BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC., Petitioner and Complainant, v. SPEEDISHUTTLE WASHINGTON, LLC, Respondent.	DOCKET NOS. TC-143691, TC-160516 & TC-161257
SPEEDISHUTTLE WASHINGTON LLC d/b/a SPEEDISHUTTLE SEATTLE, Complainant, v. SHUTTLE EXPRESS, INC., Respondent.	

POST-HEARING BRIEF OF

SPEEDISHUTTLE WASHINGTON, LLC

JUNE 19, 2017

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I. PRELIMINARY STATEMENT

A. Introduction and Summary

1 In 2013, the Commission, utilizing the discretion granted to it by the legislature pursuant to RCW 81.68.040, amended WAC 480-30-140, in order to clarify and streamline the application process, and promote competition in the auto transportation industry.[1]

2 Following that rulemaking, and in order to take advantage of the increased competition ushered in by the Commission therein, Speedishuttle Washington, LLC d/b/a Speedishuttle Seattle ("Speedishuttle") filed an application to provide door-to-door auto transportation service between Sea-Tac Airport and points in King County, Washington. Speedishuttle sought an unrestricted certificate under the revised rules to provide that service upon two bases: (1) service differentiation factors which it believed made its service different from that of the incumbent providers, and (2) Shuttle Express' historic failures to comply with Commission rules through use of independent contractors, which ultimately demonstrated that Shuttle Express was unable to serve the entire door-to-door market to the satisfaction of the Commission.

3 After a brief adjudicative proceeding on the application, the Commission ultimately agreed that Speedishuttle did not propose to provide the same service as Shuttle Express and granted Speedishuttle the unrestricted certificate it sought, expressly without reaching the issue of whether Shuttle Express had been providing service to the satisfaction of the Commission. Thus, Speedishuttle was issued Certificate C-65854: **to provide door to door passenger service between Seattle International Airport and points within King County** (as well as Charter and Excursion Services in the state of Washington).

[1] Order 04, n. 3.

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4 While Shuttle Express failed in its attempts to oppose the application as filed, in its latest transparent attempt to suppress competition, Shuttle Express now seeks, by this consolidated rehearing and complaint proceeding, to cancel that certificate, or alternatively restrict it in such a way so that there is no overlap between passengers who might use Speedishuttle's service and passengers who might use Shuttle Express' service.[2, 3] In order to accomplish that end, Shuttle Express has broadly charged that Speedishuttle made numerous misrepresentations to the Commission at the application hearing, and has also lodged repeated collateral attacks on the Commission's findings in Order 04 on the qualitative benefits of Speedishuttle's proposed service, as well as making overall collateral (and retroactive) attacks on the 2013 rulemaking. Nevertheless, the Commission has now appropriately limited the rehearing to deciding whether Speedishuttle was providing the service it proposed to provide at the application hearing and whether Shuttle Express will provide service to the satisfaction of the Commission.[4]

5 As demonstrated through the actual evidence of record, Speedishuttle has in fact provided the service it originally proposed to provide: door-to-door shared ride service between Sea-Tac Airport and points in King County, using 11-passenger Mercedes Sprinter shuttles equipped with free Wi-Fi and "Speedishuttle TV," offering reservation services via its website in the Japanese, Chinese, and Korean languages, and using some multi-lingual receptive team members. Speedishuttle has also largely implemented a departure time within 20 minutes, although it has been hampered in its ability to do so consistently by unanticipated obstacles and impediments at Sea-Tac Airport. Indeed, the only established exception to the service differentiation factors

[2] Petition for Rehearing, ¶ 1.
[3] As noted in Speedishuttle's Petition for Reconsideration, and as Shuttle Express should know the Commission has previously ruled that the kind of certificate restrictions Shuttle Express now seeks, which would be difficult if not impossible to enforce are against public policy. Order M.V.C. 1834, *In re San Juan Airlines, Inc. d/b/a Shuttle Express*, Hearing D-2566 (Aug. 1989).
[4] Order 08, ¶ 25.

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presented in Speedishuttle's original application testimony has been its subsequent decision to provide a walk-up counter at Sea-Tac, an issue whose regulatory definitional status was raised with Commission Staff before it was initiated. Thus, Speedishuttle has been fully consistent and forthcoming and the Commission's issuance of an unrestricted certificate should remain undisturbed by a ruling in this proceeding.

