BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re the 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 SPEEDISHUTTLE'S PETITION FOR ADMINISTRATIVE REVIEW OF INITIAL ORDER 06

I. INTRODUCTION

1 Respondent Speedishuttle Washington LLC d/b/a Speedishuttle Seattle, ("Respondent" or "Speedishuttle") pursuant to WAC 480-07-825, files the below Petition for Review of Initial Order 06 Granting the Petition for Rehearing of Shuttle Express, Inc. ("Petitioner," "Complainant," or "Shuttle Express"). As will be demonstrated, Speedishuttle respectfully takes exception to certain portions of Initial Order 06 in this matter based on the procedural posture and history of this case, applicable rule and law, as well as Commission case law addressing petitions for rehearing. It therefore urges the Commission to reverse those portions of Initial Order 06 on review that granted rehearing of Application TC-143691 and the unprecedented advent of a total relitigation of this auto transportation application.

II. PRELIMINARY STATEMENT/CASE PROCEDURAL SUMMARY

2 From the very beginning of this application, Shuttle Express, Inc. ("Shuttle Express") has taken extraordinary measures to avoid and to contest the entry of Speedishuttle into the regulated market.[1] First, Shuttle Express opposed the use of a brief adjudicative hearing under WAC 480-

[1] In the interest of judicial economy, Speedishuttle will not reiterate its extensive arguments opposing rehearing that it outlined in its June 7, 2016 Answer to Shuttle Express's Petition to Rehear Application Docket TC-143691 ("June 7, 2016 Opposition") here and on which it was discouraged to orally expand at the prehearing conference when the administrative law judge announced her various rulings at the commencement of that proceeding. However, while it

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30-136 and instead sought the much more expensive and expansive full-blown hearing and discovery, notwithstanding the "streamlined application process" implemented by the Commission's 2013 auto transportation rulemaking.[2] That attempt was rejected by the administrative law judge in Order 01 of December 22, 2014.

3 Second, following the brief adjudicative hearing, Shuttle Express sought to reopen the hearing record in February 2015. That effort too was denied. Following a Petition for Administrative Review by Shuttle Express which was denied, Speedishuttle was ultimately granted its certificate on March 30, 2015, which Final Order 04 was not appealed.

4 Months following that grant, Shuttle Express again sought restriction and/or curtailment of Speedishuttle's now extant certificate, this time through amendment of Final Order 04 in an unprecedented attempt to impose barriers to existing operations and/or restrictions to authority not imposed or recognized by this Commission. Ultimately that effort also unsuccessfully concluded for Shuttle Express in December of 2015.

5 Now Shuttle Express has ratcheted up the competitive pressure against Speedishuttle yet again through litigation, seeking an entire rehearing of the original application well before such a review is even procedurally envisioned at the Commission's discretion by statute. Concurrently, Shuttle Express has filed a formal complaint against Speedishuttle making much the same arguments it made at the initial brief adjudicative hearing, and in its subsequent Commission

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recognizes that the identified written argument is now a part of this docket record, it here expressly requests that the Commission take judicial notice of and incorporate those arguments of record by Speedishuttle in weighing the instant Petition for Administrative Review, in addition to the specific arguments on findings and conclusions raised, *infra*.

[2] In re *Amending and Adopting Rules in WAC 480-30 Relating to Passenger Transportation Companies*, Docket TC-121328, General Order R-572 Order Adopting and Amending Rules Permanently (2013), codified at WAC 480-30 (General Order R-572).

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appellate efforts. Upon further review, this Commission should not exercise its discretion to afford a full-blown rehearing and, at most, in the alternative, should only order a brief adjudicative hearing to address factors previously identified by the Commission upon which it originally resolved Final Order 04 and not the present factual misstatements and shotgun record references of Shuttle Express on Petition.

III. EXCEPTIONS TO PORTIONS OF INITIAL ORDER 06

6 Pursuant to WAC 480-07-825(3), the Petitioner takes specific exception to the following "Discussion and Decisions" set forth at page 3 and corresponding portions of the Findings/Conclusions set forth at page 4 of Initial Order 06. Because the administrative law judge did not separately delineate findings of facts and conclusions of law in her Initial Order, but rather combined them in a "Findings and Conclusions" section, the Petitioner characterizes the below as either exceptions to findings of fact, mixed findings of fact and law, or conclusions of law under rule, and objects to same specifically as follows:

