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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application No. D-78932 of
VALENTINETTI, STEVE & BRIAN
HARTLEY, D/B/A SEATTLE SUPER
SHUTTLE,
For a Certificate of Public Convenience and
Necessity to Operate Motor Vehicles in
Furnishing Passenger and Express Service as
an Auto Transportation Company

Docket No. TC-001566

PETITION FOR ADMINISTRATIVE
REVIEW

12 Shuttle Express, Inc., and Evergreen Trails, Inc., d/b/a Gray Line of Seattle
13 (collectively the "Petitioners") file this Petition requesting review of the *Initial Order* granting
14 the bus certificate application of Seattle Super Shuttle ("SSS"). *Initial Order Granting*
15 *Application*, Docket No. TC-001566 (2001) ("*Initial Order*"). The Commission should reverse
16 the findings of the *Initial Order* because it: (1) improperly relies on testimony regarding the
17 public need that is not competent or probative, (2) concludes that the Petitioners provide
18 unsatisfactory service based on the finding of need, which is improper, and on a handful of
19 unattributed complaints, thereby disregarding overwhelming evidence showing that the
20 Petitioners provide efficient and satisfactory service, and (3) concludes that SSS is fit to offer the
21 proposed service, despite its lack of preparation or experience necessary to provide a door-to-
22 door airporter service.

23 The evidentiary standards implied in the *Initial Order* are so low that they would,
24 if not reversed by the Commission, provide no meaningful protection for the public or the rights
25 of existing certificate holders. Because of the significant property rights at stake, Petitioners
26 request oral argument before the Commission.

1 **I. PROCEDURAL BACKGROUND**

2 On October 11, 2000, SSS filed an application to provide airporter service
3 between Sea-Tac and all points within 25 miles, including Seattle. Exhibit 2 at 2. The
4 Petitioners, which currently provide airporter service in the proposed service area, filed a protest
5 against the application on October 27th. The Commission held a hearing on May 3, 2001 to
6 consider the merits of the application.

7 At the hearing, SSS presented four witnesses: Steven Valentinetti, president of
8 SSS; Mathias Eichelberger, a travel agent; Ernest Rosengren, a driver for a transportation
9 company owned by Mr. Valentinetti; and David Estes, the owner of Vashon Shuttle and VIP
10 Shuttle, which are airporter companies serving the Sea-Tac to Vashon Island route. The
11 Petitioners presented two witnesses: David Gudgel, General Manager of Gray Line of Seattle,
12 and John Rowley, Vice President and General Manager of Shuttle Express.

13 At the conclusion of the hearing, Administrative Law Judge Marjorie Schaer
14 ("ALJ") directed the parties to file post-petition briefs summarizing their positions. TR 324,
15 ll. 6-8. On September 14, the ALJ released and served the *Initial Order* granting the application
16 of SSS.

17 **II. THE STANDARD FOR COMMISSION REVIEW OF AN INITIAL ORDER**

18 The Commission reviews initial orders de novo and does not need to give
19 deference to initial order findings. *See, e.g., In re Application D-76533 of Sharyn Pearson &*
20 *Linda Zepp*, Order M.V.C. No. 2041 (1994)("Centralia Order"). Of course at a minimum, under
21 the APA, both an initial and the Commission's final order must be based on substantial evidence
22 in the record and not be arbitrary and capricious. RCW 34.05.570(3)(e), (i). Substantial
23 evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the
24 declared premise." *Olmstead v. Department of Health*, 61 Wn. App. 888, 893, 812 P.2d 527
25 (1991) (*citation omitted*). For several reasons, the *Initial Order* does not meet the minimum
26 requirements of the APA.

1 **III. THE INITIAL ORDER ERRED IN FINDING THAT SSS HAS MET ALL THREE**
2 **PREREQUISITES FOR OBTAINING A BUS CERTIFICATE**

3 The *Initial Order* granted SSS's bus certificate application despite the fact that
4 SSS did not come forward with competent evidence to support the elements of the three-part test
5 applicable to all bus certificate applicants. Because SSS must prove all these elements, the
6 *Initial Order's* grant of its application was erroneous.

7 **A. Standard for Approval of a Bus Certificate Application**

8 The Commission must deny a bus certificate application if the applicant cannot
9 prove *all* of these three prerequisites:

10 First, that the "public convenience and necessity require [the] operation" they
11 propose. RCW 81.68.040. This requires applicants to show that there is a "there
12 is a public need for the service," Notice of Prehearing Conference, Docket
13 No. TC-001566, Appendix A (February 9, 2001)("Notice of Prehearing
14 Conference"),

15 Second, that existing certificate holders in the territory "will not provide [service]
16 to the satisfaction of the commission," RCW 81.68.040, and

17 Third, that the applicant "is fit, willing, and able to provide the proposed
18 service. . . ." *Notice of Prehearing Conference*, Appendix A.

19 In this proceeding, SSS failed to prove *even one* of these elements.

20 **B. There is no competent evidence of a public need for the proposed service.**

21 The *Initial Order* determined that there is a need for SSS's service based on
22 evidence of a type that the Commission has long refused to recognize as competent. *See Initial*
23 *Order* at 12, Conclusion of Law No. 4; *Id.* at 11, Finding of Fact No. 3. Specifically, it:
24 (1) relied on witnesses that expressed no need for SSS's service to establish public need;
25 (2) misinterpreted Mr. Rowley's testimony regarding Shuttle Express; (3) ignored evidence about
26 the underutilized equipment of the Petitioners; and (4) ignored the fact that there was no
evidence of a public need for additional airporter service serving downtown Seattle hotels. In the
end, there is no competent evidence in the record demonstrating that there is a public need.

1 **1. SSS's witnesses were not competent to testify regarding the public**
2 **need.**

3 The *Initial Order* held that "[t]he testimony of Mathias Eichelberger, Ernest
4 Rosengren, and David Estes establish that there is a need for SSS's proposed service." *Initial*
5 *Order* at 11, Finding of Fact No. 3. However, none of SSS witnesses satisfied the minimum
6 criteria to testify regarding the public need.

7 **(a) All public need witnesses must be independent and can**
8 **only testify about their own unmet needs for service.**

9 Under the Commission's own long-established criteria, all witnesses testifying
10 about public need must (1) be independent from an applicant and (2) testify only regarding their
11 own need for service:

12 Need for new service must be established by the testimony of members of the
13 public *who actually require the service*. The Commission does not accept
14 self-serving statements of an applicant. The applicant must support its application
15 with *independent* witnesses knowledgeable about the need for service in the
16 territory in which the applicant seeks authority.

17 *Notice of Prehearing Conference, Appendix A (emphasis added)*. "[T]he sort of evidence that
18 the Commission has found persuasive on the issue of public convenience and necessity is the
19 testimony of witnesses that *they* have been unable to get service when they needed it from
20 existing carriers." Final Order, *In re Application of Ali*, Order M.V.C. No. 2160 (Sept. 4, 1997)
21 *(emphasis added)*. Witnesses must meet *both* requirements, otherwise they are not competent
22 and their testimony regarding the alleged public need must be ignored. SSS did not present a
23 single witness who met both of these prerequisites. Indeed, most of its witnesses did not meet
24 even one of the prerequisites.

