

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In re Application No. D-079145 of)	DOCKET NO. TC-030489
)	
SEATAC SHUTTLE, LLC, d/b/a)	ORDER NO. 03
SEATAC SHUTTLE,)	
)	FINAL ORDER ON
for a Certificate of Public)	ADMINISTRATIVE REVIEW;
Convenience and Necessity to)	GRANTING MOTION TO STRIKE;
Operate Motor Vehicles in)	DENYING MOTION TO RESPOND;
Furnishing Passenger and Express)	AFFIRMING AND ADOPTING
Service as an Auto Transportation)	INITIAL ORDER; GRANTING
Company)	APPLICATION
.....)	

Synopsis: *This order grants an application for new authority to operate an airporter bus service between Whidbey Island and the Seattle-Tacoma International Airport. The order grants a protestant’s motion to strike portions of applicant’s answer to the petition for administrative review, denies the opportunity to respond to stricken material, and denies the protestant’s petition for administrative review.*

I. INTRODUCTION

1 This matter was heard upon due and proper notice to all interested parties before Administrative Law Judge Karen M. Caillé on June 24 and July 2, 2003, in Oak Harbor and Olympia, Washington, respectively.

2 **Nature of Proceeding.** This is an application by SeaTac Shuttle, LLC, d/b/a SeaTac Shuttle (SeaTac Shuttle or Applicant) for authority to operate “airporter” passenger bus service between Oak Harbor and the Seattle-Tacoma International Airport, serving intermediate points on Whidbey Island.

3 **Procedural History.** SeaTac Shuttle filed application No. D-079145 on April 7, 2003, to provide airporter service between Oak Harbor and the Seattle-Tacoma

International Airport. Shuttle Express d/b/a Shuttle Express (Shuttle Express) and Wickkiser International Companies, Inc. d/b/a Airporter Shuttle (Airporter Shuttle or Protestant) filed timely protests to the application.

4 SeaTac Shuttle and Shuttle Express stipulated to an amendment to the application that would narrow and clarify the authority it seeks, eliminating potential overlap of service with Shuttle Express. Based on the amendment, Shuttle Express withdrew its protest.

5 Administrative Law Judge (ALJ) Karen M. Caillé convened evidentiary hearings in Oak Harbor on June 24, 2003, and in Olympia on July 2, 2003. The hearing produced a transcript of 478 pages and 20 exhibits, including testimony from 15 witnesses.

6 **Initial Order.** The presiding ALJ entered an initial order on September 8, 2003, that proposed to grant the application, as amended.

7 **Post-order process.** Protestant Airport Shuttle petitioned for administrative review, contending that the initial order erred in its determination of need, in its determination of protestant's failure to provide service to the Commission's satisfaction, and in its failure to find that a grant of authority would operate to the detriment of the traveling public. Applicant and Commission Staff answered; protestant moved to strike a portion of the applicant's answer; applicant and Commission Staff answered the motion.

8 **Appearances.** John J. Solin and Michael Lauver, President and General Manager, represented Applicant SeaTac Shuttle. David L. Rice, attorney, Seattle, represented Protestants Shuttle Express and Airporter Shuttle. Mary Tennyson, Sr. Asst. Atty. Gen., represented Commission Staff at the hearing; Shannon Smith, Asst. Atty. Gen., represented Staff in post-hearing process.