> Exception to Discussion/Decision, ¶7, p.3. Speedishuttle concurs that Shuttle Express has no statutory right to rehearing. Nevertheless, rehearing of the proceeding in exercise of agency discretion is not appropriate based on mere allegations of facts previously considered by this Commission. Rather, the exercise of the discretion of the Commission requires more than bare allegations and insinuations.
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> Exception to Discussion/Decision, ¶8, p. 3. Speedishuttle alternatively can accept Staff's prior recommendation to limit the scope of the proceeding and conduct a brief adjudicative proceeding because the focal issues Shuttle Express has raised are specific, discrete allegations which can be readily and easily tested. The rationale of Order 06, however, presumes that Speedishuttle as the non-movant party must "disprove" the negative – unsubstantiated allegations – in order for the Commission to elect not to exercise its discretion, and that therefore an entire

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rehearing is necessary. Speedishuttle disagrees that it must carry that burden, and relies upon *Sure-Way Incineration, infra,* to support its interpretation.[3]

Exception to Finding/Conclusion (3), ¶12, p. 4. While the Commission unquestionably has the statutory discretion to permit rehearing, that provision requires Shuttle Express as the movant party to advance more than mere argument and allegations to invoke that extraordinary remedy in its filing.

Exception to Finding/Conclusion (4), ¶13, p. 4. Speedishuttle's objections to this conclusion are twofold. First, rehearing of the proceedings is not appropriate based on mere allegations of facts previously considered by this Commission. Rather, the exercise of the discretion of the Commission requires considerably more. Second, Shuttle Express has not demonstrated that any facts or evidence essential to the decision of the Commission as it expressly articulated in Order 04 have changed but merely modulated them to claim they were not reasonably available at the time of hearing. At most, it now simply repackages its earlier objections as current allegations to obtain yet another bite at the administrative apple.

Exception to Ordering Portion (1), ¶14, p. 4. As is evident below, Speedishuttle takes exception to Order 06's overarching, concluding ruling that the Petition for Rehearing should be granted.

7 In short, on Petition, Shuttle Express transparently attempts to protect its quasi-monopoly position in the market through inflammatory allegations, procedural roadblocks and continued, unabated relitigation of resolved issues until it prevails. In its labyrinth of shotgun, "moving target" assertions, it fails to present any sufficient evidence or basis for this Commission to exercise its discretion to reopen these proceedings, particularly after the repeated relitigation of these same issues.

[3] Speedishuttle also notes that ¶9 of the "Discussion and Decisions" section of Order 06 mandates consolidation of the Petition and Complaint proceedings, by finding that separate proceedings "is not an efficient use of Commission time or resources." Efficiency is of course a laudable goal. However, consolidation rulings, according to past Commission case law, are the initial province of the Commission, not the administrative law judge, under Order M.V.G. No. 1668, *In re Brent Gagnon d/b/a/ West Waste Recycling,* App. GA-763 (Nov. 1993). A circumscribed rehearing limited to issues discussed, *infra,* would presumably key off those topics and serve that efficiency goal as well.

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IV. ARGUMENTS IN SUPORT OF GRANTING PETITION FOR ADMINISTRATIVE REVIEW OF INITIAL ORDER 06

A. Unquestionably Again, Shuttle Express Seeks an End-Run Around the Commission's 2013 Auto Transportation Rulemaking.

8 The characterization of the Commission's role in Order M.V. No. 128561, *In re Application P-66910 of Frank E. Nonnemacher d/b/a Nonnemacher Farms*, 1983 Wash. UTC LEXIS 17, at *4 is instructive and directly applicable here:

> The Commission's job is not to protect existing carriers, as the petitioner seems to imply. Rather, under the laws which govern the Commission's actions, it must act in the public interest and according to law, based on evidence presented, to see that public needs are met.

9 As is well documented in this record, the Commission acted in that public interest in 2013, and revised the regulatory entry criteria for auto transportation in the wake of competitive changes in the marketplace.[4] The rulemaking sought to give companies rate flexibility, and promote competition in the auto transportation industry.[5] It was under those revised rules that Speedishuttle entered this regulated marketplace. In "Final" Order 04, the Commission rather prophetically stated "there is a public benefit in encouraging competition by motivating carriers to continually improve service."[6]

10 Here, Shuttle Express has repackaged its persisting complaints and arguments about "same service" criteria, modulated slightly, to now argue on Petition that the differentiation

[4] *In re Amending and Adopting Rules in WAC 480-30 Relating to Passenger Transportation Companies*, Docket TC-121328, General Order R-572, Order Amending and Adopting Rules Permanently (2013), "The 2013 Auto Transportation Rulemaking" *codified at* WAC 480-30 (General Order R-572).
[5] Initial Order 02, ¶12, p.4.
[6] Final Order 04, ¶31, p.10. That Order also denied the Petition for Administrative Review by Capital Aeroporter on different grounds.