B. Shuttle Express: Failure to Serve the Market/Service not to the Satisfaction of the Commission

6 Through its consistent, decade-and-a-half plus use of independent contractors, even after committing, under oath, to follow Commission rules again and again, Shuttle Express has demonstrated that it is both unable to reasonably serve the market and that it is unwilling to comply with Commission rules if that compliance impacts cost structures or the speed or mode of its regulated service. As a result, in upholding the original grant of unrestricted authority to Speedishuttle, the Commission should now once and for all also hold that Shuttle Express has not provided service to the Commission's satisfaction and additionally issue a penalty to Shuttle Express to sanction it for its repeated, willful misconduct.

7 Finally, because Shuttle Express presented no evidence which can demonstrate that Speedishuttle has engaged in predatory pricing or that its approved flexible fares are below cost, the Commission should find that Shuttle Express has failed to demonstrate that Speedishuttle's pricing is unreasonable, insufficient, unremunerative, discriminatory, illegal, unfair, or tending to oppress Shuttle Express and dismiss the subjoined Complaint of Shuttle Express against Speedishuttle.

C. Procedural History Recap

8 On October 10, 2014, Speedishuttle Washington, LLC ("Speedishuttle") filed an application for an auto transportation certificate from the Washington Utilities and Transportation Commission to provide "[d]oor-to-door shared ride shuttle service between Sea-Tac Airport and points within King County." Both Shuttle Express, Inc. ("Shuttle Express") and Pacific Northwest Transportation Services, Inc. d/b/a Capital Aeroporter Airport Shuttle ("Capital Aeroporter") objected to the issuance of the applied-for certificate and fully participated in the subsequent brief adjudicative proceeding on Speedishuttle's application on January 12, 2015.

9 Following the hearing, on January 22, 2015, the Administrative Law Judge issued Order 02 overruling the objections of Shuttle Express and Capital Aeroporter and granting Speedishuttle's application.

10 On February 9, 2015, Shuttle Express sought to reopen the record to introduce evidence of a decline in passengers from 2012 to 2013 and 2013 to 2014, implicitly arguing (as it has up to and through testimony at the application rehearing[5]) that the market could not support another competitor.[6] Additionally, both Shuttle Express and Capital Aeroporter separately filed petitions for administrative review of Order 02. In its Petition for Administrative Review, in addition to arguing that service features cannot distinguish "the essential nature of the service actually provided" and that Speedishuttle's application should therefore be denied,[7] Shuttle Express requested that if the Commission did not sustain Shuttle Express's objection to the application, it should restrict Speedishuttle's certificate to both require Speedishuttle to deliver "on its guarantees to the satisfaction of the Commission" and to provide service to all customers

[5] Kajanoff, TR. 115:19 – 116:7.
[6] SE's Motion to Reopen, ¶ 21.
[7] SE's Petition for Administrative Review of Order 02, ¶ 26.

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requesting door-to-door service in its territory.[8] It also specifically asked the Commission to condition the grant of any certificate to Speedishuttle "upon Speedishuttle providing the features it now relies upon to distinguish its service," a condition the Commission expressly rejected in Order 04. *See, Shuttle Express Petition for Administrative Review*, ¶44, p. 13.

11 By Order 04, issued March 30, 2015, the Commission overruled the objections of Shuttle Express and Capital Aeroporter to Speedishuttle's application, denied the Petitions for Administrative Review and denied Shuttle Express' Motion to Reopen, ruling that the new evidence Shuttle Express sought to introduce had virtually no probative value on any factual issue.[9] Because Speedishuttle proposed to provide an unrestricted door-to-door service between Sea-Tac Airport and King County, this ruling also implicitly answered whether the Commission believed there were any concerns about sustainability, which the Commission was required to address pursuant to WAC 480-30-140(1)(b).[10] The Commission then granted Speedishuttle an unrestricted certificate to provide door-to-door auto transportation shared ride service between Sea-Tac Airport and points in King County, Washington. Notably, the Commission there pointedly declined to determine in Order 04 whether Shuttle Express had provided service to the satisfaction of the Commission, finding that unnecessary based on its findings that the service Speedishuttle proposed to provide was not the same service as that offered by Shuttle Express.

12 Shuttle Express and Capital Aeroporter next then elected not to appeal Order 04 to Superior Court. Speedishuttle was issued unrestricted Certificate C-65854 on April 13, 2015.