25 **(b) Mr. Rosengren was not competent to testify about the**
26 **public need.**

 Mr. Rosengren met neither requirement to testify about the public need. First,
 Mr. Rosengren is not independent, because he is a driver for Mr. Valentinetti, the president of

1 SSS. *Initial Order* at 5; TR 139, ll. 16-17. An employee¹ cannot offer independent testimony on
2 behalf of an application sponsored by their employer, as occurred here. All of Mr. Rosengren's
3 testimony is in effect the self-serving testimony of Mr. Valentinetti, the applicant.

4 Second, Mr. Rosengren testified about the transportation needs of *other people*.
5 For example, he testified that, while he was a part-time driver for Shuttle Express for
6 approximately seven months in the fall and winter of 1996-1997, he noticed that the people he
7 picked-up often had to wait 20 to 30 minutes and that there was "one night during the
8 Thanksgiving weekend when people had been waiting two hours, and sometimes as long as three
9 hours." *Initial Order* at 5, ¶ 19. These events do not involve Mr. Rosengren's personal
10 transportation needs, and he was not competent to testify about them. In fact, Mr. Rosengren
11 testified that he had only used Shuttle Express once in the last 12 months and that the service had
12 been "adequate." TR 129, l. 20 to 130, l. 7. He never testified that he had a pressing need for
13 additional airporter service or that he would personally benefit from SSS's service. *See* TR 139,
14 ll. 21-25.²

15 Because Mr. Rosengren met neither requirement to serve as a public need witness,
16 he was not competent to testify on this issue. The *Initial Order* should have ignored his
17 testimony instead of basing its findings upon his allegations.

18 Even if Mr. Rosengren were competent to testify about the experiences of other
19 people, which is not the case, these events are too remote in time to be considered in determining
20 need or satisfactory service of Petitioners. Applicants must show "[t]hat there *is* a public need,"
21 not that there *was* a public need five years ago. *Notice of Prehearing Conference*, Appendix A.
22 The Commission will generally not consider events that occurred more than one year before an
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24 ¹ The Commission need not determine Mr. Rosengren's legal status as employee or independent contractor. He is
clearly does not meet the "independent" requirement, as he relies on the Applicant for his livelihood.

25 ² The Petitioners believe that Mr. Rosengren's complaints pertain primarily to whether the Petitioners offer
26 satisfactory service, not whether there is a public need. However, the *Initial Order* cites Mr. Rosengren's testimony
as proving that there is a public need, so the Petitioners are addressing his testimony in this section.

1 application was filed. *Centralia Order* at 8. The Commission will consider complaints that are
2 two to three years old if there is strong corroborating evidence that the problems still exist. *In re*
3 *Sharyn Pearson and Linda Zepp*, Order M.V.C. No. 2057 (1994) ("*Centralia Order*
4 *Reconsideration*").³ Here, Mr. Rosengren testified almost exclusively about uncorroborated
5 events that occurred *four to five years ago*, during 1996 to 1997, and thus are far too remote.

6 Of course, any travel delays experienced by people on Thanksgiving are not
7 representative of the day-to-day experiences and needs of the public. Thanksgiving is the peak
8 travel period of the year, and it places unique stresses on all aspects of the transportation
9 infrastructure, including the airport, van and bus service, and cabs. SSS has requested
10 authorization to provide bus service every day of the year, not just Thanksgiving. It must present
11 evidence of need on the remaining 363 days of the year, but has not done so.

12 In yet another defect with Mr. Rosengren's testimony, it also violated the
13 Commission's requirement that an applicant must present "live testimony." The Commission
14 "will not consider written statements of witnesses whom the applicant has not made available for
15 cross examination at hearing; the Commission will generally only consider live testimony."
16 *Notice of Prehearing Conference*, Appendix A. In this case, the people who allegedly had a
17 need (those allegedly "waiting hours") were not available for cross examination. This deprived
18 the Petitioners of the ability to determine the nature of these passengers' needs. That SSS
19 introduced this information into the record through the live statements of Mr. Rosengren rather
20 than through a sworn written statement makes no substantive difference. Because Petitioners
21 could not cross the people Mr. Rosengren allegedly saw waiting, there is no way to know if his
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24 ³ The *Centralia Order Reconsideration* accepted some two to three year old passenger complaints that the existing
25 certificate holder did not offer non-stop service from Thurston County. *Id.* at 4. It apparently did so primarily
26 because the existing certificate holder corroborated these complaints by admitting it still refused to provide non-stop
service in Thurston County at the time the application was filed. *Id.* The case centered on whether the existing
certificate holder's continuing refusal to provide non-stop service was justified.

1 observations had any bearing on need. They may have been waiting for friends, a Metro bus, or
2 some other form of transportation.

3 On a related issue, Mr. Rosengren's testimony cannot support the *Initial Order*
4 because it is pure hearsay. "Hearsay evidence is inherently weak; when it is . . . vague and
5 incomplete . . . , it cannot be relied on as the basis for a decision." *In re Application of Pro Ag*
6 *Transport*, Order M.V. No. 145062 at 7 (June 9, 1992). As noted above, there is clearly
7 insufficient supporting information to justify reliance on Mr. Rosengren's hearsay testimony.

8 **(c) Mr. Estes was incompetent to testify regarding the**
9 **public need.**

10 Mr. Estes was also not competent to testify about the public need because he does
11 not "actually require" the service proposed by SSS. As Mr. Estes admitted, he "[does not] like
12 ride-sharing." TR 156, ll. 17-22; TR 157, ll. 13-20.⁴ Rather than discussing his own needs,
13 Mr. Estes testified about the alleged needs of other people not called to testify. For example, he
14 testified that "customers say to us" and that passengers at the airport were "begging us to take
15 them" during a 1996 ice storm. TR 144, ll. 2-8; TR 148, ll. 23-24; TR 137, ll. 4-7. However,
16 this does not pertain to Mr. Estes' personal need for additional service and did not meet the
17 Commission's requirements for a demonstration of need.

18 Because Mr. Estes was not competent to testify about the public need, the *Initial*
19 *Order* should not have relied his testimony to establish need. The *Initial Order's* reliance on his
20 statements (*Initial Order* at 8, ¶ 34) was erroneous.

21 Even assuming, for sake of argument, that Mr. Estes were competent to testify
22 about the experiences of third parties, the events he discussed occurred too long ago to be
23 relevant. As discussed above, an applicant must prove that there is a "public need" for service,
24 not that there was a need at some point in the past. *Notice of Prehearing Conference*,

25 _____
26 ⁴ This is apparently the case even though Mr. Estes himself owns and operates a ride-sharing service. TR 142,
ll. 12-15.