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factors the Commission found are *de minimis* and again argues that Speedishuttle offers the "same service" under WAC 480-30-140(2). [7]

11 In doing so, Shuttle Express ostensibly focuses on Speedishuttle's multilingual business model as identified by the Commission. Yet, the Shuttle Express Petition for Rehearing subtly tweaks the Commission's crucial rulings on this overarching differentiation factor which were:

> … [**t]he totality of these features** demonstrate that the proposed service uniquely targets a specific subset of consumers seeking door-to-door service to and from the airport: **those who are tourists, tech-savvy, or non-English speaking. Speedishuttle's business model thus includes luxury vehicles, significantly increased accessibility for non-English speaking customers, individually-tailored customer service, tourism information, and Wi-Fi service.** [8]

12 In truth, it was this totality of features that the Commission found warranted approval of Speedishuttle's application, not the solitary factor of multilingual greeter services on which Shuttle Express now particularly fixates. In fact, Shuttle Express misstates the Commission's conclusions there to imply that what was required (and implicitly identified by the Commission in Order 04) was "multilingual greeters." At hearing, Mr. Morton had actually testified that "[w]e'll do our best to hire multilingual receptive teams so we can communicate with some of the people that are from different countries."[9] "Receptive teams" is not restricted to "greeters" but of course could also be reservationists, drivers, ticket sellers or any other employee comprising the "multilingual business model." That representation, both in the Complaint and Petition for Rehearing and even in the Staff's June 7, 2016 proposal, seems to have somehow morphed at this Petition stage into an immutable pledge to consistently employ "multilingual greeters."

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[7] In a classic retroactive challenge to the *weight* of the evidence as found by the Commission which is within its discretion.
[8] Final Order 04, ¶21, p.7 (emphasis added).
[9] TR. 24:8-10.

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13 Again, it is important to return to the Commission's actual verbiage here, where, in Order 04, it had found that:

> In our view, however, Speedishuttle's multilingual business model creates a significant distinction. Shuttle Express does not offer multilingual customer service, either on its website, by phone or by way of personal greeters; there is an entire demographic of travelers whose needs cannot be met by Shuttle Express's existing service. On that basis alone Speedishuttle's proposed service is not the same service Shuttle Express currently provides.[10]

14 The focus, then, was not even on the singular factor of greeters, but rather the overall business model. Shuttle Express grudgingly admits, as it must, that Speedishuttle offers multilingual booking options.[11] It cannot objectively dispute the use of luxury vehicles; it implicitly acknowledges Speedishuttle provides increased accessibility for non-English speaking customers as those booking on its website can do so in Chinese, Japanese, and Korean; it notes that greeters are present when reservations are booked in advance;[12] it does not provide any evidence disputing that Speedishuttle offers Speedishuttle TV which provides tourism information related to the Seattle area; it only disputes "on information and belief" that Speedishuttle offers Wi-Fi in each of its vans.[13] Asserting something "on information and belief" should be completely insufficient to support a Petition for Rehearing. The facts are Speedishuttle does have a multilingual business model, and employs greeters, Speedishuttle TV, luxury vehicles and Wi-Fi. Each of these factors the Commission found helped differentiate the service offered under law. Critically, each of these issues was also raised by Shuttle Express

[10] Final Order 04, ¶20, pp. 6, 7 (emphasis added).
[11] Petition and Complaint of Shuttle Express ("Shuttle Express Petition") ¶15.
[12] Shuttle Express Petition, ¶23(a), p. 9. Strangely, Shuttle Express complains here about multilingual services being offered as promised, but not being offered for every walk up passenger, something Speedishuttle never promised. That distinction is absurd in light of Shuttle Express' recurring complaints that Speedishuttle offers "walk up" service at all. Shuttle Express is once again seeking to have it both ways after already initiating (through external contacts) having Speedishuttle's certificate restricted, a process which culminated in a December 2015 rejection of that attempt as lacking regulatory support.
[13] Shuttle Express' Petition, ¶40, pp. 16-17.

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following the entry of Initial Order 02 in its Petition for Administrative Review. And just as before, Shuttle Express has now sought to downplay these same codified differentiation factors. The Commission declined to adopt Shuttle Express' reasoning then, entered Final Order 04 and it should now flatly reject these repackaged challenges.

B. Any Rehearing of Disputed Differentiation Factor Issues Should be Limited and Heard in a Brief Adjudication Format Consistent with the 2013 Auto Transportation Rulemaking.

