

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application of

SPEEDISHUTTLE WASHINGTON,
LLC d/b/a SPEEDISHUTTLE SEATTLE

For a Certificate of Public Convenience
and Necessity to Operate Motor Vehicles
in Furnishing Passenger and Express
Service as an Auto Transportation
Company

DOCKET TC-143691

STATEMENT OF CERTIFICATE HOLDER
IN OPPOSITION TO ATTEMPT TO
AMEND, REVISE OR RESTRICT
OPERATING AUTHORITY

I. PRELIMINARY STATEMENT

1 The unprecedented November 4, 2015 Notice of Intent to Amend Order 04 from the Commission comes more than seven months after the issuance of Final Order 04, granting Speedishuttle Washington, LLC d/b/a Speedishuttle Seattle (“Speedishuttle”) Auto Transportation Authority pursuant to RCW 81.68 following issuance of its certificate and operating authority, C-65854. Speedishuttle is now authorized to provide “Door to Door Passenger Service Between Seattle International Airport and points within King County. Charter and Excursion Carrier Services in the state of Washington.”

2 Speedishuttle commenced regulated operations on or about May 1, 2015 and has operated consistent with Commission law and rule since that time. On August 13, 2015, a “Notice of Bench Request” on the long-completed adjudication record was issued, soliciting specific information about SeaTac Airport operations by Speedishuttle. Following clarification of Bench Request No. 2 and Response to and Objection by Speedishuttle to portions of Bench Request No. 2, Order 05 was served in the closed record, overruling the objection to the Bench Request and requiring production of information which, without waiver of objection, was provided on September 15, 2015. Following another six to seven-week interval, Speedishuttle received the

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above Notice of Intent to Amend Order 04, potentially based in part on extra-record accusations lodged with the Commission by an Objector which now, in response, apparently intends somehow reducing the scope of the certificate authority upon which Speedishuttle has built and invested in its regulated operations since being granted the certificate on April 9, 2015.

3 Speedishuttle purposely above says “somehow,” because it is not altogether clear what the Commission may intend by language set forth in the letter of November 4, 2015, which simply expresses a...

[concern] that Order 04 could be interpreted to grant Speedishuttle broader authority than the company applied to provide and the Commission intended to grant. Pursuant to RCW 80.04.210 [sic] and WAC 480-07-875(1), therefore, the Commission intends to amend Order 04 to specify that Speedishuttle’s authority extends only to providing the prearranged, door-to-door service the Company described in its application and at the brief adjudicative proceeding.

4 Speedishuttle files this response accordingly without complete confidence that it is presently fully informed in the premises or that it comprehends the articulated and abbreviated rationale behind the threatened sanction of diminution in its operating certificate.

II. ARGUMENT IN OPPOSITION TO MODIFYING SPEEDISHUTTLE’S CERTIFICATE

A. Any imminent reduction in the scope of Speedishuttle’s certificate appears antithetical to the Commission’s 2013 rulemaking’s goals of clarity in the process and expansion of airporter service options

5 The Commission’s announced intent to limit Speedishuttle’s preexisting, months’-old service authority would, above all else, be antithetical to the Commission’s dramatically revised and liberalized 2013 Auto Transportation Rulemaking, wherein the Commission stated its express intent to “provide greater clarity to existing companies, applicants and the Commission during the application process and...reduce the time and resources spent during the process.”¹

¹ *In re Amending and Adopting rules in WAC 480-30 Relating to Passenger Transportation Companies*, Docket TC-121328, General Order R-572 (Sept. 2013), “The 2013 Auto Transportation Rulemaking” at ¶13.

An amendment restricting Speedishuttle’s authority for seemingly vague reasons (“the Commission is concerned that [its Order] could be interpreted to grant Speedishuttle broader authority than the Company applied to provide and the Commission intended to grant”), is hardly in concert with such stated goals of greater clarity and efficiency.