1 Appendix A. In this case, the ice storm discussed by Mr. Estes occurred in 1996, which was five
2 years ago and was an unusual circumstance at that. It has no relevance now.⁵ Mr. Estes
3 provided no dates for the other alleged statements, so it is impossible to determine whether they
4 are recent enough to be relevant.

5 Mr. Estes was also not a reliable witness, as shown by the inconsistencies in his
6 testimony. For example, Mr. Estes argued that the Petitioners should not have a "monopoly" on
7 the Sea-Tac to Seattle route, TR 145, ll. 9-13. Then, he asserted that there is nothing wrong with
8 the monopoly held by *his* airporter company on the Sea-Tac to Vashon Island route. TR 159,
9 l. 25 to 160, l. 7. When asked why he would oppose the application of another airporter
10 company to serve the Sea-Tac to Vashon Island route, he explained that "I think it's just a matter
11 of self-interest. We are out there to make money, and if somebody takes away our territory, then
12 we are going to oppose it." TR 160, ll. 5-7. Mr. Estes apparently was unaware until the hearing
13 that the application, if granted, would permit the Applicant to serve the Sea-Tac to Vashon Island
14 route. When informed of this fact, Mr. Estes admitted that he was concerned. TR 163, l. 24 to
15 164, l. 3.⁶ Mr. Estes' testimony reflected only his self-interested viewpoints, not the views of the
16 travelling public.

17 **(d) Mr. Eichelberger was incompetent to testify regarding**
18 **the public need.**

19 Mr. Eichelberger also failed both of the minimum requirements to testify about
20 the public need. First, he never testified that he "actually require[s]" additional transportation
21 service. Instead, he testified about the "a strong need for a shuttle service to sell its product by
22 offering a commission to travel agencies." *Initial Order* at 4, ¶ 14.⁷ This testimony does not

23 _____
24 ⁵ It also has no relevance to the satisfactory service of Petitioners since any carrier would have difficulties serving
during the worst winter storm in decades.

25 ⁶ The ALJ reduced the scope of the authorization later during the hearing. TR 219, ll. 11-25.

26 ⁷ This Petition addresses Mr. Eichelberger's allegations about the Petitioners' travel agency promotions in the next
section addressing whether the Petitioners offer satisfactory service.

1 pertain to Mr. Eichelberger's personal need for service and thus does not help establish SSS's
2 prima facie case. Even if he were competent to testify about travel agencies, his entire testimony
3 on this issue is pure speculation about how the travelling might benefit. SSS presented *no*
4 *traveler witnesses* who testified that this arrangement would help serve their own needs for
5 additional airporter service. Not even Mr. Eichelberger claimed that this arrangement would
6 encourage him to use the Petitioners' or SSS's services.

7 Second, Mr. Eichelberger is not an independent witness. He has been a friend of
8 Mr. Valentinetti's for two and a half years. TR 122, ll. 10-23. Even with his obvious bias, his
9 testimony failed to establish that he had a need for Mr. Valentinetti's proposed service.

10 Like all the other SSS witnesses, Mr. Eichelberger failed to meet the minimum
11 requirements to testify about the public need. His testimony on this issue was incompetent, and
12 the *Initial Order* erred by relying on it.

13 **(e) Mr. Valentinetti was incompetent to testify regarding**
14 **the public need.**

15 The "Factual Basis" section of the *Initial Order* discusses Mr. Valentinetti's claim
16 that the Petitioners do not provide sufficient service to meet the public need. *Initial Order* at 3,
17 ¶ 12. It is uncertain whether the *Initial Order* actually relies on Mr. Valentinetti's claims. To
18 clarify this issue, all of Mr. Valentinetti's testimony regarding the public need on behalf of SSS is
19 self-serving and incompetent, since he is SSS's president and primary sponsor. If the testimony
20 of Mr. Valentinetti and his other three witnesses are disregarded as to public need, as they should
21 be under the guidelines of the *Notice of Prehearing Conference* and a long line of Commission
22 orders, the record is devoid of any competent evidence to support a finding of public need.

23 **2. Contrary to the *Initial Order's* claims, Mr. Rowley never testified**
24 **that Shuttle Express cannot meet the public need.**

25 The *Initial Order* stated that the testimony of SSS's witnesses on need was
26 "bolstered" by "the testimony of John Rowley, Jr. that Shuttle Express is not able to meet the
demand for door-to-door service." *Initial Order* at 11, Finding of Fact No. 3. First of all, this is

1 inconsistent with Mr. Rowley's testimony. Mr. Rowley testified that Shuttle Express only has
2 difficulty meeting demand on *Thanksgiving and Christmas*, which are the busiest travel days of
3 the year, not that it cannot or does not meet the need. TR 311, ll. 6-25. As explained later in this
4 brief, Shuttle Express takes extraordinary measures to insure that it is able to meet the demand at
5 all times, which includes the use of outside contractors if necessary. TR 300, ll. 8-12. The
6 *Initial Order's* overbroad finding infers that Shuttle Express cannot meet the demand for service
7 on a regular basis. Not only is such an inference not supported by Mr. Rowley's testimony, it is
8 directly contrary to the hard data that Shuttle Express introduced into evidence of it relatively
9 low utilization percentages. *See* Exhibit 27.

10 Second, whether or not the Petitioners are especially busy on Christmas or
11 Thanksgiving does not show that there is a public need for SSS's proposed service. SSS must
12 show that there is an unmet need *that its proposed service can fill*. RCW 81.68.040. In this case,
13 SSS did not and could not show that its proposed service could meet the needs of the traveling
14 public on Christmas and Thanksgiving any better than the Petitioners could meet that need.
15 SSS's vans would experience the same delays and the challenges of peak demand as the vans and
16 buses of the Petitioners.

17 **3. The Petitioners have substantial unused capacity, which demonstrates**
18 **that there is no unmet need.**

19 The Petitioners were not required to present independent evidence regarding the
20 public need, especially since SSS failed to produce any competent evidence in support of its
21 application. Nevertheless, the Petitioners presented strong evidence showing that there is no
22 unmet need based on the fact that their vehicles are not fully utilized. For example, Gray Line's
23 monthly utilization averages between 37% and 65%. Exhibit 19. Shuttle Express has an average
24 utilization rate of approximately 17%, based on comparing seat capacity with guests carried.
25 Exhibit 27. This extra capacity is available to serve the public need, should it arise. TR 248,
26 l. 17 to 249, l. 1; TR 288, l. 12-15. If there were additional need, the Petitioners would not have

1 such low utilization rates. Even at peak travel times, Petitioners go to great lengths to ensure that
2 the needs of the travelling public are met, such as using more expensive town cars to provide
3 shuttle service, as described below.

4 Moreover, the public need for airporter service has dropped substantially since the
5 hearing in May. Due to the recent terrorist incidents, air travel has plummeted and so has the
6 Petitioners' ridership.⁸ There is even less justification to add an additional airporter service now.
7 That would idle even more of the Petitioners' equipment and dilute the small number of
8 remaining riders without serving any unmet public need.