15 As noted, if there is to be any reexamination of Application TC-143691, it is these pivotal findings in the Commission's Order 04 that should control the subject of reexamination and/or rehearing of the differentiation factors that Speedishuttle proposed to offer, and does, in fact, offer. The Initial Order Granting Rehearing seemingly overlooks these salient determinative points expressly established as the basis for grant of authority by the Commission in Order 04 by effectively removing any and all limitations on rehearing. In other words, Order 06 mandates a complete no-holds-barred "do over" adjudicative proceeding. In so decreeing, Initial Order 06 appears to justify that limitless scope by merely encapsulating Speedishuttle's entire argument in its 29-page June 7 submission, in quoting a single, isolated passage where Speedishuttle had characterized the Petition as:

> [R]iddled with hearsay, unsubstantiated allegations, and after-the-fact conjecture and suppositions that are not in [any] way sufficient to support a Petition for Rehearing. Nor do they even deny, much less disprove, that Speedishuttle has utilized technology and a multilingual business model in offering and operating its regulated services."[14]

16 That is hardly comprehensive context for the numerous objections based in fact, law and Commission precedent relied on by Speedishuttle to oppose Rehearing.

[14] Order 06, ¶4, p. 2 (quoting Speedishuttle's Answer to Petition for Rehearing ¶16 at p.9).

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17 As the Commission also expressly found in its Order 04, Speedishuttle's operations and business model target a specific "subset of customers" as well as more reasonably serving some of the customers who would otherwise utilize Shuttle Express and who lack other workable regulated service options. The fact that, in targeting this customer niche, Speedishuttle might "directly compete with Shuttle Express" in identifying and targeting a current, underserved customer group is not an earth-shattering, unanticipated revelation or result meriting the radical remedy of application rehearing. That Speedishuttle would compete with Shuttle Express was never in doubt, and this premise and allegation cannot serve as a basis of any justification of retrial of this application by the Commission despite Shuttle Express' reliance upon its "qualified exclusivity" as pled in its Petition.[15]

C. <u>While Speedishuttle is Now Directly in the Petitioner's Crosshairs, the Convergence of Intense Competition at SeaTac is Hardly Primarily Attributable to its Authorization in Spring, 2015.</u>

18 When it enacted the 2013 Auto Transportation Rulemaking, the Commission well-understood and concisely posited that regulated transportation companies are and would be facing intensifying competition in coming years. Speedishuttle has repeatedly noted this foreshadowing by the Commission when it stated:

> Many alternatives to auto transportation company service exist, including taxis, limousines, public transit, rail, or intrastate airline service. Individuals may drive to SeaTac International Airport and park at the Port of Seattle or in one of the many private lots. They may also obtain rides from family or friends. The Commission must review current rules and processes to ensure that they recognize current competitive conditions. It must also ensure that its processes are streamlined and efficient.[16]

[15] *See*, Shuttle Express Petition ¶29, pp.12-13.
[16] 2013 Auto Transportation Rulemaking, ¶25, p. 9.

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19 As recently as March 2016, "Transportation Network Companies,"[17] Uber, Lyft and Wingz, received Port of Seattle authorization to begin offering both individual and shared ride service from Seattle Tacoma International Airport ("SeaTac"), none of which are subject to Commission entry or rate control but all of which directly compete with and materially diminish regulated revenues available to both Shuttle Express and Speedishuttle. Additionally for instance, the Sound Transit Link Light Rail ("Light Rail") reports a 27% increase in ridership for the first quarter 2016 compared to the same quarter in 2015.[18] These services all provide alternative methods for potential customers to obtain access to or from SeaTac. Any analysis of Shuttle Express' claim of decreased ridership which it attributes to Speedishuttle cannot be considered in isolation without recognition of these alternative services and their emergence, and indeed, Shuttle Express' premise of the cause of its decreased ridership is therefore, at a minimum, misdirected. None of this is a surprise, indeed, it was actively acknowledged by the Commission when the 2013 Auto Transportation Rulemaking was enacted with the goal of reducing restrictions to entry into the regulated market Shuttle Express occupies. There was no doubt that such expanding options could impact incumbent providers. Tellingly here, in decrying the current circumstance, Shuttle Express makes no acknowledgment of these disparate and intensifying forces. Instead, it only targets the "low hanging fruit" of its new regulated competitor, Speedishuttle.

20 In truth, Shuttle Express seeks only to preserve its self-proclaimed "qualified exclusivity" in the regulated shared ride service market. This premise was flatly rejected by the Commission both implicitly in its 2013 Auto Transportation Rulemaking, and explicitly, in final Order 04.

[17] *See*, RCW 48.177 et seq.
[18] http://www.soundtransit.org/ridership (last accessed August 19, 2016).

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Indeed, as the *Nonnemacher* Order reminds, the Commission's mission under this newly-revised WAC 480-30 regulatory regime is not to protect an incumbent simply because it was the first to arrive.