6 Additionally, Shuttle Express’ efforts to block and now restrict Speedishuttle’s permit runs contrary to the language expressed in the 2013 rule changes, which liberalized market entry standards and intentionally fostered increased competition in the auto transportation industry following an extensive stakeholder rulemaking. Specifically, the Commission noted in the rule changes that “the state’s restriction on entry [into the market] is not a barrier behind which a company is shielded from competition.”² Similarly, the Commission made clear that it required “only that a company is fit to enter the market, not that it will be able to operate over the long term”³ and that the revised statute “allows the commission a great deal of flexibility in applying the standards to determine entry into the market.”⁴ Finally, the Commission noted that “[t]here is public benefit in encouraging competition by motivating carriers to continually improve service.”⁵ Again, restricting the permit of a new entrant to the regulated auto transportation industry (particularly after the fact) seems inapposite to both the letter and spirit of the 2013 rule changes.

² *Id.* at ¶39.

³ *Id.* at ¶30.

⁴ *Id.* at ¶33.

⁵ *Id.* at ¶34.

B. The Commission's Notice posits a potential outcome in derogation of case law on permit restrictions which disfavors any permit restrictions without a "strong showing"

7 Furthermore, and perhaps more troubling, the Notice portends an action contrary to the Commission's longstanding reluctance to restrict operating permits.⁶ Commission orders have been consistent in holding that permit restrictions should be rejected absent a "strong showing" that they are required.⁷ Not surprisingly, there is no evidence of a "strong showing" in this case. Upon information and belief, the only "showing" of any kind is Shuttle Express' efforts, both on the record and continuing apparently outside the record, to permanently limit Speedishuttle's service capabilities in the door-to-door market at Sea-Tac Airport through the use of inexact service differentiation factors. This effort to discourage competition on such a de minimis distinction (i.e. "door-to-door" vs. "walk-up," discussed, *infra*) is also hardly consonant with the Commission's effort in the above 2013 Auto Transportation Rulemaking to broaden, not restrict, competitive forces.

8 As previously noted in this record by Speedishuttle, in a recent commercial ferry case, the Commission rejected similar permit restriction conditions, finding them neither necessary nor

⁶ *In re Robert Earl Overby, d/b/a/ R.E.O. Delivery Service*, App. No. P-72188 (June 1989) at 6, quoting Order M.V. No. 135702, *In re Cartin Delivery Service, Inc.*, App. No. E-19099 (April, 1987) ("restrictions in permits are disfavored"). The *Cartin Delivery* case also alludes to the policy against permit restriction imposition where there is no need or policy justifying same or where rejecting the restriction would not broaden the application such to require re-docketing. Here, the revision to Speedishuttle's certificate would be contrary to the full scope of "door to door service" as defined by the Commission and would simultaneously materially reduce, not broaden, the availability of regulated airporter service. Such an action would again be contrary to the Commission's 2013 rulemaking, expanding access by auto transportation carriers and customers alike in addition to directly contravening the cited line of Commission authorities disfavoring permit restrictions.

⁷ *See, e.g.*, Order M.V. No. 147067, *In re Barry Swanson Trucking, Inc.*, Application E-76555 (Oct. 1993) at 2 ("restrictive language in a permit will not be imposed without a strong showing of the need for the restriction"); *see also* Order M.V. No. 148367, *In re Redline Courier, Inc.*, Application P-77664 (Dec. 1994) at 17-18 ("the Commission disfavors restrictions in permits, and will not impose restrictive language unless there is a strong showing that it is required"); *see also* Order M.V. No. 128995, *In re United Parcel Service, Inc.*, App. No. E-18527 (Jan., 1984) at 6 ("in the case of restrictions against authority, the better policy is to reject restrictive language unless there is a strong showing that it is required"); *see also R.E.O. Delivery Service* at 6-7 ("the Commission has held that the better policy is to reject restrictive language unless there is a strong showing that it is required").

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appropriate.⁸ There, the Protestant sought restrictions on the Applicant’s routing, speed and passenger capacity by superimposing such restrictions on the proposed certificate. Analyzing the three proposed restrictions separately, the Commission rejected them all, observing, “[A]lthough we require ferry companies to file and adhere to a time schedule, the Commission will not attempt to manage the day-to-day business decisions of a regulated company.”⁹

9 Here, restricting Speedishuttle’s door-to-door service authority so as to preclude it from engaging in the undefined practice of authorizing “walk-up” service is just the kind of operations “micromanagement” of day-to-day business that the Commission, in *McNamara*, eschewed.¹⁰

C. The Commission’s threatened action to amend the previous Order runs contrary to the Commission’s own definitions of transportation service relevant to the parties in this matter

10 Upon information and belief, the Commission’s proposal to amend the order may be motivated in part at least by extra-record informal complaints to the Commission lodged by Shuttle Express concerning, as alluded to above, Speedishuttle’s purported “walk-up” service. However, the term “walk-up service” is undefined and entirely absent from the definitions section of WAC 480-30. For the Commission to unilaterally restrict a permit based on the alleged impropriety of such an undefined service is contrary to due process and longstanding Commission practice.