[8] Shuttle Express' Petition for Administrative Review, ¶ 48.
[9] Order 04, n. 7 ¶ 16.
[10] WAC 480-30-140(1)(b) states in pertinent part, "The commission will also consider whether increased competition will benefit the traveling public, including its possible impact on sustainability of service."

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13 A little more than a year after Speedishuttle commenced operating in Washington regulated service, on May 16, 2016, Shuttle Express filed the instant omnibus Petition "for Rehearing of Matters in re Docket No. TC-143691 and to Cancel or Restrict Certificate No. C-65854; Based Upon Mis-representations by Applicant, Error and Omissions in Prior Proceedings, and Changed Conditions Not Previously Considered; and Formal Complaint Against Speedishuttle Washington, LLC for its Rules, Regulations or Practices in Competition with Complainant that are Unreasonable, Insufficient, Unremunerative, Discriminatory, Illegal, Unfair, or Tending to Oppress the Complainant" (collectively "Petition for Rehearing and Complaint," or separately, "Petition for Rehearing" and "Shuttle Express' Complaint"). While the Petition for Rehearing and Complaint were awkwardly combined in the same docket, they were assigned separate docket numbers and subsequently consolidated into the current proceeding at the prehearing conference on August 2, 2016.

14 After rehearing was granted in Order 06 over Speedishuttle's strenuous objections, Speedishuttle sought administrative review of that Order, arguing, *inter alia*, that Shuttle Express was transparently attempting to protect a self-declared, quasi-monopoly through inflammatory and baseless accusations, procedural roadblocks and continued unrelenting relitigation of previously-resolved issues through a labyrinth of unfounded, shotgun, "moving target" assertions.[11]

15 However, in Order 08, entered on September 27, 2016, the Commission denied Speedishuttle's Petition for Administrative Review. Nevertheless, due to its ostensibly shared concern about whether rehearing would permit relitigation of the BAP, it also, in the Order, significantly limited the scope of that rehearing.[12, 13]

[11] Speedishuttle's Petition for Administrative Review of Order 06, ¶ 7.
[12] Order 08, ¶¶ 24-25.

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16 Finally, on December 1, 2016, Speedishuttle filed a Formal Complaint against Shuttle Express ("Speedishuttle's Complaint"), alleging that Shuttle Express' operations between January 16, 2014 and September 29, 2016 blatantly violated WAC 480-30-213 through continued use of independent contractor drivers and equipment and through unfiled ticket agreements providing commissions to hotel employees, in violation of RCW 81.28. On Speedishuttle's Motion and over Shuttle Express' objections, that proceeding was subsequently consolidated on January 5, 2017 with the proceeding on Shuttle Express' Petition for Rehearing and Complaint, by Order 12/05/02.

II. ISSUES PRESENTED IN THIS PROCEEDING

17 Based upon Shuttle Express' Petition for Rehearing and Complaint, as subsequently limited by Order 08, guided as well now by Speedishuttle's Complaint, this proceeding presents the following issues for determination by the Commission:

1) Whether Shuttle Express has ever established the alleged misrepresentations and false and misleading testimony by Speedishuttle upon which it based its Petition for Rehearing;
2) Whether, as provided in Order 08, "Speedishuttle is limiting the service it provides to the service and customer types described in the business model on which the Commission based its grant of authority;" [14]
3) Whether Shuttle Express provides service to the satisfaction of the Commission;[15]

[13] Which initial limitation was later expanded to include whether Shuttle Express has provided service to the satisfaction of the Commission when Order 08 was amended by Order 17 on April 3, 2017.
[14] Order 08, ¶ 25.
[15] Order 17, amending Order 08.

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3A) Whether Shuttle Express violated WAC 480-30-213 by providing auto transportation services in vehicles operated by non-employee drivers using non-owned vehicles;

3B) Whether Shuttle Express violated RCW 81.28.080 by making commission payments to hotel concierge staff without an approved ticket agent agreement on file with the UTC; and

4) Whether Speedishuttle has engaged in predatory pricing or offered fares below cost.