9 **4. There is no evidence of an unmet public need for an additional**
10 **airporter serving the downtown Seattle hotels.**

11 SSS's certificate granted by the *Initial Order* includes the authority to serve
12 downtown Seattle hotels, which Gray Line currently serves. The *Initial Order* took this action
13 based on its finding that Gray Line's airporter service is "sufficiently different" from SSS's
14 service "to appeal to discrete segments of the market." *Initial Order* at 8, ¶ 35. The *Initial*
15 *Order's* reasoning, and its decision to grant the certificate, are plain error. Actually, a new
16 airporter service to the downtown Seattle hotels would directly compete with Gray Line's
17 service. This is due to the nature of the market Gray Line serves. Presently, Gray Line provides
18 scheduled service between Sea-Tac and various downtown Seattle hotels on 47 passenger buses.
19 Gray Line's buses run with enough frequency that it will serve the same segment of the traveling
20 public originating service from those hotels as would otherwise use a door-to-door service.

21 The *Initial Order's* grant of SSS's application threatens the viability of Gray
22 Line's service. Gray Line's operation is very efficient, but it needs high volumes to provide low
23 fares. Without a sufficient volume of passengers, the service is not economically viable. Shuttle
24 Express does not deplete this volume, because its current authority restricts it from providing

25 _____
26 ⁸ The Petitioners request the Commission to take official notice of these facts, which occurred after the May hearing
and are highly relevant to SSS' pending petition. WAC 480-09-750(2).

1 door-to-door service to specified downtown Seattle hotels served by Gray Line. *See* Exhibit 20.
2 The *Initial Order* would, if affirmed, disrupt this arrangement by granting SSS the authority to
3 provide passenger service that is "door-to-door, by reservation only between Seattle-Tacoma
4 International Airport and points in the City of Seattle" without restrictions. *Initial Order* at 12,
5 Conclusion of Law No. 4. SSS would be able to serve the same downtown hotels as Gray Line,
6 which not even Shuttle Express can do. This will decrease Gray Line's traffic volume as SSS's
7 service grows, thereby making it very difficult to operate a scheduled bus service between
8 downtown and the airport with the same frequency and low fares.

9 Because SSS would compete with Gray Line, SSS should have presented
10 evidence that there is a need for additional service to the downtown hotels. It failed to do so with
11 even a single witness.

12 In conclusion, not one of SSS's witnesses was competent to testify regarding the
13 public need. Mr. Rowley demonstrated that there is no public need by testifying that Shuttle
14 Express rarely has difficulty meeting demand. Both Petitioners proved that most of their
15 equipment remains idle most of the time. Under these circumstances, the *Initial Order's* finding
16 of an unmet public need was clearly erroneous and not based on substantial evidence. The
17 Commission should reverse its conclusions.

18 **C. The Petitioners Do Not Provide Unsatisfactory Service**

19 Because of SSS's failure to present any competent witnesses to meet the first
20 requirement for a certificate, the Commission need not even evaluate "satisfactory service"
21 element of the three-part test. For the sake of completeness, however, this petition will also
22 address the second element.

23 The *Initial Order* determined that Shuttle Express does not provide satisfactory
24 service because it allegedly does not provide a "program of compensation for travel agencies"
25 and allegedly "does not have sufficient capacity to meet the demand for door-to-door service."
26 *Initial Order* at 11, Finding of Fact No. 5. Further, the *Initial Order* found that Gray Line's

1 service is not satisfactory "because the scope and nature of its services do not meet the public
2 needs for more door-to-door service." *Id.*, Finding of Fact No. 4. These findings relied on
3 fragmentary, anecdotal evidence and ignored a mountain of contrary evidence clearly proving
4 that the Petitioners provide satisfactory service. Specifically, the *Initial Order* erred by:

- 5 (1) incorrectly finding that Shuttle Express does not have a travel agency
6 promotion program.
- 7 (2) finding that Shuttle Express has insufficient capacity without any
8 evidentiary support.
- 9 (3) relying on complaints of the SSS's witnesses that were of insignificant
10 magnitude and frequency.
- 11 (4) citing cases that undermine its conclusions,
- 12 (5) applying an unattainable standard of perfection to the Petitioners, when the
13 statutory standard is "satisfactory" service,
- 14 (6) improperly combining the "public need" and "satisfactory service" elements
15 in its findings regarding Gray Line
- 16 (7) ignoring the overwhelming evidence provided by the Petitioners
17 demonstrating that they provide satisfactory service.

18 The next section addresses each of these issues in turn.

19 **1. Under the statutory standard, existing certificate holders must only
20 provide satisfactory service, not perfect service.**

21 The Commission may only issue a certificate to operate in a territory already
22 served by a certificate holder "when the existing auto transportation company or companies
23 serving such territory *will not* provide the same to the satisfaction of the commission. . . ."
24 RCW 81.68.040 (*emphasis added*); Notice of Prehearing Conference, Appendix A. The phrase
25 "will not" is in the future tense, and therefore requires proof that existing certificate holders will
26 refuse to provide satisfactory service in the future. As noted in the section discussing the public
need, the Commission will only examine "recent evidence of service quality," so events that
occurred more than one year ago are generally irrelevant unless there is very strong
corroborating evidence. *See Centralia Order* at 3, 8; *Centralia Order Reconsideration* at 4.

1 Existing certificate holders do not have to provide "perfect" service. Instead,
2 complaints about the existing operators must be "of the magnitude or frequency that would
3 require a conclusion that [the existing operators] will not provide service to the satisfaction of the
4 Commission." *In re Apple Blossom Lines, Inc.*, Order M.V.C. 2139 at 7 (Jan. 26, 1996) ("*Apple*
5 *Blossom*"). Existing certificate holders need only "meet the reasonable expectations of the
6 public" *Centralia Order* at 5. The Commission will give substantial weight to
7 convenience, directness, and speed of the airporter service. *Id.* at 3.

8 **2. Shuttle Express offers a discount program for travel agencies even**
9 **though it is not required to do so.**

10 The *Initial Order* found that "Shuttle Express does not provide service to the
11 satisfaction of the Commission because it does not provide a program of compensation for travel
12 agencies that allows the traveling public to arrange for transfers at SeaTac Airport from remote
13 locations." *Initial Order* at 11, Finding of Fact No. 5. This finding is clear error because
14 uncontroverted evidence showed that Shuttle Express *does* offer a compensation program for
15 travel agencies. Under its "ID-50" program, Shuttle Express offers travel agents a 50% discount
16 off of their rates. TR 278, ll. 11-19. This allows travel agents to mark up the Shuttle Express
17 fares and keep the difference. As Mr. Rowley explained, "we even put the travel agency's name
18 on the brochures to kind of make it their own." *Id.* Approximately 300 to 400 travel agents
19 currently use the program. *Id.* There is no functional difference between this discount program
20 and Mr. Eichelberger's travel agency commission proposal.⁹ Of course, it is likely that
21 Mr. Eichelberger is not even aware of this program, given his admission that he has no personal

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23 ⁹ The Petitioners are not certain what the *Initial Order* meant by the finding that Shuttle Express' compensation
24 program should "allow[] the traveling public to arrange for transfers at SeaTac Airport from remote locations" or
25 that there is a need for "a door-to-door service in Seattle that is available for booking by travel agencies in other
26 cities." *Initial Order* at 8, ¶ 34; *Id.* at 11, Finding of Fact No. 5. However, since this issue appeared nowhere in the
transcript, the record does not support a finding of unsatisfactory service on this ground. As noted above, Shuttle
Express has implemented a program with travel agents to promote its service, and it is capable of handling requests
by travel agencies in other cities. In contrast, Mr. Valentineti presented no evidence that SSS could or would
provide this service.