11 On the other hand, “door-to-door service” and “on-call service” are both specifically defined in WAC 480-30-036. “Door-to-door service” means “an auto transportation company service provided between a location identified by the passenger and a point specifically named

⁸ *In re Application of Sean McNamara d/b/a/ Bellingham Water Taxi, et al.* Dockets TS-121253 and TS-121395 (July 2013).

⁹ *Id.* at ¶21, p. 7.

¹⁰ What’s more, the Commission’s Final Order No. 4, overruling objections, expressly declined “to attach [similar] conditions proposed by Shuttle Express to Speedishuttle’s permit.” Docket TG-143691, ¶16, p. 8, citing to its case law on “strong showing” requirements. It appears we have come full circle.

by the company in its filed tariff and time schedule.”¹¹ “On-call service” means “unscheduled auto transportation company service provided only to those passengers that have by prior arrangement requested service prior to boarding.”¹² These two definitions do not appear to define a “walk-up” service and in no way implicate a preclusion of “walk-up” traffic by a “door-to-door” provider. In fact, a restriction on “walk-up” service would be wholly unenforceable in light of the definitions. For example, when does a “door-to-door” walk-up customer become “prearranged” with a ticketed reservation: seconds, minutes or days before the vehicle departs? The definitional rules seem to suggest only “prior to boarding.”¹³ No other temporal limitation is included.¹⁴ Therefore, short of amending the definitional section of WAC 480-30 which would require the due process protections of an administrative rulemaking under RCW 34.05.310, allowing “door-to-door” service but precluding “walk-up” service presents an inherent and unavoidable conflict with the Commission’s existing definitional rules.

12 Plainly, WAC 480-30 contains a definition section for a reason. Among other things, it provides a central reference point for parties and the Commission to adjudicate the scope and appropriateness of applications for auto transportation authority.¹⁵ Destabilizing the ability of parties to rely on a framework of definitions emboldens parties to invoke industry slang, terms of art or other undefined concepts as legal bases for amending or overturning Commission

¹¹ *Id.* WAC 480-30-036.

¹² It is also noteworthy that Speedishuttle never sought nor was granted “on-call service” which would have constituted a further limitation on its “door-to-door” operating authority.

¹³ *Id.*

¹⁴ Another definitional rule, at WAC 480-30-036, provides for “by-reservation-only service” as: “transportation of passengers by an auto transportation company, with routes operated only if passengers have made prior reservations.” Speedishuttle does not operate on “routes” and did not limit its requested service to routed, reservation-only service, although “door-to-door” passenger service providers logically promote the use of reservations to maximize the efficiency and convenience of their regulated service operations.

¹⁵ It is relevant to note Shuttle Express’ own inconsistency in the interpretation of the revised rules at WAC 480-30. For instance, as noted in Order 01 in this proceeding, Shuttle Express took the position that WAC 480-30-136 [the procedures for considering objections to auto transportation applications] “were ...unlawful when Shuttle Express took the opposite position during the rulemaking process.” Order 01, Docket TC-143691, ¶9, p. 4.

decisions. Absent an act by the Commission or Legislature to amend the definitions or delete them altogether, interested parties ought not be allowed to predicate undefined terms such as “walk-up service” as grounds for scaling back issued authority.

D. The implied basis for amending and restricting Speedishuttle’s permit raises continuing due process concerns and is not the recognized method or practice for amending an application, and furthermore, there was no intent to do so by Speedishuttle

13 Amending and restricting Speedishuttle’s certificate to door-to-door service barring “walk-ups” on the apparent grounds that its supplemental “walk-up” service exceeds its certificated service also raises basic due process concerns for several reasons.