21 What Shuttle Express transparently seeks by its Petition is regulated market share preservation at all costs, ignoring the indisputably unleashed, unregulated forces which have multiplied since 2013 and which impacts are now being felt by all certificated carriers. Indeed, the sanctioned emergence of Speedishuttle in spring, 2015 is but one dimension of the substantial increased competition now buffeting Shuttle Express. Again, this was hardly unanticipated nor is it in isolation reflective of the "sea change" in shared ride offerings now roiling the ground transportation marketplace at SeaTac Airport. Indeed, to validate Shuttle Express' threshold argument by granting rehearing, would directly contravene the Commission's coherent pronouncement that encouraged increased regulated ground service options at the airport.

D. <u>This Commission Should Not Exercise Its Discretion to Re-Litigate the Same Issues and Particularly within Less Than Two Years after Order 04 Granted Speedishuttle's Certificate.</u>

RCW 81.04.200 provides, in pertinent part:

> Any public service company affected by any order of the commission, and deeming itself aggrieved, **<u>may, after the expiration of two years from the date of such order taking effect,</u>** petition the commission for a rehearing upon the matters involved in such order, setting forth in such petition the grounds and reasons for such rehearing, which grounds and reasons may comprise and consist of changed conditions … , or that the effect of such order has been such as was not contemplated by the commission or the petitioner, or for any good and sufficient cause which for any reason was not considered and determined in such former hearing.
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> (emphasis added)

22 The statute establishes a two-year default period during which any issue decided by the Commission need not be reheard. The Commission also routinely refuses to grant rehearing

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where the petitioner fails to show changed circumstances or harm to the petitioner not anticipated at the time of the first order.[19] Neither of those circumstances is shown here. Simply put, the bare contentions advanced by Shuttle Express are not sufficient to support the Commission exercising its discretion to grant rehearing inside the two-year period, contrary to Order 06's conclusion.

E. Even if Two Years Had Elapsed, Shuttle Express' Petition Cannot Support Rehearing, Particularly under Civil Rule 59 Standards.

23 Even if two years had elapsed, rehearing under RCW 81.04.200 is hardly axiomatic. For a comprehensive analysis of the rehearing statute in Title 81 RCW, see, Order M.V.G. No. 1533, *In re Sure-Way Incineration, Inc*, Application GA-868 (Feb. 1992), at 7-8. The Commission, in *Sure-Way*, found that "…the grounds stated in the petition do not meet standards for rehearing set out in the statute, **even after the required period has elapsed**."[20] (emphasis added). Again, regardless of the time interval elapsed, to justify rehearing, a petitioner must demonstrate changed conditions; injurious results affecting the Petitioner not considered or/anticipated in the former hearing; proof the effect of the Order was not as contemplated by the Commission; and demonstration of good and sufficient cause which was not considered or determined by the Commission in its Final Order. Shuttle Express provides no such evidence to do so here.

[19] *See*, Order M.V. No. 128561, *In re App. P-66910 of Frank E. Nonnemacher d/b/a Nonnemacher Farms*, (1983) (citing Order M.V. No. 125248, *In re App. P-65613 of Washington Air Taxi Express, d/b/a WATE, INC.*, (1982); Order SBC No. 398; *In re App. B-277 of Island Ferry*, (1982); Order M.V. No. 126431, *In re App. E-18498 of Tacoma Hauling*, (1982)). *See also, WUTC v. Pacific Power and Light Company*, 2015 Wash. UTC LEXIS 734; 320 P.U.R.4th 178 (analyzing the parallel regulation and identical statute codified at RCW 80.04.200).

[20] *Sure-Way Incineration, Inc*, ¶10, 11, p. 8.

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24 As the Commission has further explained, it also looks to Civil Rule 59(a) for guidance.[21] CR 59 lists grounds for a new trial or "reconsideration." Washington Courts have long held that granting or denying a motion under CR 59 "is a matter within the trial court's discretion and will not be disturbed on appeal absent a showing of a manifest abuse of that discretion."[22] Similarly here, as noted, the grant of rehearing under RCW 81.04.200 remains within the Commission's discretion even provided the necessary statutory criteria elements are met. Shuttle Express seeks rehearing by claiming to have found what it terms "new evidence." However, a Court examining a motion under CR 59(a)(4) on the basis of "newly discovered evidence" cannot be satisfied by mere allegations of new evidence. Rather, the evidence presented with the motion must have been "material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial."[23] Moreover, a new trial may be granted on this basis only if the new evidence:

> (1) will probably change the result of the trial;
> (2) was discovered since the trial;
> (3) could not have been discovered before trial by the exercise of due diligence;
> (4) is material; and
> (5) is not merely cumulative or impeaching.[24]