III. AUTHORITY AND ARGUMENT

A. False Pretenses: Shuttle Express Engineered a Rehearing Based on Allegations of Misrepresentations It Could Not, and Never Did, Subsequently Establish

18 Shuttle Express sold this entire rehearing to the Commission based upon a smattering of inflammatory allegations of lies and misrepresentations by Speedishuttle, all of which had supposedly hoodwinked this Commission into granting Speedishuttle's application. Understanding that these alleged misrepresentations were inaccurate at best, Speedishuttle initially objected to granting this rehearing on unfounded allegations in recognition that it would inevitably become an overwhelmingly expensive and protracted exercise. Nevertheless, the Commission granted the rehearing despite the objections that Shuttle Express had done nothing more than make unsubstantiated allegations, recycle previous arguments as "newly discovered evidence," and provide incompetent and conclusory statements in support,[16] concluding: "[w]e find that Shuttle Express's Petition alleges facts that, if true and known to the Commission at the time of the previous hearing, may have impacted the Commission's ultimate decision.

[16] *See* Speedishuttle Washington, LLC's Answer to Shuttle Express' Petition to Rehear Application Docket TC-143691.

Accordingly, we conclude that Shuttle Express's Petition for Rehearing should be granted."[17] The Commission, a full year or more later, is now in a position to judge whether Shuttle Express' allegations of fact have been substantiated and duly reject Shuttle Express' requested remedies because they were and remain totally unsubstantiated.

19 The "lies and misrepresentations" Shuttle Express intemperately alleged against its competitor can accurately be summarized as: 1) Cecil Morton lied to the Commission when he said Speedishuttle will not have walk-up service;[18] 2) Speedishuttle represented to the Commission that it would uniquely target an entire demographic of travelers who allegedly were not being met by Shuttle Express;[19] 3) Speedishuttle does not provide personal greeters;[20] 4) Speedishuttle has made no apparent effort to hire multilingual greeters;[21] 5) multilingual reservations can only be made by booking a reservation in advance on Speedishuttle's website,[22] 6) Speedishuttle might not be providing "working TV and Wi-Fi in all its vans,"[23] 7) Speedishuttle promised to increase the total number of travelers using door-to-door shared ride service from the airport,[24] and 8) Speedishuttle failed to implement its departure guarantee.[25] Now that the record is closed, as is discussed in detail below, the Commission can perceive these allegations for what they ultimately were: a false exercise made solely in attempt to suppress competition in the Sea-Tac airport ground transportation market and preserve Shuttle Express' self-described, "qualified" service monopoly.

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[17] Order 06, ¶ 8.
[18] Petition for Rehearing, ¶¶ 10-11.
[19] *Id*. at ¶ 14.
[20] *Id*. at ¶ 23(a).
[21] *Id*.
[22] *Id*. at ¶ 23(b).
[23] *Id*. at ¶ 23(c).
[24] *Id*. at ¶ 18.
[25] *Id*. at ¶ 23(d).

i. "Walk-up Service Factor"

20 As noted, Shuttle Express alleged that Cecil Morton lied to the Commission under oath when he testified that one of the factors which differentiated Speedishuttle's proposed service from that of Shuttle Express' service was that it would not provide walk-up service. As proof of that statement, Shuttle Express initially pointed to evidence that some five months later, Speedishuttle requested authority to perform walk-up service at the airport from the Port of Seattle. But since its Petition for Rehearing was filed, Shuttle Express has submitted absolutely zero corroborative evidence to establish that Mr. Morton's original testimony was intentionally false or misleading. Moreover, Shuttle Express expert Don Wood admitted that he had no basis to allege that Cecil Morton intended to deceive the Commission.[26]

21 While it is undisputed that Speedishuttle did in fact ultimately commence walk-up service several months after the application hearing, Speedishuttle also produced undisputed evidence establishing its innocent intent. Specifically, at the time of the application hearing, Mr. Morton did not intend for Speedishuttle to provide walk-up service because Speedishuttle was under the misconception that it would not be permitted to provide walk-up service at the airport regardless of the Commission's decision due to an exclusive concession agreement between Shuttle Express and the Port of Seattle which allowed only Shuttle Express to provide that service.[27] It was only after Speedishuttle's application hearing on January 12, 2015 that it learned, months later, through discussions with the Port of Seattle, that Shuttle Express' exclusive concession

[26] Wood, TR. 360:24-25.
[27] Roemer, Exh. HJR-1T at 38:9-10.