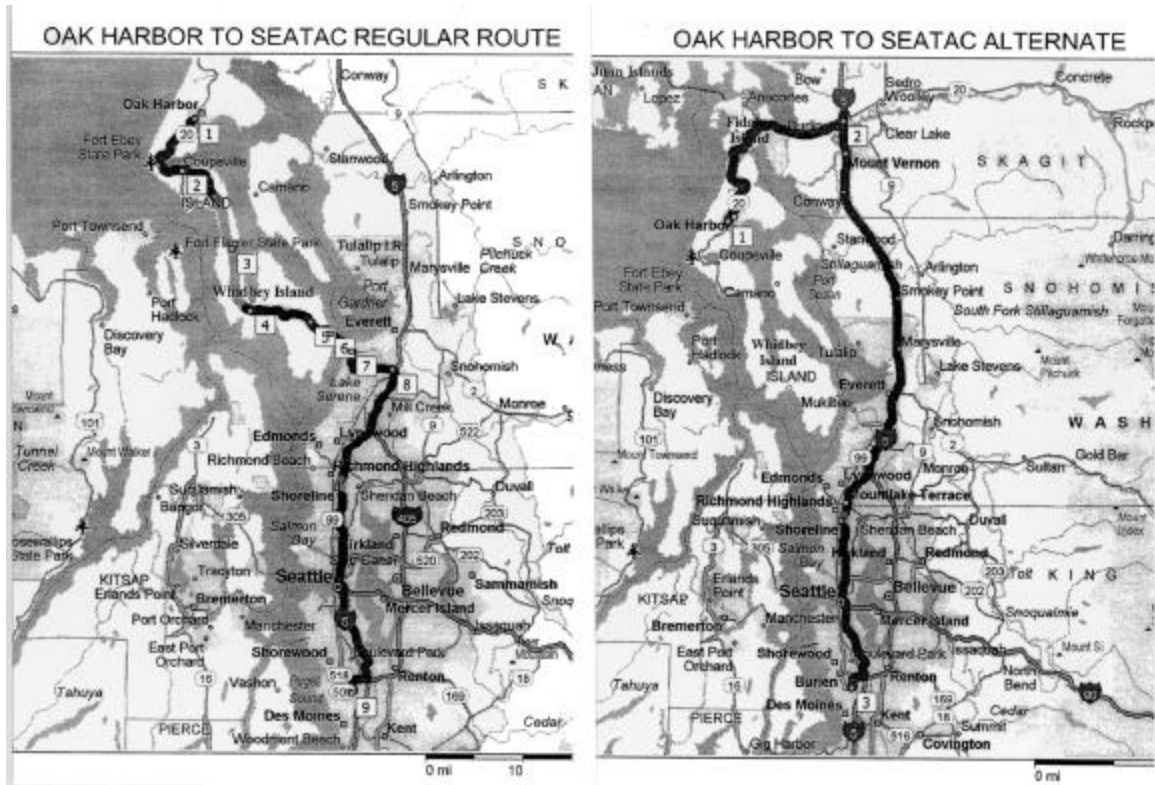
II. MEMORANDUM

9 **Background.** Whidbey Island is an island in Puget Sound, located north and west of Seattle. The communities of Oak Harbor and Coupeville, among others, are situated on the island. The island is also the site of the Whidbey Island Naval Air Station, a military base.

10 The island has road access to the mainland at its north end by bridge, and at its south end by ferry across relatively narrow waters of Puget Sound. The ferry serves between the communities of Clinton, on Whidbey Island, and Mukilteo, on the mainland. The Seattle-Tacoma International Airport (“Sea-Tac”) at Sea-Tac, Washington, south of Seattle, is the principal metropolitan airport serving air passengers to and from Whidbey Island.

11 **The Application.** On April 7, 2003, SeaTac Shuttle filed an application that requests authority to provide door-to-door passenger service, by reservation only, between Oak Harbor and the Seattle-Tacoma International Airport via SR 20 and SR 525 to the Clinton-Mukilteo Ferry via SR 525, SR 526, Interstate 5, direct to SeaTac with pickup points within 1 mile of SR 20 and SR 525. Shuttle Express and Airporter Shuttle protested the Application.