14 First, Speedishuttle never expressly sought, intended to preclude, or knowingly considered a restriction on the undefined “walk-up” service.¹⁶ The administrative law judge may apparently now be isolating Speedishuttle’s testimony from the brief adjudicative proceeding on January 11, 2015 (three and a half months before Speedishuttle gained access to Sea-Tac Airport) as evidence that Speedishuttle consciously proposed a voluntary amendment restricting the door-to-door service that it had by that time already formally requested. The testimony where this reference occurs was made in passing based on Speedishuttle’s understanding of so-called “concession agreements” between Shuttle Express and Sea-Tac Airport, as well as Speedishuttle’s experience in providing specific attributes of airport service in Hawaii.¹⁷ To place this in appropriate context, at the time of this testimony, Speedishuttle had no familiarity with how it would be permitted to physically operate at Sea-Tac by the Port, nor how operating

¹⁶ Recall as well, its noticed application on the Commission’s October 21, 2014 Docket sought “door-to-door passenger service between Seattle International Airport and points within King County.” Speedishuttle has never wavered from that intended docketed service request, and indeed, was issued that specific authority in its auto transportation permit by Order 04.

¹⁷ Brief Adjudicative Proceeding, Docket No. TC-143691 (Jan. 2015) Tr. 48:6-15. *See also* Tr. 24:2-14; *see also* Tr. 30: 2-7.

restrictions at Sea-Tac would or could limit door-to-door service. The testimony was directed to and in anticipation of the operational limitations that could be imposed on Speedishuttle by the Port through “concession agreements” rather than any definitional service limitations that could or would be imposed on the company by the Commission here at issue. In other words, the idea that the statements made in that testimony can be imposed upon Speedishuttle to restrict its door-to-door certificate authority was not contemplated by the witness. To reiterate, there was simply no affirmative, voluntary or intentional move to restrict or otherwise narrow the applied-for door-to-door authority, which again is already codified by rule and which has no temporal limitation.

15 Second, Speedishuttle has repeatedly maintained in the record its understanding that the service it provides is fully consistent with its certificate for door-to-door service.¹⁸ In line with the above arguments that “door-to-door service” is broadly defined in WAC-30-036 and contains no temporal limitation that would exclude “walk-up service,” Speedishuttle affirmatively answered in its response to Bench Request No. 2C that its certificate “does not limit or otherwise restrict the definitional provision of door-to-door service which Speedishuttle provides.”¹⁹

16 Ironically, shortly after receiving its original auto transportation authority over two and a half decades ago, *Shuttle Express* had direct experience with temporal restrictions on authority. Indeed, in Order M.V.C. 1893, *In re Evergreen Trails, Inc. d/b/a Grayline of Seattle v. San Juan Airlines, d/b/a Shuttle Express*, TC-900407 (Nov. 1990), the Commission sustained the complaint of Grayline for violating the on-call restriction in Shuttle Express’ then certificate. It found that in ignoring that service restriction Shuttle Express had “skimmed” Grayline’s traffic...

¹⁸ Speedishuttle Response to Bench Request No. 2C, Docket No. TC-143691 (Sep. 2015) at p. 1.

¹⁹ *Id.*

by pulling up to any of the hotels served by Grayline ahead of Grayline's scheduled stop and picking up passengers who would otherwise have been served ...by Grayline. However, the authority granted in the final order limits Shuttle Express to on-call service only.

Order M.V.C. No. 1893 at 5. [Emphasis added.]

17 Shuttle Express' original certificate issued under the pre-2013 rule regime contained an express permit restriction which Speedishuttle here never sought, intended, nor applied for.²⁰ Twenty-five years later, Shuttle Express might wish to turn the proverbial certificate tables on Speedishuttle, but it lacks the express "on-call" service restriction to dictate the result the Commission reached in the *Grayline* complaint case brought against Shuttle Express. Speedishuttle has never had such a restriction in its certificate and again, has operated fully within the definitional parameters and authorized scope of its certificate.

18 Third, Speedishuttle did in fact act to restrict its application before and during the hearing. For instance, it moved to eliminate the application's initial reference to "scheduled service" and was well aware of how to formally limit its application.²¹ The fact that it made no such motion for limiting "door-to-door" service is compelling and should resolve any doubt that Speedishuttle knowingly and voluntarily intended to restrict its authority.

