificate. Of equal importance and concern is the fact that Shuttle Express has not been "candid and forthcoming" in its dealings with the Commission. Its violations are willful and premeditated. Shuttle Express, since its inception, has

attempted "to pick and choose those parts of the law that apply to them and other parts of the law that do not apply to them" despite Commissioner Pardini's warning in his concurring opinion to Order M.V.C. No. 1809 in the King County Case.

For the above reasons, Complainant hereby requests that the Commission now amend Shuttle Express's certificate to restrict service to or from the following hotels which were served by the Grayline airporter at the time of the hearings in the King County Case, Docket No. D-2566:

Stouffer Madison Hotel
Crown Plaza Hotel
Four Seasons Olympic Hotel
Seattle Hilton Hotel
Seattle Sheraton Hotel
Westin Hotel
Warwick Hotel
Loyal Hotel Inn
Quality Inn
Days Inn
Downtown Travel Lodge
Best Western Executive Inn

It should be noted that this restriction will not preclude Shuttle Express from serving any other hotel in Seattle, including the Mayflower Park and the Edgewater Inn, the two hotels which supported Shuttle Express's application. This restriction will also be consistent (1) none of the above hotels served by the Grayline airporter indicated a requirement for the services of Shuttle Express, and (2) the Commission concluded in Docket No. D-2566 that "within the limits of the services they have provided in the past, [the Grayline airporter has] provided adequate service. [The Grayline

airporter has] served scheduled stops in their territories promptly and efficiently. . . . It is not disputed that the intervenors have provided clean, neat, safe, courteous, and timely service."

The restriction will not prevent Shuttle Express from providing the type and kind of service it proposed to all those who supported the service, and then some. Also, the proposed restriction can be enforced, since it is not subject to "shades of interpretation" which Shuttle Express has applied to its existing authority in order to provide duplicating services between the airport and hotels served by Grayline. It will not be difficult to monitor whether Shuttle Express is carrying passengers to or from those hotels. Finally, and of compelling importance to Grayline, the proposed restriction, while allowing Shuttle Express to provide service to the types of riders and the entities supporting its service, will afford the Grayline airporter the necessary protection from abuses of Shuttle Express so that it can continue its airporter service to the public.

VI.
CONCLUSION

Shuttle Express is inflicting unwarranted harm on the operations of the Grayline airporter. It is doing so by its "evolved" concept of its on-call service, a concept which it initially presented to the Interstate Commerce Commission and then to this Commission in its classification and the King

County application cases. Up to that point, according to the testimony of Mr. Sherrell, president of Shuttle Express, the service provided in the past as well as proposed for the future was restricted to a prior arranged service, a service with the on-call restriction characterized by Mr. Sherrell as a "heavy restriction."

The evolution began following the King County Case and first surfaced in the Lloyd's Connection case, then the Pierce County case and finally here, in this Complaint case. Now, Mr. Sherrell characterizes "on-call" as meaning nothing more than "not a scheduled carrier" and including authority to serve "walk-ups" and "hail the van" passengers. (TR. 106). In fact, Mr. Sherrell does not currently consider the on-call restriction as a restriction at all! (TR. 103). Obviously, an airporter which is not required to maintain a schedule and which can accept any type of passenger traveling between Sea-Tac and any location in King County is, for all practical purposes, a totally unrestricted airporter.

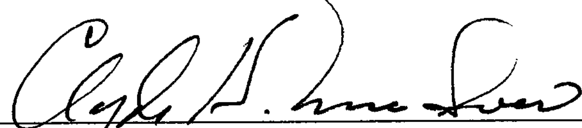
It is respectfully submitted that the time has come to end, once and for all, the evolution Shuttle Express is undergoing under the guidance of Mr. Sherrell, its president. An overwhelming amount of uncontroverted evidence has been presented to the Commission herein which establishes that Shuttle Express is willfully and continuously violating its certificate restrictions and subsequent Commission directives and the rules and regulations of the Port of Seattle. The

Commission, therefore, can and should exercise its powers under RCW 81.04.110, RCW 81.04.210, and RCW 81.68.030 and restrict Shuttle Express from providing an airporter service between the Seattle-Tacoma International Airport and the hotels in Seattle served by the Grayline airporter identified herein in paragraph V.

DATED this 7th day of August, 1990.

Respectively submitted,

MILLER, NASH, WIENER, HAGER & CARLSEN



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CERTIFICATE OF SERVICE

I certify that I have served by hand-delivery messenger the foregoing Post-Hearing Brief upon:

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Administrative Law Judge Steven E. Lundstrom
State of Washington
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DATED at Seattle, Washington, this 7th day of August, 1990.

B. Dillon Pocrnich

CERTIFICATE OF SERVICE

I certify that I have served the foregoing Post-Hearing Brief upon Mr. Richard Reiniger d/b/a Bellevue Suburban Airporter, 2000 118 S.E., Bellevue, Washington 98005, and Ms. Diane Coombs d/b/a Everett Airporter Services, 6303 Swans Trail Road, Everett, Washington 98205, by mailing to said parties by first-class mail, postage prepaid, a copy thereof, properly addressed.

DATED at Seattle, Washington, this 7th day of August, 1990.

B. Dillon Pocrnich