25 "Failure to satisfy any one of these five factors is a ground for denial of the motion."[25] This framework is particularly instructive analogous guidance in weighing the Commission's role under RCW 81.04.200. The shared goals of finality and prudently limiting multiple bites at

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[21] *See e.g.*, Order M.V. No. 140273, *In re App. P-72389 of Thomas C. Kolean and James B. Stewart, d/b/a Olympic Transport*, (Sept. 1999) Wash. UTC LEXIS 76 (citing Order M.V. No. 126785 *In re John A. Huffman/Rich's Hauling Service*, App. No. P-65687 (April, 1983)).
[22] *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812 (1968); *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 561 (1991) (citing *Lockwood v. A C & S, Inc*., 44 Wn. App. 330, 363 (1986), *aff'd*, 109 Wn.2d 235 (1987)).
[23] *Go2Net, Inc. v. C I Host, Inc*., 115 Wn. App. 73, 88 (2003) (citing *Holaday v. Merceri*, 49 Wn. App. 321, 329 (1987).
[24] *Id.*
[25] *Id*. (*citing Holaday*, at 330).

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the administrative apple are upheld by actually requiring new and material evidence before granting rehearing.

26 Shuttle Express falls far short of that mark here. It presents no new evidence at all, rather only reargument and insinuation. The only claim that it backs with "hard data" is ostensibly that ridership in general is falling, but it also admits that was presented as evidence in the original application proceeding.[26] The Commission necessarily already considered that evidence both in its prior refusal to reopen and in its cited discussion of airport competitive forces implementing the final rules for the auto transportation industry in 2013. That proffered evidence is simply not probative of any demonstrable fact.

27 None of the remaining claims in Shuttle Express' ponderous pleading are anything more than allegations unsupported by evidence, by which it seeks to convert the long-completed brief adjudication process into a reopened conventional adjudication with discovery, formal processes and vastly increased costs. Again, the so-called "newly discovered evidence"[27] was all raised by Shuttle Express in the original petition, and then claimed as insufficient to differentiate the proposed service.[28] The Commission simply disagreed.

28 In the cited *WUTC v. Pacific Power and Light Company* and *Go2Net, Inc. v. C I Host, Inc.* cases, which respectively denied rehearing or reconsideration, the issues presented were very similar to those presented in Shuttle Express' Petition. There is no new evidence to introduce, rather, reinvention of the same issues raised by Shuttle Express at the application

[26] And *see* discussion about the impact of recent airport competition at ¶19 above.
[27] In what amounts to a classic revisited attack yet again on the Commission's discretionary weighing of the evidence.
[28] *See* Shuttle Express' Petition for Administrative Review, dated February 10, 2015, at ¶25 p.8, listing and attempting to minimize the Speedishuttle's "greeter," "multi-lingual reservation website", "Wi-Fi and recorded video messages, and "20-minute 'guaranteed' airport departure time…" Again, we have heard this repeatedly before.

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hearing. Long-standing policy underpinnings to the statute cut directly against rehearing on these facts. Reopening or rehearing for new evidence should only be ordered where discovered evidence was not reasonably available at the time of the hearing.

> This rule encourages all participants to prepare thoroughly for hearing; it encourages complete, thorough proceedings bringing all relevant information to the Commission for an informed decision, and it encourages an efficient process without repeated bites at the apple. **A failure to adopt this rule could encourage persons to put on a haphazard case, and then only diligently search for evidence if the first result is negative.** [29]

(Emphasis added).

29 Here, Shuttle Express cloaks its identical complaints as "new evidence," claiming, without any proof that Speedishuttle is not doing what it promised. That is woefully insufficient and inadequate to warrant reopening.

F. The Commission Already Considered the So-Called "Changed Circumstances" Raised by Shuttle Express in Its Petition.

30 The cornerstone to a successful rehearing petition is a demonstration of changed circumstances, or injurious results *not anticipated by the Commission at the time of entry of the final order.*[30] As demonstrated here, and in Speedishuttle's previous Answer, each of Shuttle Express' complaints have been previously addressed to the Commission. Importantly, each was also contemplated by the Commission in Final Order 04. Thus again, these concerns were already considered, anticipated and previously determined by the Commission.

[29] Order M.V.G. No. 1206, *In the Matter of App. GA-795 Lawson Disposal, Inc.*, (Oct. 1985); 1985 Wash. UTC LEXIS 27, at *4.
[30] Order No. 2, *In the Matter of the Cancellation of Temporary Authority to Operate as a Household Goods Carrier Held by The Moving Club, Inc*., Docket No. TV-031701, 2004 Wash. UTC LEXIS 82, at *7.