1 knowledge of the travel agencies' experiences with the Petitioners. TR 118, ll. 15-23; TR 124,
2 ll. 7-20.¹⁰

3 Even assuming, for sake of argument, that Shuttle Express did not have a discount
4 program, the *Initial Order* could not properly have found that the Petitioners offer unsatisfactory
5 service on that basis. A bus certificate holder is only required to "reasonably hold[] out its
6 services to the public" and thus does not need to provide every conceivable form of advertising.
7 *Apple Blossom* at 8. Here, the Petitioners introduced substantial evidence that they advertise and
8 promote their services widely. Even Mr. Eichelberger himself admitted that he "saw a lot of
9 promotions" for Shuttle Express. TR 126, l. 23 to 127, l. 1.

10 **3. Contrary to the *Initial Order's* claims, Shuttle Express does not lack**
11 **the capacity to meet the demand for door-to-door service.**

12 The *Initial Order* found that "Shuttle Express does not provide service to the
13 satisfaction of the Commission because it does not have sufficient capacity to meet the demand
14 for door-to-door service from SeaTac to the city of Seattle in an adequate and timely manner."
15 *Initial Order* at 11, Finding of Fact No. 5. This conclusion is based on several misinterpretations
16 of the record. First, the *Initial Order* held that "Shuttle Express cannot meet all demands at busy
17 times even for reservations called in 24 hours ahead of need." *Initial Order* at 9, ¶ 36. This
18 finding misstates the evidence, which shows only that Shuttle Express faces challenges meeting
19 demand on Thanksgiving and Christmas, not that it "cannot" meet the demand. TR 311, ll. 6-9.
20 Mr. Rowley explained that during the rest of the year, Shuttle Express has no problem meeting
21 demand. TR 313, ll. 1-10. Although Shuttle Express is very busy in the summer, "the peak time
22 during the summer is sustained, and we are able to plan well enough to meet the demands." *Id.*

23
24 _____
25 ¹⁰ Like Shuttle Express, Gray Line's pamphlets "are available all throughout Seattle," including hotels, ferry
26 terminals, and the airport baggage claim and travel information booths, as well as being "mailed out to travel
agencies both locally and internationally." TR 232, ll. 17-25. Gray Line also offers a "travel agency incentive
program" to encourage travel agencies to promote their service. TR 233, ll. 1-6.

1 The *Initial Order* cites Mr. Rowley's testimony in a manner that suggests that this is a common
2 situation, when actually it occurs rarely, if at all.

3 If anything, the utilization statistics submitted by the Petitioners and discussed in
4 the "public need" section of this Petition prove that the Petitioners have *too much capacity*.
5 TR 288, ll. 6-7. According to Mr. Rowley, Shuttle Express "would like to carry more people,
6 and we have the equipment to do so." TR 288, ll. 10-11. If there were additional need, Shuttle
7 Express could "absolutely" satisfy the need with the extra capacity. TR 288, ll. 12-15.

8 Of course, it would be irresponsible for Shuttle Express to maintain enough
9 equipment year-round to satisfy the demand for travel on Christmas and Thanksgiving, which the
10 *Initial Order* apparently expects. Increasing the amount of idle equipment or drivers beyond
11 current amounts would drive fares higher. This would jeopardize the Commission's interest in
12 "fair rates," which was cited by the *Initial Order*. *Initial Order* at 9, ¶ 36. Ironically, if Shuttle
13 Express did increase its capacity in this manner, its fiscal irresponsibility could well support a
14 finding that it provides unsatisfactory service.

15 Second, the *Initial Order* states that "Shuttle Express must at times divert
16 potential customers of the regulated company to its non-regulated division, or to other
17 unregulated forms of transportation." *Initial Order* at 9, ¶ 36. Shuttle Express never sends
18 customers to any "unregulated" service. Shuttle Express simply diverts customers to its town car
19 division, which is regulated by the Commission, or to Farwest Cab or Everett Yellow Cab, which
20 are regulated by the counties. TR 300, ll. 8-12. The rates charged by these town car and cab
21 services for all customers with reservations are Shuttle Express' regular commission-tariffed
22 rates, even though those passengers receive a premium service. TR 306, ll. 17-22; TR 308, ll. 22
23 to 309, 1-12. Mr. Rowley explained that this approach is necessary to keep its operations
24 "efficient" by avoiding too much capacity. TR 306, ll. 17-23. Further, this is a very rare event,
25 as noted above.

1 Third, the *Initial Order* determined that "Shuttle Express at times fills all of its
2 capacity of van seats at the airport and customers must wait until other vans reach the airport."
3 *Initial Order* at 9, ¶ 36. However, there was no competent evidence of this activity. SSS
4 presented *not one witness* who could testify that they personally had to wait an undue time while
5 using Shuttle Express' service. This erroneous statement appears to be derived from
6 Mr. Rosengren's testimony. As noted earlier, Mr. Rosengren is Mr. Valentinetti's employee, and
7 all of his testimony on this issue is incompetent, untimely, and must be disregarded.

8 Finally, the *Initial Order's* conclusions are directly contrary to this Commission's
9 finding in February 2001 that both Gray Line and Shuttle Express have "an extensive fleet of
10 vehicles with which [they] provide service" on the Seattle to Sea-Tac route. *In re Application D-*
11 *78826 of Alice Modig*, M.V.C. Order No. 2279 (2001). There is no evidence that the capabilities
12 of the Petitioners has suddenly plummeted within the last seven months.

13 **4. The SSS's witnesses' complaints identified in the "Factual Basis"**
14 **section of the *Initial Order* were of insufficient magnitude and**
15 **frequency to support a finding of unsatisfactory service.**

16 The "Factual Basis" section of the *Initial Order* discusses several anecdotal and
17 isolated complaints voiced by SSS's witnesses. It is unclear whether the *Initial Order* relied on
18 them in reaching its conclusions. Moreover, it is not clear whether the *Initial Order* considered
19 them to be relevant to the "public need" or "satisfactory service" issue. To ensure that the
20 Petitioners' position regarding them is unambiguous, this section addresses why the complaints
21 of these witnesses carry no weight.