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agreement with the Port of Seattle had expired and provision of walk-up service was in fact possible.[28]

22 After learning that the Port of Seattle would actually permit walk-up service, Speedishuttle could simply have commenced the provision of walk-up service in the understanding that its door-to-door certificate was unrestricted. However, because Speedishuttle had originally indicated it did not plan to provide walk-up service, it assumed a more cautious approach, instead. That is, before commencing walk-up service, it first took the step of conferring, though its counsel, with Commission staff to ensure that it would be permitted to provide walk-up service under its certificate.[29] When Commission Staff indicated it believed Speedishuttle would be authorized to provide that service because Commission rules do not distinguish between pre-arranged and walk-up service only then did Speedishuttle seek approval from the Port of Seattle to provide walk-up service and obtain a kiosk to do so.[30]

23 Meanwhile, unlike Speedishuttle, whose plans were verbally vetted with the Commission Staff, Shuttle Express acted unilaterally to interfere with Speedishuttle's ability to provide walk-up service, both emailing the Port of Seattle to claim that Speedishuttle was prohibited from providing walk-up service by the Commission, and contacting the Commissioners to relay its complaints and characterizations of Speedishuttle's new service.[31] When those efforts were ultimately unsuccessful, it commenced this proceeding, now claiming that use of a walk-up kiosk, a factor never even discussed in the Commission's Final Order granting Speedishuttle's certificate, renders Speedishuttle's service the "same-service" as Shuttle Express.

[28] Roemer, Exh. HJR-1T at 38:10, 11.
[29] Roemer, Exh. HJR-1T at 38:11-20.
[30] Roemer, Exh. HJR-1T at 38:14-23.
[31] Exhibit D-1 to Declaration of Blair I. Fassburg in Support of Speedishuttle's Motion for Summary Determination.

24 In Order 04, the Commission first noted Shuttle Express' contentions that Speedishuttle's service features of complimentary Wi-Fi and television, multilingual website, use of multilingual personal greeters, and departure time guarantees were inconsequential and did not distinguish between Speedishuttle's proposed service and Shuttle Express' service.[32] The Commission there knocked down that argument, finding that Speedishuttle's multilingual business model alone distinguished it from Shuttle Express, which did not offer multilingual customer service, and moreover, that "the totality of **these** features demonstrate" that Speedishuttle's service is "substantially different from the existing service the objecting carriers offer."[33] Thus, the Commission specifically found that it was the features Shuttle Express claimed did not distinguish Speedishuttle's service which absolutely and ironically did differentiate its service. Moreover, the use of the word "these" by the Commission is critical in understanding what features differentiated Speedishuttle from Shuttle Express, because it could have referred to Speedishuttle's application testimony generally, but did not. Instead, it found that the specific features Shuttle Express identified in fact differentiated Speedishuttle's service. And because nowhere in **those** features was the provision of walk-up service mentioned, it appears incontrovertible that the Commission did not believe that whether or not Speedishuttle would provide walk-up service was important to its finding that Speedishuttle's service was not "the same."

[32] Order 04, ¶ 19 (which contains a discrete list of the features raised by Shuttle Express being discussed by the Commission).
[33] *Id*., ¶¶ 20-21 (emphasis added).

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ii. Representations that Speedishuttle would limit its service to an entire demographic of travelers who allegedly were not being served by Shuttle Express

25 Shuttle Express has also repeatedly charged that Speedishuttle bamboozled the Commission through disingenuous representations that it would uniquely target and limit itself to an entire demographic of travelers who were not being served by Shuttle Express. This argument is contravened by the testimony of Shuttle Express' witnesses, who do not claim Speedishuttle's service was supposed to be limited.[34] But nonetheless, if Speedishuttle had actually made such representations, it should be fairly easy to identify where it did so in the application hearing record. If it did not make such representations, then the Commission's findings that Speedishuttle's business model offered those benefits would constitute findings of the Commission. While Shuttle Express would undoubtedly prefer that this nuance be ignored, it is, in fact, critical. If Speedishuttle actually made such representations falsely it could be a factor in reconsideration of its application. However, if only the latter is correct, then Shuttle Express is once again making a collateral attack on the Commission's exercise of its legislatively-granted authority to make findings of fact within its realm of special expertise.