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31 *WUTC v. Pacific Power and Light Company*,[31] relies on the Washington Supreme Court's reasoning to explain that more than reargument of the same issues (whether or not the facts are new which were already considered by the Commission) should exist before an entire rehearing is required. Yet, Initial Order 06 appears to set the bar precisely that low. Indeed, in Initial Order 06, the administrative law judge synthesizes Speedishuttle's arguments against Shuttle Express' bare allegations, as simply "not alone disprov[ing] them."[32] Significantly, this improperly shifts the burden to Speedishuttle, as the non-movant party. As noted above, the totality of arguments, cited case law and contrary statutory and regulatory provisions relied upon by Speedishuttle in opposition to its Petition for Rehearing, are nullified. Apparently the only way to deflect a Petition for Rehearing is to prove that all prima facie bare allegations are false on their face – an insurmountable burden inconsistent with the case law under CR 59.

G. <u>Public Policy Eschews the Result of Order 06.</u>

32 While it may be an inherent inclination and tendency for an administrative body like the Commission to maximize due process forums for all comers, there is a compelling public policy counterbalance to this predisposition in this circumstance, to-wit: when does due process become excessive and oppressive to the financial and operational detriment of the regulated industry and its customers alike and, more importantly, to the orderly administrative decision-making apparatus of this agency? If Petitions for Rehearing are to be granted on the basis of prima facie assertions and allegations by which a moving party can simply lodge charges that, if true and known to the Commission at the time of hearing, "may have impacted the Commission's

[31] 2015 Wash. UTC LEXIS 734; 320 P.U.R.4th 178.
[32] Initial Order 06 ¶8, p. 3.

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ultimate decision,"[33] where on the continuum does this end? Here, the Petitioner is apparently merely able to presuppose, speculate, implicate and recycle past allegations and insinuate the certificate holder's "true intent" to successfully secure a wide open "do over" of the entire application. This outcome is chilling. It is no exaggeration, in Speedishuttle's view, that the discretionary lenience shown Shuttle Express' apparent unfettered right to Rehearing and Complaint by Initial Order 06 heralds the possibility that any party dissatisfied by a final Commission Order could precipitate complete relitigation of a proceeding, by combining unsworn allegations of counsel identifying purported "changed circumstances," contending unconsidered "injurious results" not otherwise contemplated at the time, or mere "incantations" of statutory terms in RCW 81.04.200. This effect not only completely contravenes the "streamlining" of application processes for this industry implemented in the rulemaking in 2013, but undeniably invites litigants unhappy with Commission decision outcomes to simply reset the adjudicative stage. Surely, the Commission, in its instinctive inclination to afford due process to all parties, realizes the countervailing, undermining threat to administrative process and finality granting this Petition for Rehearing represents.

33 In fact, as noted in Speedishuttle's previous Answer, long-established policies of finality should apply here in the form of res judicata[34] and collateral estoppel.[35] Each promotes the policy of finality. The policy underlying res judicata is "that every party should be afforded one,

[33] Initial Order 06, ¶13, p. 4.
[34] The elements of *res judicata* are: identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *See e.g*., *Lejeune v. Clallam County*, 64 Wn. App. 257, *review denied*, 119 Wn.2d 1005 (1992).
[35] The elements of collateral estoppel are met here: "(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice." *State v. Williams*, 132 Wn.2d 248, 254 (1997) (*quoting Beagles v. Seattle-First National Bank*, 25 Wn. App. 925, 929 (1980)).

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but not more than one, fair adjudication of his or her claim."[36] Similarly, "[t]he policy behind collateral estoppel is to prevent relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case." There is no question that the elements for each are met here, where the parties are the same, the issues are the same, the facts are the same and the result was Final Order 04 which addressed the concerns Shuttle Express raises here. Initial Order 06 critically fails to expressly consider either such doctrine in construction of RCW 81.04.200, even in a threshold weighing thereof. The Commission should decline to rehear the application on Shuttle Express' recycled complaints here, where it already fully considered these assertions and where doing so would contravene res judicata and collateral estoppel principles.

H. Any Subsequent Rehearing Should Be Narrowly Tailored To Address the Specific Bare Allegations Raised by Shuttle Express and the Necessary Showing by Speedishuttle Consistent with Order 04.

34 As previously noted, in the event the Commission somehow deigns to entertain Shuttle Express' Petition for Rehearing, Speedishuttle's showing should be limited to demonstration of the differentiation factors expressly delineated by the Commission in its Order 04 relating to its differing "business model" as set forth at ¶21, p. 7 of the Order:

1. Luxury vehicles
2. Significantly increased accessibility for non-English speaking customers
3. Individually-tailored customer service
4. Tourism information
5. Wi-Fi Service

[36] *In re Personal Restraint of Gronquist*, 138 Wn.2d 388, 400 (1999) (emphasis added), (citing *Lejeune v. Clallam County*, 64 Wn. App. 257, *review denied*, 119 Wn.2d 1005 (1992)).