22 First, Mr. Estes claimed that "his customers have shared complaints of Shuttle
23 Express" regarding a variety of issues. *Initial Order* at 4, ¶ 17. This is pure hearsay and cannot
24 support the *Initial Order's* findings. *In re Application of Pro Ag Transport*, Order
25 M.V. No. 145062 at 7 (June 9, 1992). Mr. Estes provided virtually no details about these
26 complaints, the people who made them, or the dates they occurred, which makes it impossible to
determine whether they are recent enough to be relevant. SSS never called these customers as

1 witnesses, thus depriving the Petitioners of the ability to cross-examine them and obtain relevant
2 details about their experiences.

3 Mr. Estes also complained that the Petitioners provided inadequate service to
4 other people during the 1996 ice storm. *Initial Order* at 5, ¶ 17. As noted earlier, the 1996 ice
5 storm occurred too long ago to be relevant. In any event, the Petitioners *did* provide service that
6 day to the best of their ability, resulting in accolades for Gray Line from the City of Seattle and
7 some passengers and hotels. TR 246, ll. 9-14; TR 289, l. 22 to 290, l. 12. Ultimately, Mr. Estes
8 conceded that Shuttle Express is "fairly good at what they do." TR 143, ll. 19-20.¹¹

9 Mr. Eichelberger voiced only one specific complaint about Shuttle Express'
10 service. He alleged that Shuttle Express changed a friend's early morning pick-up location thirty
11 minutes prior to the pick-up time. *Initial Order* at 4, ¶16; TR 119, l. 15 to 120, l. 13. At most,
12 this is a small inconvenience. It is possible that an alert driver made the change because the
13 address given by Mr. Eichelberger was not appropriate as a pickup location. TR 291, ll. 9-15.
14 SSS did not call the friend to testify, so it is impossible to determine whether he personally was
15 satisfied with the service or what the reason was for the location change. In the end,
16 Mr. Eichelberger conceded that the only time he personally used Shuttle Express it was timely,
17 the vans were clean, the driver was courteous, and the ride was safe. TR 123, l. 21 to 124, l. 4.

18 Mr. Rosengren's complaints about the Petitioners were vague and anecdotal. For
19 example, he claimed that some passengers did not like the fact that they had to wait for Shuttle
20 Express to pick them up. *Initial Order* at 5, ¶ 19. As noted in the section of this Petition
21 discussing the public need, all of these complaints were made during 1996 to 1997. They are
22 now too old to be relevant. *Centralia Order* at 8. He also did not identify any of the passengers
23 who complained, the routes at issue, or any other specific information that would enable the
24 Commission to evaluate these claims. In any event, a certain amount of waiting is inherent in a

25 _____
26 ¹¹ Mr. Estes mistakenly referred to Shuttle Express as Super Shuttle during this part of the hearing but later
confirmed that all references to Super Shuttle were actually directed at Shuttle Express. TR 151, l. 19-21.

1 share-ride service. Passengers who do not want to wait can take a taxi and pay the higher fare
2 needed to cover the greater costs of such a premium service. Mr. Rosengren described his only
3 experience with Shuttle Express in the last year as "adequate." TR 129, l. 20 to 130, l. 7. His
4 only complaint about service actually provided to him was that he once waited an hour and a half
5 at the airport for Shuttle Express, but there is no evidence that this occurred recently enough to
6 be relevant. TR 140, ll. 19-22. He cannot be too unhappy with Shuttle Express' service because
7 he admitted that he would use it again. TR 140, ll. 10-12.

8 Finally, Mr. Valentinetti criticized the Petitioners' service, but this testimony is
9 self-serving and thus irrelevant. See TR 318, l. 20 to 319, l. 6. Even so, he admitted that
10 "Shuttle Express runs a good operation" and "Gray Line is also good too." TR 318, ll. 15-18. In
11 doing so, Mr. Valentinetti effectively conceded that the Petitioners operate satisfactory airporter
12 services.

13 SSS's case is based on the theory that there is no harm in having one more
14 airporter service, regardless of how the Petitioners currently operate. This is not the statutory
15 standard, which requires SSS to prove that the current certificate holders provide unsatisfactory
16 service. RCW 81.68.040. SSS has failed to meet this burden, and it is not entitled to a certificate
17 based on this record.

18 **5. The cases cited by the *Initial Order* do not support its findings**

19 The *Initial Order* cites several cases as support, but these cases actually
20 undermine its conclusions. For example, the *Initial Order* cites the *Centralia Order* for the
21 principle that "[t]he restriction on entry is not a barrier behind which poor service, or service that
22 is unresponsive to the changing requirements of the market, is shielded from competition."
23 *Initial Order* at 9, ¶ 36. However, the *Centralia Order* actually shows that service must be either
24 extremely bad or unavailable before it is "unsatisfactory." In that case, the Commission found
25 that the Capital Aeroporter, the existing certificate holder, provided unsatisfactory service to
26 Lewis County because it had "virtually abandoned" service to that county. *Centralia Order* at 8.

1 On reconsideration, the Commission found that Capital Aeroporter provided unsatisfactory
2 service to Thurston County as well because it *refused* to provide non-stop service to the airport
3 by diverting passengers through Tacoma, which Capital Aeroporter agreed was the case.
4 *Centralia Order Reconsideration* at 4. This diversion resulted in extreme anxiety for Olympia
5 passengers while the van "wander[ed] around the Tacoma area picking up passengers." *Id.*
6 Further, this proceeding shows that passenger complaints must address recent events to be
7 relevant. As noted earlier, in the *Centralia Order*, the Commission refused to consider
8 complaints regarding events occurring more than one year before the application was filed.
9 *Centralia Order* at 3, 8. Although the *Centralia Order Reconsideration* considered passenger
10 complaints that were two to three years old, these complaints were corroborated by the existing
11 certificate holder. *Centralia Order Reconsideration* at 4.

12 None of those conditions exist in this case. Here there is no evidence that the
13 Petitioners have "virtually abandoned" service between Seattle and Sea-Tac Airport. To the
14 contrary, they vigorously serve the route. There is no evidence from *actual passengers* that the
15 Petitioners refused to provide non-stop service from particular cities or neighborhoods. Almost
16 all of the uncorroborated incidents cited by the *Initial Order* occurred four to five years ago,
17 which is far outside the time frame permitted in the *Centralia Order*.

18 The *Initial Order* also cites *In re Lloyd's Connection, Inc.* for the principle that
19 "[a]n applicant for an auto transportation certificate must establish that the public convenience
20 and necessity require the proposed operations. *In re Lloyd's Connection, Inc.*, Order M.V.C. No.
21 1892 (1990). The Petitioners do not dispute this but instead want to highlight the Commission's
22 finding that "a few complaints about [the certificate holder's] service . . . do not rise to the level
23 of overall unsatisfactory service by existing carriers." *Id.* at 5. Clearly, an applicant must
24 establish that there is a systemic problem with the existing service rather than isolated problems.
25 There is no evidence in this record of systemic problems with the Petitioners' service.
26

1 Finally, the *Initial Order* cites *In re Heckman Motors, Inc.* for the principle that
2 "[g]iving more choices for riders will optimally serve their needs." Third Supplemental Order,
3 *In re Heckman Motors, Inc.*, Docket No. TC-000835 (2001). That case is distinguishable,
4 because both carriers in the proceeding agreed that the market at issue was underserved. Here,
5 the Petitioners dispute SSS's claims that the market is underserved. The Commission cannot rely
6 on this out of context statement to re-write the bus statute, which grants existing certificated
7 holder a quasi-monopoly. RCW 81.68.040.