26 A thorough review of the application case record will readily demonstrate that Speedishuttle made no such representations to the Commission. Indeed, as noted by the Administrative Law Judge, "[w]e'll just state for the record that's not anywhere in the record up until this point. Speedishuttle never said that it was going to just stick to serving a specific subset. It was the Commission that brought that up in the orders."[35] Nevertheless, Shuttle Express' Petition for Rehearing and proffered testimony also demonstrate that this review is entirely unnecessary. In

[34] Kajanoff, TR. 435:8-20; Marks, TR. 583:24 – 584:13.
[35] Wood, TR. 303:19-25.

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its Petition for Rehearing, Shuttle Express argued, "[t]he only specific and credible evidence in the record supporting Speedishuttle's multilingual offering was its website, with pages that allow booking in Chinese, Japanese, and Korean. Evidence of multilingual greeters at the airport was weak to non-existent ('[w]e'll do our best to hire')."[36] Similarly, Wesley Marks testified, "[t]he only concrete evidence Speedishuttle presented on how it would serve the supposed [sic] unserved was the three links to booking pages presented in Chinese, Japanese, and Korean." [37]

27 It is certainly feasible that the Commission might find that Speedishuttle's multilingual features would demonstrate that its service would expand service to a new demographic. Indeed, it does exactly that. And in fact, there is Commission precedent to demonstrate that a new service which offers increased accessibility for non-English speaking customers justifies the issuance of an overlapping certificate.[38] However, again, because this was a finding of *the Commission* and not a representation by Speedishuttle, a significant portion of Shuttle Express' attacks on Speedishuttle are in fact nothing more than an untimely appeal, challenging yet again, the Commission's original rationale for granting Speedishuttle's application in March, 2015.

iii. Speedishuttle Unquestionably Does Offer Personal Greeters

28 Whether or not Speedishuttle actually provides personal greeters should be an even easier issue for resolution because not a single shred of evidence was presented to supply even an inference that Speedishuttle fails to supply greeters. Instead, the Commission has been offered sworn testimony from Jack Roemer, who testified that Speedishuttle typically does greet its pre-

[36] Petition for Rehearing, ¶ 15.
[37] Marks, Exh. WAM-1T at 10:1-3.
[38] *See* Order M.V. No. 148596, *In re Son M. Pae d/b/a Western Moving Co.*, Hearing E-78164 (Jun. 1995), (approving a household goods application over an incumbent's objection, without restriction, because the applicant's service offered the benefit of increased Korean-language accessibility).

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arranged passengers.[39] While they had some complaints about whether Speedishuttle was able to greet all of its passengers, even Shuttle Express witnesses who proffered testimony on this subject, Wesley A. Marks and Jason DeLeo, affirmed that Speedishuttle does provide personal greeters.[40] While Wesley A. Marks and Jason DeLeo offered qualitative critiques about whether Speedishuttle had adequate staffing to greet all of its incoming pre-arranged passengers, those critiques were both based upon a very narrow window of observation and, in the case of Mr. DeLeo, appear to be factually inaccurate and simply do not amount to evidence that Speedishuttle does not supply the complimentary greeters it always said it would.

iv. Speedishuttle Absolutely has Made Efforts to Hire Multilingual Receptive Team Members

29 Whether Shuttle Express' allegation that Speedishuttle misled the Administrative Law Judge and the Commission about its efforts to hire multilingual receptive teams is true should also be easy to resolve because, as Mr. Roemer testified[41] and Shuttle Express effectively (although indirectly) admits, Speedishuttle has actually hired multilingual receptive team members. As of September, 2016, those employees represented 14 non-English languages, and in response to Bench Request 3, Speedishuttle informed the Commission that as of May 15, 2017, Speedishuttle employed 19 multilingual employees, including drivers, greeters, and call center employees, who spoke 13 languages other than English.

30 While Shuttle Express' Petition for Rehearing offers the bold allegation that "Respondent has made no apparent effort to hire multilingual greeters"[42] which mantra is repeated throughout its witnesses' testimony, Shuttle Express' opening testimony admitted that Speedishuttle had hired

[39] Roemer, Exh. HJR-1T at 35:10.
[40] Marks, Exh. WAM-1T at 16:20,21; DeLeo, Exh. JD-1T at, 3:12, 13, 19, 20.
[41] Roemer, Exh. HJR-1T at 20:20-21; 23:10-11.
[42] Petition for Rehearing, ¶ 23(a).