19 Finally, these references to the record notwithstanding, the November 4 Notice may also hint that the record be reopened or alternatively, that extra-record evidence be considered as justification for the permit restriction, even though Speedishuttle never expressly sought, intended to provide, or knowingly considered such restricted service. Reopening the record or considering outside evidence in this fashion would violate the precedent set by yet another long line of Commission orders.

²⁰ "Despite...many and repeated admonitions, Shuttle Express has engaged in a pattern of conduct which ignores the restriction placed on its operating authority." *Id.* at 5.

²¹ See Tr 35:4-12.

20 For example, in a July 1989 solid waste application case, the Commission refused to reopen the hearing record and declined to look outside the record for information concerning whether garbage certificates were cancelled by operation of law in respect to areas annexed to the city.²² In doing so, the Commission stressed that “holding hearings is to allow every potential party with a claim or a position to present that claim or position. That function would be thwarted if the Commission did not insist that evidence be presented in full at the hearing.”²³

21 In a 1993 energy rate case, the Commission rejected Puget Sound Power & Light Company (“PSE”)’s argument in its petition for reconsideration that elements of the Commission’s initial order were based on risk assumptions that were no longer true.²⁴ The Commission characterized PSE’s proffered evidence on alternative risk assumptions as “new evidence, and none of the reasons [PSE] offer[ed] in support of the petition were presented on the record.”²⁵ PSE’s basic arguments there were thus “completely based on assertions that [were] outside the record.”²⁶

22 In a 2013 energy case concerning a coal power purchase agreement, the Commission rejected an argument raised by PSE in a petition for reconsideration that was based on extra-record evidence that had “crept into the public discussion that followed in the wake of [the

²² See Order M.V.G. No. 1402, *Application of R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal and Seattle Disposal Company, d/b/a Rabanco Companies* (July 1989), 1989 Wash. UTC LEXIS 51, 1989 WL 1785222.

²³ *Ibid.* at 12, 1989 Wash. UTC LEXIS 51 at 23.

²⁴ See *Petition of Puget Sound Power & Light Company for an Order Regarding the Accounting Treatment of Residential Exchange Benefits*, Docket No. UE-920433 (Dec. 1993)

²⁵ *Id.* at 19.

²⁶ *Id.* at 19-20. See also Order 08 No. UE-072375, *In the Matter of the Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc.* (Dec. 2008) at 24 (“due process requires that at some point the record be closed and the parties be given a decision to which they are entitled.”).

Commission's initial order]."²⁷ Clearly, the evidence was "outside the record...and [was] not a basis for any part of the Commission's decision."²⁸

23 The Commission was even more harsh in rejecting extra-record evidence in a 1994 energy case, again involving PSE.²⁹ In that case, the Commission felt that efforts by the company outside the record to "backdoor" the Commission's decision-making process³⁰ represented a "manipulation of the public process."³¹ The Commission noted: "if we allowed matters outside the record to control our decision making, we would be violating the law..."³²

24 Finally, the Commission has long held that relying on evidence or allegations presented through an ex parte communication is also strongly disfavored.³³ In a 1983 commercial ferry case, the Commission rejected an applicant's list of exceptions objecting to an Initial Order as improper ex parte attempts to present evidence not presented at the hearing.³⁴ Specifically, the Commission stated that, "presentation of argument or evidence can only be allowed to occur upon notice to all parties to a proceeding."³⁵

25 Here, Speedishuttle's right to engage in day-to-day regulated transportation operations within the parameters of its specifically-worded certificate constitutes a property interest that is protected by due process.³⁶ In Speedishuttle's view, an amendment that would restrict or diminish the regulated service authority articulated in its extant certificate based in part on an

²⁷ *Id.* at 27.

²⁸ *Id.*

²⁹ See Docket No. UE-920433, *Petition of Puget Sound Power & Light Company for an Order Regarding the Accounting Treatment of Residential Exchange Benefits* (Sep. 1994).

³⁰ PSE organized and marshalled its over 20,000 shareholders to send letters to the Commission and make statements at a public hearing urging the Commission to reconsider its Order. See *id.* at 81-83.