8 **6. The Initial Order improperly assumes that the Petitioners' service**
9 **must be perfect rather than merely satisfactory.**

10 The *Initial Order* states that it is evaluating whether the Petitioners provide
11 "satisfactory" service, but its analysis clearly indicates that it is applying a much higher standard
12 of near perfection. The *Initial Order* overlooks the fact that some minor complaints are
13 inevitable given the huge number of passengers handled by the Petitioners. Shuttle Express
14 handles 45,000 people per month, and Gray Line serves around 25,000 passengers per month.
15 TR 277, ll. 7-10; TR 229, ll. 10-13. In Shuttle Express' case, 99.75% of these trips occur without
16 a complaint. TR 277, ll. 7-10. With such large volumes, some passengers will experience
17 delays. That is why the Commission requires complaints to be of sufficient magnitude or
18 frequency to indicate a widespread problem. Nevertheless, the *Initial Order* has justified its
19 findings on the basis of isolated, vague complaints made many years ago by people never called
20 to testify. The *Initial Order* is holding the Petitioners to a higher standard than "satisfactory"
21 service.

22 **7. The Initial Order improperly combines the "public need" and**
23 **"satisfactory service" elements in its findings regarding Gray Line**

24 The *Initial Order* determined that "Gray Line of Seattle does not provide service
25 to the satisfaction of the Commission because the scope and nature of its services do not meet the
26 public needs for more door-to-door service from Sea-Tac Airport to the City of Seattle." *Initial*
Order at 11, Finding of Fact No. 4. However, Gray Line's alleged inability to meet the public

1 need for door-to-door service does not justify a finding that its service is unsatisfactory. These
2 are two separate elements, and SSS's failure to prove both of them requires a denial of its
3 application. *Notice of Prehearing Conference*, Appendix A. Moreover, because of the
4 frequency of Gray Line's service to the downtown hotels, it is providing the equivalent of door-
5 to-door service to those locations.

6 **8. The Petitioners presented substantial evidence proving that they**
7 **provide highly satisfactory service.**

8 Although it was not their burden of proof, the Petitioners rebutted the Applicant's
9 case by demonstrating that they give passengers convenient, direct, speedy, safe, and highly
10 satisfactory airporter service. For example, Gray Line has a sophisticated dispatch system that
11 enables drivers to arrive timely at frequently scheduled stops. TR 230, l. 21 to 231, l. 5. It has
12 an extensive maintenance facility and parts inventory that allows buses to stay running and to
13 meet the demand during peak periods. TR 235, l. 11 to 236, l. 13. It keeps its buses clean and
14 recycles wash water and waste oil. TR 237, l. 18 to 238, l. 20. Gray Line also has equipment to
15 assist disabled passengers. TR 238, l. 23 to 239, l. 13. Moreover, Gray Line has 225 drivers
16 available to offer airporter service, all of whom are subject to extensive hiring policies and
17 procedures as well as ongoing monitoring of driver performance. TR 240, l. 17; TR 241, l. 12 to
18 242, l. 8. Gray Line has a sophisticated safety program to ensure that these drivers operate the
19 vehicles properly. TR 242, l. 19 to 243, l. 8. SSS, Gray Line's managers are aware of and follow
20 state and federal regulations that govern their operations. TR 244, ll. 11-15. It also has a
21 concession agreement with Sea-Tac that allows it to furnish ground transportation by bus.
22 Exhibit 14. Finally, Gray Line has received community accolades for the quality of its service.
23 Exhibits 17 and 18.

24 Similarly, Shuttle Express provides highly satisfactory service. It has a highly
25 sophisticated dispatch procedure that enables it to route vans in the most efficient manner
26 possible. TR 272, l. 12 to 273, l. 21; TR 273, l. 24 to 274, l. 9. It has procedures to handle the

1 needs of disabled passengers. TR 281, l. 23 to 282, l. 5. Shuttle Express' drivers are subject to
2 extensive hiring policies and procedures as well as ongoing monitoring after they begin
3 employment. TR 282, l. 23 to 284, l. 4. Shuttle Express has a safety manager with 10 years of
4 experience who is responsible for maintaining the safety of Shuttle Express' operations. TR 284,
5 l. 14 to 285, l. 2. Shuttle Express has a sophisticated maintenance facility, TR at 280, ll. 2-20,
6 and it recycles waste water after washing the airporter vans. TR 281, ll. 14-20. Shuttle Express'
7 managers are familiar with state and federal regulations affecting their operations, and they
8 follow these regulations. TR 287, ll. 4-9. Shuttle Express also has an exclusive concession to
9 provide door-to-door airporter service at Sea-Tac International Airport until December 31, 2002
10 that may be renewed through December 31, 2005.

11 In sum, the Petitioners have sophisticated operations that provide safe, reliable
12 and timely service. In fact, all of SSS's witnesses praised the Petitioners' service during the
13 hearing. In contrast, SSS has presented only second-hand anecdotes about the experiences of
14 unnamed third parties. If there were significant problems with the Petitioners' service, SSS
15 should have no difficulty in calling witnesses to testify about their own experiences. That they
16 did not do so indicates that problems with the Petitioners' service are minor and infrequent.
17 Accordingly, SSS has not proved that the Petitioners provide unsatisfactory service.

18 **D. SSS Failed to Meet Its Burden to Show That It Is Fit, Willing, and Able to**
19 **Provide the Requested Service**

20 The third requirement is that the applicant "is fit, willing, and able to provide the
21 proposed service." Notice of Prehearing Conference, Appendix A; *In re Lloyd's Connection, Inc.*
22 *d/b/a Airport Connection Airporter*, Order M.V.C. 1892 at 3 (December 1990). As part of this
23 demonstration, an applicant must prove "that it is willing and able to comply with the applicable
24 laws and the Commission's rules" and "that it has sufficient financial resources and assets to
25 conduct the proposed operations." Notice of Prehearing Conference, Appendix A. The
26

1 requirement is phrased in the present tense. A promise to become fit in the future is not
2 sufficient.