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multilingual staff. Its witnesses then seek to downplay the significance of the languages spoken and efforts made to hire multilingual receptive team staff, inexplicably now complaining that Speedishuttle also hired employees who spoke only English. For instance, in his opening testimony, Wesley Marks discussed Speedishuttle's production to Shuttle Express of a list of the languages spoken by Speedishuttle employees.[43] Rather than acknowledging that list established Speedishuttle hired multilingual receptive team members and admitting its mistake, Mr. Marks modified the allegation by charging that the languages spoken somehow did not qualify as hiring multilingual receptive team members because they "do not reflect any effort to target unserved foreign passengers."[44] When asked about this testimony on cross-examination, Mr. Marks immediately backed off this criticism, denying that passengers who spoke the same languages of Speedishuttle's employees were, in effect, "the wrong kind of passengers."[45]

31 Shuttle Express attempted to further deflect evidence that Speedishuttle had in fact made efforts to hire multilingual receptive team members in Exhibit WAM-3T, in which Mr. Wesley Marks testified, "Mr. Roemer claimed that their Craigslist ads mention languages, but we could not validate that, except for the most current ad."[46] But when confronted on cross-examination with a Speedishuttle ad from Craigslist which expressed a preference for multilingual drivers, and the preferred languages of Chinese/Mandarin, German, Portuguese, and French,[47] Mr. Marks acknowledged he had in fact seen such solicitations.[48]

[43] Marks, Exh. WAM-1T at 9:12-13.
[44] Marks, Exh. WAM-1T at 9:13-15.
[45] Marks, TR. 588:9.
[46] Marks, Exh. WAM-3T at 19:1-2 (emphasis added).
[47] Exh. WAM-22X.
[48] Marks, TR. 591:22-25.

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v. Speedishuttle's Multilingual Reservations Work Precisely How Speedishuttle Said They Would

32 With respect to Shuttle Express' challenge as to Speedishuttle's application testimony about its multilingual website, Shuttle Express' challenge and arguments on rehearing amount to yet another collateral attack on the Commission's findings in Order 04.

33 Recall Shuttle Express claimed in its Petition for Rehearing that "[m]ultilingual reservations can only be made by booking a reservation in advance on the website. Given the essential nature of this service to the Commission's grant of authority and the misrepresentations by Respondent that are now evident, discovery is warranted on the issue of whether multilingual service is truly offered to any more than a *de minimis* number of Respondent's passengers."[49] In its testimony, however, Shuttle Express admits the irrefutable fact that Speedishuttle offers through its website a reservation portal for reserving service in Chinese, Japanese or Korean.[50]

34 Because it offers the precise service it said it would, and, as discussed above, Shuttle Express expressly acknowledged that the only representations made by Speedishuttle at the application hearing about multilingual services were the provision of a website in Chinese, Japanese and Korean and efforts to hire multilingual receptive teams, Shuttle Express' allegations about evidentiary misrepresentations on this point are fundamentally groundless and misguided. Moreover, any challenge about whether those features, which have in fact been provided by Speedishuttle, truly distinguish Speedishuttle's service from that of Shuttle Express, again constitute a collateral attack on the findings of the Commission about the nature of Speedishuttle's service. This is true regardless of the measurable number of multilingual passengers who have reserved service using Speedishuttle's website, and the immeasurable

[49] Petition for Rehearing, ¶ 23(b).
[50] Marks, Exh. WAM-1T at 10:12-14.

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number of foreign language passengers who have otherwise benefitted from use of Speedishuttle's foreign language websites, drivers and/or from receiving service from a multi-lingual receptive team member.

vi. Speedishuttle is Irrefutably Providing Free Wi-Fi and Speedishuttle TV

35 Shuttle Express also flatly questioned whether Speedishuttle was providing free Wi-Fi and Speedishuttle TV.[51] While Shuttle Express initially claimed it simply did not know whether Speedishuttle provided these service features, it would have been simple enough to ask that through discovery and then promptly acknowledge that Speedishuttle had actually provided free Wi-Fi and installed HD television sets and displayed Speedishuttle TV as it said it would once it received that verification. Instead, Shuttle Express has subsequently chosen to distort and/or obfuscate what these service features were proposed to be, and then mischaracterize data request responses by Speedishuttle in order to maintain a critique where none would otherwise validly exist.