³¹ *Id.* at 83.

³² *Id.*

³³ See, e.g., Order S.B.C. No. 404, *In the Matter of Application B-282 of Lavinia M. Longstaff, d/b/a Sea Wolf Charters* (Aug. 1983), 1983 Wash. UTC LEXIS 27, 1983 WL 908129.

³⁴ See *id.*

³⁵ 1983 Wash. UTC LEXIS 27 at 5.

³⁶ See, e.g., RCW 81.77.0201, which refers to a holder of a "certificate property right."

undefined service limitation (“walk-up service”) and allegations of impropriety in offering same is not at all consistent with precepts of administrative due process.

E. Reforming Order 04 and Certificate C-65854 should be a final alternative, not an initial, readily-available option

26 It is indeed a slippery slope, fraught with far broader regulatory policy implications, if extra-record challenges of regulated operations months after the issuance of a Final Order, coupled with revisiting testimonial snippets potentially taken out of context serve as the basis for a subsequent administrative remedial action diminishing the scope of an Applicant’s certificate authority. Even assuming *arguendo* here that the Applicant’s current operations’ scope were found to violate the terms of its authority (which Speedishuttle wholeheartedly disputes) it also questions whether an enforcement investigation and/or a resort to a formal complaint under RCW 81.04.510 or 84.04.110 is not in fact a far more appropriate venue and mechanism at this juncture.³⁷ Instead of simply announcing an intent to invoke the radical remedy of reforming the prior Final Order under RCW 81.04.210, for all of the above reasons, this latter statutory option should be a disfavored remedy of last resort.

III. CONCLUSION

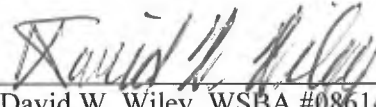
27 For the agency, potentially on the basis of extra-record complaints, Bench Request Responses long after the record closes and/or reexamination of original, isolated testimonial excerpts from the brief adjudicative proceeding to contemplate an intent to modify an Initial Order and dilute a certificate is frankly, chilling. Despite the Commission’s inherent ability to amend its own orders at any time (albeit, only rarely exercised), after-the-fact developments “on the ground” at the terminal facility owned and operated by the Port of Seattle should hardly serve

³⁷ Indeed, a complaint forum was the procedural source of the reinforced interpretive limitation of the restriction of Shuttle Express’ original authority. *See*, Order M.V.C. No. 1893, Docket TC-900407 et al, above.

as a basis for amending a Commission Order, particularly when doing so would appear to contravene administrative due process, longstanding Commission policy on permit restrictions, existing definitional standards and recent articulation of the Agency's rulemaking goals in expanding service in the auto transportation industry. In short, it is simply counterintuitive for all of above reasons for the Commission to even contemplate such administrative action and Speedishuttle therefore respectfully urges this initiative be reconsidered, and upon further reflection, rejected.

DATED this 25 day of November, 2015.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2015, I caused to be served the original and three (3) copies of the foregoing documents to the following address via first class mail:

Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
Attn.: Records Center
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

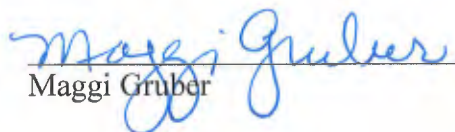
I further certify that I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to:

records@utc.wa.gov

and served a copy via email and first class mail, postage prepaid, to:

Julian Beattie Assistant Attorney General Office of the Attorney General Utilities and Transportation Division 1400 S. Evergreen Park Dr. SW PO Box 40128 Olympia, WA 98504-0128 (360) 664-1192 Email: jbeattie@utc.wa.gov	Rayne Pearson Administrative Law Judge 1300 S. Evergreen Park Drive SW P.O. Box 47250 Olympia, WA 98504-7250 (360)-664-1355 rpearson@utc.wa.gov
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Greg Kopta Director/Administrative Law Judge 1300 S. Evergreen Park Drive SW P.O. Box 47250 Olympia, WA 98504-7250 (360)-664-1355 gkopta@utc.wa.gov	

Dated at Seattle, Washington this 25th day of November, 2015.


Maggi Gruber