12 Figure 1, below (pages from the application) illustrates the applicant’s principal and alternate proposed routes.



13 Shuttle Express operates between Mukilteo and Sea-Tac, also serving intermediate points, but serves no points on Whidbey Island. Its service overlaps with the Applicant's request to serve points within one mile of SR 20 and SR 525 from Mukilteo to Interstate highway no. 5. On June 24, 2003, Applicant agreed to amend its application to forego this overlapping service. Shuttle Express agreed to withdraw its protest upon acceptance of the stipulated amendment.¹

14 Airporter Shuttle provides frequent service between Oak Harbor and SeaTac Airport by way of the Deception Pass bridge and Mount Vernon, Skagit County.² In Mount Vernon, passengers bound to or from Oak Harbor change buses. Airporter Shuttle does not provide service south of Oak Harbor on Whidbey

¹We will use the term "protestant" in this order, without further description, to refer to Airporter Shuttle, the remaining active protestant.

²The applicant seeks authority to use this "northern" route through Anacortes and Mount Vernon as an alternate—without stops or changes of bus—when service on its regular route is interrupted.

Island, although it possesses authority to do so. No existing company offers airporter service to that portion of the requested territory. Airporter Shuttle protests only the Oak Harbor portion of the authority sought in this application.

15 **The Issues.** The State of Washington regulates entry into the airporter auto transportation (bus) business through the provisions of Chapter 81.68 RCW. Among other things, the law provides that the Commission may not grant an application for authority to serve in a territory served by another carrier until after a hearing in which it finds (1) that the new service is required by the public convenience and necessity; and (2) that the existing carrier will not serve to the Commission's satisfaction.³ In addition, the Commission examines an applicant's regulatory and financial fitness to conduct the proposed operations⁴ and considers whether the proposal is consistent with the public interest.⁵

16 **The Evidence.** The applicant and the protestant both presented witnesses addressing the issues. Protestant contests the validity of the findings of fact and the application of specialized law to the facts, as found.

³This application is governed by RCW 81.68.040, which reads in part as follows:

No auto transportation company shall operate for the transportation of persons, and baggage, mail and express on the vehicles of auto transportation companies carrying passengers, for compensation between fixed termini or over a regular route in this state, without first having obtained from the commission under the provisions of this chapter, a certificate declaring that public convenience and necessity require such operation; ... The commission shall have power, after hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the commission, and in all other cases with or without hearing, to issue said certificate as prayed for; or for good cause shown to refuse to issue same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate to such terms and conditions as, in its judgment, the public convenience and necessity may require.

⁴ Consistent with the Commission's rules for auto transportation companies in Chapter 480-30 WAC, the Commission considers an applicant's financial fitness, and its fitness generally to provide the service for which it seeks authorization.

⁵See, *RCW 80.01.040(2)*.

- 17 **The Initial Order.** The initial order proposed that the application be granted, finding that the applicant had demonstrated that the service was required by the public convenience and necessity, that it was consistent with the public interest, and that the existing carriers failed to provide service to the satisfaction of the Commission. Protestant Airporter Shuttle petitioned for administrative review, opposing the result of the order; the Applicant and Commission Staff both responded in support of the initial order.
- 18 **Motions to Strike Portions of the Applicant's Answer to the Petition for Administrative Review and to Allow a Response.** In responding to the petition for administrative review, the Applicant, which is not represented by an attorney, referred to actions that the Protestant had taken after the hearing, outside the record. Protestant moved to strike the references, arguing that the references are to facts that are outside the record. Protestant also moved for permission to respond to the off-record references, contending that the references so prejudiced respondent that it must be afforded the opportunity to respond, even if the references are stricken.
- 19 The Applicant did not oppose the motion to strike, but did oppose the motion for leave to respond. Commission Staff opposes both motions, the motion to strike because it is moot—all parties having acknowledged that the factual references were improper and should be disregarded—and the motion to respond because it is improper to respond to factual references that are disregarded.
- 20 The Commission grants the motion to strike and denies the motion to respond.
- 21 The Commission will not consider factual information that is not on the record of a proceeding. This is mandated by RCW 34.05.461(4), of the Administrative Procedure Act, and is a fundamental tenet of procedural due process. The Commission will not consider the representations of the applicant in its answer

to the petition. Because the Commission and all parties agree that the information may not be considered, the Commission grants the motion to strike.