3 The *Initial Order* held that SSS met this criteria despite the facts that SSS is
4 clearly unprepared to offer the proposed service and has presented no reliable evidence of its
5 finances. *Initial Order* at 12, Conclusion of Law No. 2.¹² Rather than identifying all the
6 significant problems with SSS's proposed operations, the Petitioners have highlighted a few
7 glaring facts that show SSS's lack of fitness:

- 8 • SSS has no concession agreement with Sea-Tac Airport, which an
9 essential contract that permits an airporter to pick-up and drop-off
10 passengers at the Airport.¹³
- 11 • The Applicant cannot obtain a concession agreement in the near future
12 because Shuttle Express currently has an exclusive concession to
13 provide door-to-door airporter service at Sea-Tac.¹⁴ This agreement
14 will not expire until December 31, 2002 and may be extended to
15 2005.¹⁵
- 16 • The Applicant's principal managers Mr. Valentinetti and Mr. Hartley
17 have never operated a door-to-door passenger service.¹⁶
- 18 • The Applicant also has not established procedures and guidelines to
19 operate an airporter service in accordance with Department of
20 Transportation regulations.¹⁷
- 21 • Mr. Valentinetti provided no documentation to support his claims that
22 SSS had a six-month cash reserve.¹⁸

23 ¹² Since the Applicant failed to show a public need, the Commission should deny the application without
24 considering any remaining issues. However, this brief discusses the Applicant's failure to show fitness, for the sake
25 of completeness.

26 ¹³ TR 207, l. 15 to 208, l. 3.

¹⁴ Exhibit 24.

¹⁵ *Id.* The Petitioners do not ask this Commission to enforce Shuttle Express' concession agreement with the airport.
Rather, Petitioners believe Shuttle Express' concession agreement is strong evidence that the Applicant will be
unable to obtain a concession agreement to serve Sea-Tac. This is an additional factor countering the Applicant's
claim of need for an additional door-to-door airporter.

¹⁶ TR 99, ll. 2-3.

¹⁷ See e.g. Exhibit 2; TR 170, ll. 2-9; TR 169, ll. 10-11; TR 169, l. 14 to 170, l. 13; TR 170, ll. 2-12.

¹⁸ TR 174, ll. 7-10.

1 Clearly, Mr. Valentinetti plans to obtain a bus certificate now, then figure out how
2 to run an airporter service later. This is unacceptable in an industry charged with safely and
3 reliably carrying the traveling public to their destination. SSS is not currently fit, willing, and
4 able to provide the proposed service as required by law.

5 **IV. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

6 Given the foregoing deficiencies, the Commission should reverse and replace the
7 *Initial Order's* Findings of Fact and Conclusions of Law as follows:

- 8 • Replace Finding of Fact No. 2 with the following statement:

9 SSS possesses inadequate financial resources, experience, and procedures to offer
10 the proposed airporter service. Further, SSS has no concession agreement with
11 the Port of Seattle and is incapable of obtaining one before December 31, 2002 at
12 the earliest. Based on the evidence provided, SSS has failed to prove that it will
13 comply with the laws and rules governing auto transportation companies under
14 Chapter 81.68 of the Revised Code of Washington.

- 15 • Replace Finding of Fact No. 3 with the following:

16 SSS failed to present evidence showing that there is a need for the proposed
17 service. Its witnesses Mathias Eichelberger, Ernest Rosengren, and David Estes,
18 and Steven Valentinetti did not meet the Commission's minimum requirements to
19 offer competent public need testimony because they were neither independent nor
20 did they testify regarding their own need for additional service. In contrast, David
21 Gudgel and John Rowley, the Petitioners' witnesses, demonstrated that there is no
22 current need for additional airporter service based in part on the large amount of
23 unused equipment the Petitioners have, which is available to serve the public need
24 should it arise. Further, the Petitioners both reasonably hold out their service to
25 the public by advertising through many mechanisms, including travel agent
26 promotion programs.

- Replace Finding of Fact No. 4 with the following:

 Gray Line of Seattle provides service to the satisfaction of the Commission
because the scope and nature of its services meet the public needs for airporter
service between Sea-Tac Airport and specified downtown Seattle hotels. Gray
Line also demonstrated that it has a superior safety program, excellent
maintenance procedures and facilities, extensive experience, and sufficient
capacity, and that it has provided many years of satisfactory service.

- Replace Finding of Fact No. 5 with the following:

 Shuttle Express provides service to the satisfaction of the Commission because it
has a superior safety program, excellent maintenance procedures and facilities,

1 extensive experience, and sufficient capacity, and has provided many years of
2 satisfactory service.

- 3 • Replace Conclusion of Law No. 2 with the following:

4 SSS is not fit, willing, and able to provide the services requested under
5 Chapter 81.68 RCW and Chapter 480-30 WAC.

- 6 • Replace Conclusion of Law No. 3 with the following:

7 The existing certificate holders serving the requested territory provide service to
8 the satisfaction of the Commission in the territory in which SSS proposes to
9 operate, and it is therefore improper to grant overlapping authority to SSS under
10 RCW 81.68.040.

- 11 • Replace Conclusion of Law No. 4 with the following:

12 It is in the public interest and required by the public convenience and necessity to
13 deny SSS a certificate to provide service as an auto transportation company.

- 14 • Add the following new Conclusion of Law No. 5:

15 SSS has failed to demonstrate that there is a public need for its proposed services.

16 **V. THE COMMISSION SHOULD GRANT ORAL ARGUMENT IN THIS CASE**

17 The Commission may hear oral argument on a petition for review where it "will
18 assist the Commission in making its decision." WAC 480-09-780(5). In this case, oral argument
19 would help the Commission understand how the *Initial Order's* conclusions depart from
20 established precedent by changing the regulation of bus certification in Washington. In
21 particular, the *Initial Order's* grant of SSS's application based on such an inadequate record
22 effectively eliminates the qualified monopoly guaranteed by RCW 81.68.040. The outcome of
23 this proceeding is therefore important for all bus certificate holders throughout Washington.
24 Oral argument will help the Commission's understanding of the issues before it decides to act on
25 this critical issue affecting property rights of existing certificate holders.

26 **VI. CONCLUSION**

Briefly stated, the *Initial Order* granted SSS's despite its total lack of experience,
preparation, or financial resources based on the testimony of Mr. Valentinetti's friends and one of
his employees that the existing certificate holders have difficulty meeting demand a handful of

1 days out of the year. This is plainly does not meet the required three-part test, and it unfairly
2 compromises the Petitioners' property rights in their own certificates.

3 In any case, if the Commission looks at need only as ensuring excess capacity in
4 periods of extraordinary demand, it is easy to conclude that a little more is a little better. The
5 practical consequences of such an approach, however, particularly with a door-to-door service
6 vans or autos, would be a multitude of small operators. The Commission would then be charged
7 with regulating with what looks more like a taxi cab market, rather than a common carrier
8 market, which is likely a task beyond the Commission's resources.

9 Even if the Commission were somehow to find that creating a taxi cab like
10 regulatory environment were in the public interest, the bus statutes do not allow it to do so. The
11 Commission must find, in addition to need, that the services of existing carriers are somehow not
12 satisfactory. This threshold is much higher than the initial order seems to recognize, and is
13 certainly not met with a mere showing of need, as the initial order has done.

14 For these reasons, the Commission should reverse the *Initial Order* and deny the
15 application of SSS by adopting the following conclusions of law and findings of fact proposed
16 above.

17 DATED at Seattle, Washington, this _____ day of October, 2001.

18 MILLER NASH LLP

19
20
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26
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