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35 Any other rehearing issues or evidentiary showings mandated for rehearing are not only legally inappropriate, but wholly disregard the express verbatim findings of the Commission's unappealed Final Order and misapply the Commission's 2013 auto transportation rules in a prejudicial, retroactive and discriminatory fashion. In doing so, they threaten this new entrant's multimillion dollar infrastructure and operational investment which was entirely consistent with, and indeed, indirectly encouraged by, the 2013 rulemaking's competition goals. These vital policy goals and the orderly process of administrative decision-making and finality ought not be sacrificed purely for the cyclical, unyielding due process gratifications of a petitioner-respondent who has constantly tested the regulatory system for more than two and a half decades and who has, on occasion, asserted that it knows how to regulate the industry better than the Commission. For all of the above reasons, granting a full blown "do-over" of its competitor's closed and completed application record on these facts to Shuttle Express is, respectfully, incomprehensible.

I. Recommended Findings/Conclusions

36 Speedishuttle therefore recommends the following revised findings and conclusions be substituted for those objected to in Order 06:

> Recommended Finding/Conclusion (3), ¶12: Under RCW 81.04.200 and consistent with Washington Appellate and Commission decisions, the Commission should decline to exercise discretion to rehear proceedings where the same issues will be presented again and where the underlying Commission rule changes in 2013 form the basis of an increase in competition that was undoubtedly anticipated, consistent with and indeed fostered by Commission rules and which are here subject to collateral attack. The Petition should therefore be denied.

> Recommended Finding/Conclusion (4), ¶13: Shuttle Express' Petition alleges facts consistent with its objections at the time of hearing and which were duly considered by the Commission in its ultimate decision. In an abundance of caution, the Commission alternatively grants a brief adjudicative rehearing to

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address the specific factual contentions raised by Shuttle Express expressly found by the Commission to constitute "differentiation factors," limited to:

1. Luxury vehicles.
2. Significantly increased accessibility for non-English speaking customers.
3. Individually-tailored customer service.
4. Tourism information.
5. Wi-Fi Service.

V. CONCLUDING STATEMENT/PRAYER FOR RELIEF

37 Speedishuttle submitted its original auto transportation application in good faith in the wake of the 2013 Rulemaking with the expectation that those policy goals meant what they said: providing existing airporter companies' rate flexibility, and promoting competition in the regulated auto transportation industry. It relied on those fundamental changes in rule and willingly offered itself in service to the Washington intrastate regulated marketplace, and in the process invested millions of dollars in personnel, plant and equipment upon being issued its current certificate property right by this Commission. However, after repeatedly and successfully deflecting Shuttle Express' numerous past litigation challenges, it now finds its entire investment in the Washington marketplace potentially imperiled by a Petitioner-Complainant who has consistently thwarted Commission law and rule throughout its service history as the Commission itself has noted.[37] "Unclean Hands" in the perception of Initial Order 06 apparently has no bearing on the unfettered exercise of discretion under RCW 81.04.200.

38 Since its application was granted, Speedishuttle has been repeatedly, baselessly and unilaterally attacked by a Petitioner who has asserted the same arguments over and over, reformulated at every conceivable interval. Yet now, in the wake of the Initial Order's outcome, Speedishuttle faces a full-blown adjudicative proceeding to rehear its application, a conjoined

[37] *WUTC v. Shuttle Express, Inc., Docket No. TC-120323 (Mar. 2014);* and *see again,* Speedishuttle's Answer to the Petition for Rehearing, ¶¶39, 40, pp. 20-23.

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complaint by the entrenched provider, burdensome and intrusive discovery, protracted continued litigation and significant additional expense all without any acknowledgment, realization or explanation of how this result is consistent or squares with the 2013 Auto Transportation Rulemaking which the Petitioner never formally challenged either at the Commission or in court. The Commission should reject this transparent overreach outright or, instead, grant a very circumscribed application rehearing limiting the proceeding to addressing the actual differentiation factors found by the Commission in Order 04, and once again, contested by Shuttle Express in its Petition for Rehearing.

DATED this 24 day of August, 2016.

RESPECTFULLY SUBMITTED,

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2016, I caused to be served the original and two (2) 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 the WUTC web portal;

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	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
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Dated at Seattle, Washington this 24th day of August, 2016.

Maggi Gruber
Legal Assistant

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