22 Protestant asks leave to respond to the asserted factual information in the Applicant's answer, even though its motion to strike is granted. Protestant asserts that the statements of improper information so taint the record that mere deletion cannot cure the flaw. The Commission disagrees.

23 While the Applicant's representations of fact are improper, they are easily segregated from material the Commission is entitled to consider. Because the Commission will not consider any information that is not on the record or admitted by a party, the improper references pose no threat to the integrity of the proceeding. The opposite would be true if the Commission were to allow a response, but struck the original references. The Commission denies the motion for leave to respond.

Consistency with the public interest.

24 Protestant challenges the initial order on a basis that the Whidbey Island market is too small to support competing airporter services. This is essentially a challenge to the order's finding that the proposed service is consistent with the public interest, based on protestant's view that diluting the market with another provider would prevent both carriers from achieving revenues enabling the current level of service.

25 Protestant bases its contention on the evidence of its witness, Richard Johnson. The company predicts that customers would be worse off than at present if the application were granted, because neither company could support the existing frequency of service and any potential savings in travel time to and from the airport would be offset by the need for longer waits at the airport.

26 The initial order rejected this perspective, noting that the witness's study was based on protestant's costs, was not demonstrated to be reliable, and was self-serving in its conclusions.

27 The Commission rejects Protestant's challenge. The protestant's conclusion is speculative, its credibility was found lacking by the Administrative Law Judge, and it is based on Protestant's own costs and its own views of how to provide service and how that service is used. The documentation and the witness's testimony are not sufficient to demonstrate that a grant of additional authority would be contrary to the public interest.

28 The Commission does not find the Protestant's evidence persuasive, and does not find that a grant of additional authority would be contrary to the public interest.

Service to the Commission's Satisfaction.

29 Protestant contends that the initial order ignores evidence that it is serving to the Commission's satisfaction. It points to the contention that its service is economically feasible as it is structured; it argues that the Applicant's case is based on Protestant's providing continuing service; it fails to consider Oak Harbor's limited population and consequent limited ability to provide service; and it notes that the Applicant proposes only four round trips per day to the airport, which is fewer than Protestant offers.

30 The initial order demonstrates that it carefully considered the protestant's points, and rejected each of them. The order properly found that while the protestant's service is economically feasible, it is not a direct, expedited service that is consistent with the nature of airporter service.

31 The Commission rejects this challenge. The Commission has defined airporter service as a direct, premium service:⁶

Airporter service is commonly understood to be a premium service that is direct, expedited, and convenient. Convenience, directness, and speed are essential characteristics of such service.

32 The duration and the directness of the route are factors that the Commission does consider in determining whether an airporter service is operating to the satisfaction of the Commission. Here, the initial order properly found that the service is not satisfactory, given the alternatives.⁷

33 The initial order is correct and is clear in its analysis in finding that Protestant failed to provide service to the Commission's satisfaction. The test of satisfaction is an objective test, based on whether the service meets the needs of the public. *In re Bremerton-Kitsap Airporter, Inc., Application No. D-2444, Order M.V.C. No. 1357 (Aug. 1984).*

Public Convenience and Necessity.

34 The applicant presented the testimony of witnesses regarding shipper need, including the testimony of travelers and travel agents who are responsible for securing airporter transportation in conjunction with their clients' other transportation needs. The initial order found witnesses' testimony credible in statements that some passengers have experienced inconvenience with Airporter Shuttle's indirect route and required connection, and that other passengers have

⁶ *In re Application D-76533 of Pearson & Zepp d/b/a Centralia-SeaTac Airport Express, Order M.V.C. No. D-76553, Commission Order on Reconsideration (June 24, 1994, citations omitted).*

⁷ The Administrative Law Judge found that "Airporter Shuttle has struck a compromise between economics and public need, to the detriment of public need." Initial Order, paragraph 71.

been inconvenienced by Airporter's lack of service on Whidbey Island south of Oak Harbor.

35 Airporter Shuttle argues that this testimony does not demonstrate need for an additional carrier, and that the initial order's finding of need is arbitrary and capricious. The Commission disagrees.

36 The protestant concedes that it fails to serve portions of Whidbey Island south of Oak Harbor, which it is authorized to serve, and it declined to protest that portion of the application. Witnesses described need for service from that territory, and the finding of public convenience and necessity is proper for points within that territory.

37 Protestant contends that the witnesses' testimony is insufficient to support a need for two carriers serving Oak Harbor. An applicant need not meet that burden of proof. To prove a public need, an applicant must only demonstrate that the existing service fails to meet the reasonable needs of the traveling public, and that its service would meet those needs. There appears to be no mistake on witnesses' part, as Protestant charges, that Applicant proposes only a supplemental service. It was clear in the testimony of some of the supporting witnesses that they knew the uncertainties associated with a grant of authority.

38 Protestant challenges travel agent testimony of need for an additional carrier. Protestant contends that an applicant must provide testimony of a person who actually needs the service, and that a travel agent does not qualify. The Commission rejects this challenge.

39 While not the traveler, a travel agent is responsible in the direct course of her business for securing travel arrangements for her clients that include or involve the use of airporter bus services. The Commission has accepted such testimony in the past, and has rejected testimony of persons in the travel industry who

were not shown to have the responsibilities, the experience and the knowledge of travel needs of a travel agent.⁸ This record shows that by means of the responsibilities of her occupation, and her direct dealings with sellers and consumers of travel services, a travel agent has sufficient knowledge of the need for and availability of airporter service in the territory sought.

40 Protestant also challenges the testimony of need offered by Priscilla Heistad, Executive Director of the Oak Harbor Chamber of Commerce, contending that the testimony fails the test of personal knowledge. This witness had no personal experience with inadequate airporter service and described no deficiencies within her personal knowledge. The witness's statements, based on the witness's personal responsibilities with the Chamber and in the course of working with the business community, may be accepted only as statements of her sentiment, but not as proof of need for an additional carrier.

41 The evidence demonstrates that the more direct route proposed by the applicant avoids the need to wait for connecting bus service and avoids the uncertainties that such service poses.

42 The protestant's connecting service also uses a longer route than applicant's proposed direct service, which is inconvenient and takes 45 minutes longer than Applicant's proposed service between Oak Harbor and Sea-Tac. Protestant responds that the applicant's proposal, which relies on ferry service, is prone to delays and occasional service outages. Protestant challenges applicant's proposed time schedule as unrealistic in light of uncertainties due to traffic, ferry, and road conditions. The Commission notes that the applicant's testimony

⁸ See, e.g., *In re Application No. D-78932 of Valentinetti & Hartley, d/b/a Seattle Super Shuttle*, Docket No. TC-001566, Order Reversing Initial Order, Denying Application (Feb. 2002) (declining to rely on testimony of witness who had no demonstrated experience with the needs of the traveling public).

was treated as credible by the administrative law judge, and affirms the findings and conclusions relating to travel length and convenience.

43 Protestant challenges the testimony of supporting witnesses, urging that they support only a service that is supplementary to the protestant's existing service. Protestant contends that if the application is granted, its service will be uneconomical and could be discontinued, in which case the applicant's service would be insufficient.

44 The Commission rejects this argument. Some, but not all, of the supporting witnesses saw the proposed service as supplemental, but all of the applicant's witnesses supported the need for applicant's services. Protestant's evidence of the adverse economic consequences of the grant of a competitive service is not persuasive, as it is impossible to predict what consumer choices will be made and how each of the carriers will respond to those choices. What is clear on this record is that the existing carrier, without competition, chose to provide a circuitous route to its customers and to refuse to serve a portion of its territory.

45 Protestant contends that the initial order is arbitrary and capricious in its findings. Our review of the order finds that it painstakingly discusses the evidence, including the evidence cited by Protestant on review, considers the evidence offered by both parties, and states well-framed reasons for the findings it makes. This is the antithesis of "arbitrary and capricious."

46 An action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. *Rios v. Dep't of Labor & Indus.*, 145 Wash.2d 483, 501, 39 P.3d 961 (2002). "[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Rios*, 145 Wash.2d at 501, quoting *Hillis v. Dept. of Ecology*, 131 Wash.2d 373 at 383, 932 P.2d 139 (1997).

47 The initial order clearly weighs carefully the parties' arguments and the evidence relating to those arguments, analyzes the evidence, and reaches a conclusion supported by the evidence. It clearly cannot be characterized as arbitrary and capricious under the definitions applied in this jurisdiction.

48 **Adoption of the Initial Order.** The Commission affirms and adopts the initial order in this docket, including its findings of fact and conclusions of law, as the Commission's own for purposes of the proceeding. In doing so, the Commission grants the application and denies the challenges to the order that are contained in Protestant's petition for administrative review. The initial order is attached to this order as Appendix B, and is deemed modified to the extent necessary to reflect the findings, conclusions, and analysis that are set out in this Commission Final Order.

49 The Commission grants the application. Upon demonstration of compliance with pertinent administrative requirements, including the possession of insurance as required by law, the Commission will issue a certificate of public convenience and necessity as set out in Appendix A, attached to this order.

50 **Conclusion.** The Commission denies the petition for administrative review. The findings of the initial order are properly based on the record and reflect the credibility assessments of the administrative law judge. The conclusions of law are properly based on the findings of fact and on Commission precedent.

III. FINDINGS OF FACT

51 Having discussed above all matters material to this decision, and having stated the findings and conclusions, the summary findings of fact are set forth below. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions in this order are incorporated by this reference.

- 52 (1) On April 7, 2003, SeaTac Shuttle, LLC, d/b/a SeaTac Shuttle filed with the Commission Application No. D-079145 for a certificate of public convenience and necessity to operate motor vehicles in furnishing passenger and express service as an auto transportation company. The Application requests authority to provide door-to-door passenger service, by reservation only, between Oak Harbor and the SeaTac International Airport via SR 20 and SR 525 to the Clinton-Mukilteo Ferry via SR 525, SR 526, Interstate 5, direct to SeaTac with pickup points within 1 mile of SR 20 and SR 525.
- 53 (2) Shuttle Express d/b/a Shuttle Express (Shuttle Express) is an existing auto transportation company whose authority to provide door-to-door and scheduled service between Mukilteo and SeaTac Airport overlaps with the authority requested by SeaTac Shuttle.
- 54 (3) Wickkiser International Companies, Inc. d/b/a Airporter Shuttle (Airporter Shuttle) is an existing auto transportation company whose authority to provide door-to-door and scheduled service between Oak Harbor and SeaTac Airport overlaps with the authority requested by SeaTac Shuttle.
- 55 (4) Shuttle Express and Airporter Shuttle filed timely protests of the Application.
- 56 (5) On June 24, 2003, SeaTac Shuttle and Shuttle Express filed a stipulation in which SeaTac Shuttle narrowed and clarified the authority it seeks, essentially eliminating any overlap of service with Shuttle Express, and Shuttle Express withdrew its protest as long as the Commission approves the amended authority.

- 57 (6) The stipulation of SeaTac Shuttle and Shuttle Express is consistent with
the public interest and should be approved.
- 58 (7) Airporter Shuttle protests only the Oak Harbor portion of the authority
sought by SeaTac Shuttle.
- 59 (8) SeaTac Shuttle possesses sufficient financial resources to begin operations
and continue them for a reasonable period while its business is building.
- 60 (9) The testimony of Loretta Martin, William Bradkin, Diane Manninen, and
Katie Dickerson establishes that there is a need for SeaTac Shuttle's
proposed airporter-type service south of Oak Harbor between Oak Harbor
and the Clinton/Mukilteo ferry, and then non-stop to SeaTac.
- 61 (10) The testimony of William Bradkin, Sue Sebens, Greg Wasinger, Dave
Johnson, Priscilla Heistad, and Gary Brown establishes that there is a need
for SeaTac Shuttle's proposed airporter-type service between Oak Harbor
and the Clinton/Mukilteo ferry, and then non-stop to SeaTac.
- 62 (11) Airporter Shuttle does not provide service to the satisfaction of the
Commission for its Oak Harbor customers because the company's service
is not convenient, direct, or expeditious.
- 63 (12) SeaTac Shuttle is financially fit and capable of providing its proposed
service, and exhibits regulatory fitness.

IV. CONCLUSIONS OF LAW

64 Having discussed above all matters material to this decision, and having stated
general findings and conclusions, the summary conclusions of law are set forth
below. Those portions of the preceding detailed discussion that state conclusions

pertaining to the ultimate decisions in this order are incorporated by this reference.

- 65 (1) The Washington Utilities and Transportation Commission has jurisdiction over the parties to and subject matter of this application.
- 66 (2) The Stipulation fairly resolves the issues between Shuttle Express and SeaTac Shuttle and is consistent with the public interest.
- 67 (3) SeaTac Shuttle is fit, willing and able to provide the services requested under chapter 81.68 RCW and chapter 480-30 WAC.
- 68 (4) The existing certificate holder serving the requested territory does not provide service to the satisfaction of the Commission where SeaTac Shuttle proposes to operate and, therefore the Commission should grant overlapping authority to SeaTac Shuttle under RCW 81.68.040.
- 69 (5) It is consistent with the public interest and required by the public convenience and necessity that the Commission issue a certificate of public convenience and necessity to operate motor vehicles in furnishing passenger and express service as an auto transportation company to SeaTac Shuttle, LLC, doing business as SeaTac Shuttle to provide passenger service as set forth in Appendix A.
- 70 (6) Based on the above findings of fact and conclusions of law, the undersigned administrative law judge makes and enters the following order.

V. ORDER

THE COMMISSION ORDERS That

- 71 (1) The Commission grants Protestant's motion to strike portions of
Applicant's answer to the Petition for Administrative Review and denies
Protestant's motion to respond to the improper portions of the answer.
- 72 (2) The Commission denies the Protestant's Petition for Administrative
Review.
- 73 (3) The Commission grants application No. D-079145 of SeaTac Shuttle, LLC,
d/b/a SeaTac Shuttle for a certificate of public and necessity to operate
motor vehicles in furnishing passenger and express service as an auto
transportation company. Contingent on the Applicant's compliance with
pertinent provisions of Chapter 81.68 RCW and the rules of the
Commission governing auto transportation companies, the Commission
will issue to the Applicant a Certificate of Public Convenience and
Necessity to read in accordance with Appendix A, which is attached and
by this reference made a part of this order.

Dated at Olympia, Washington, and effective this 25th day of November 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

APPENDIX A

SeaTac Shuttle d/b/a
SeaTac Shuttle
1150 S.E. Dock Street, #201
Oak Harbor, WA 98277

PASSENGER SERVICE by reservation only:

BETWEEN: Oak Harbor and the SeaTac International Airport via SR 20, SR 525, the Clinton-Mukilteo Ferry, SR 525, SR 526, and Interstate 5. Door to door service in conjunction with the above route with pickup points on SR 20 and SR 525. Closed door service between Clinton and Sea-Tac.

ALTERNATE ROUTE: In the event that the Clinton-Mukilteo Ferry service is not available, or there are no other reservations for passengers on the above named route south of Oak Harbor, the company may for any individual trip elect to utilize the following alternate route: SR 525, SR 20, Interstate 5 via Burlington, with closed door service between Oak Harbor and SeaTac.

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APPENDIX B
INITIAL ORDER