36 Instead of propounding discovery addressing whether Speedishuttle actually offered Speedishuttle TV and free Wi-Fi on each of its vans and then addressing the responsive information by simply conceding that it does, Shuttle Express chose to serve overly burdensome data requests. For example, it sought "statistical data for each reservation or trip to or from Sea-Tac Airport including but not limited to [a lengthy list of data categories which included whether the passenger used Wi-Fi or watched TV]"[52] and further requested records to show when amenities such as TVs and Wi-Fi were installed, operated and used.[53] Reserving objections, Speedishuttle responded by providing the install date for Wi-Fi and TV as to each piece of

[51] Petition for Rehearing, ¶ 10.
[52] Exh. HJR-10.
[53] Exh. HJR-13 and Exh. HJR-14.

equipment.[54] Nonetheless, Shuttle Express witness Wesley A. Marks incredulously maintained under oath that "[Speedishuttle] denied any knowledge of the operability or real-world functioning of the Wi-Fi service"[55] and that as to whether the TV really worked, "[Speedishuttle] claimed to be clueless."[56] Again, this completely ignores the disconnect between its broad allegations and acknowledging what the evidence actually shows which is exactly what Speedishuttle represented on free Wi-Fi and Speedishuttle TV.

vii. Speedishuttle Never Promised it Would Increase the Total Number of Passengers Using Door-to-Door Shared Ride Service to and from the Airport

37 As noted above, Shuttle Express also alleged in its Petition for Rehearing "shotgun pleading" that Speedishuttle promised it would increase the total number of travelers using door-to-door shared ride service.[57] A review of the application case record once again demonstrates that Speedishuttle made no such promise and Shuttle Express has made literally no showing to establish that such a promise was ever made.

viii. Speedishuttle is Largely Meeting its Departure Time Commitment to the Commission Despite Significant Unforeseen Obstacles to Doing So

38 The final supposed misrepresentation by Speedishuttle relates to its commitment to depart the airport within 20 minutes of the passenger's arrival with greeter in the baggage claim. Speedishuttle concedes it does not publish a guaranteed departure time, but diligently attempts to maintain this departure time, with large success, nonetheless.[58] And this is true, despite confronting a gauntlet of impediments to obtaining permission to stage vehicles at the passenger

[54] Exh. HJR-14.
[55] Marks, Exh. WAM-1T at 8:5-6.
[56] Marks, Exh. WAM-1T at 8:17-19.
[57] Petition for Rehearing, ¶ 18.
[58] Roemer, Exh. HJR-1T at 29:11-14.

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pick up zone as Shuttle Express has been permitted to do and which would greatly assist in consistently meeting this departure interval proposal.[59]

B. The Commission's Finding that Speedishuttle Does not Provide the Same Service as the Incumbents Should be Affirmed and Speedishuttle's Certificate Should Remain Unrestricted

i. The Commission was Granted Discretion to Determine When to Authorize More than one Provider of Auto Transportation Services in the Same Territory

39 In these consolidated proceedings, as alluded to above, Shuttle Express has assumed the unwavering legal position that it is entitled to a service monopoly prohibiting any other door-to-door auto transportation company from operating as an auto transportation service in the same territory absent a finding that Shuttle Express failed to provide service to the satisfaction of the Commission.[60] Based upon this position, Shuttle Express avers that if Speedishuttle's service features have not attracted a new demographic of customers, then it is essentially the same service as that offered by Shuttle Express and thereby should not have ever been granted a certificate by the Commission.[61] Notwithstanding the fact that a post-application review of the effectiveness of service features in attracting a particular demographic of customers implicates a collateral attack on the findings of the Commission in originally granting the application, Shuttle Express' position on rehearing wholly misconstrues the broad discretion granted by the legislature to the Commission to formulate its own criteria for entry by an auto transportation company.

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[59] Roemer, Exh. HJR-1T at 29:15 – 30:2.

[60] *See*, Petition for Rehearing, ¶ 29 (arguing that the "[b]ecause the statute governing grants of overlapping auto transportation authority give qualified exclusivity to an incumbent certificate holder, the Commission must walk a fine line in interpreting and applying its new rules to ensure that it implements its policy goal of "facilitating the ability of other providers to enter the market" consistent with the limitations of RCW 81.68.040. Specifically, "when the applicant requests a certificate to operate in a territory already served by a certificate holder" it may grant the new authority "only when the existing auto transportation company will not provide the same to the satisfaction of the commission…")

[61] *See* Marks, Exh. WAM-1T at 22:19 – 23:2.

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40 The specific statute controlling entry for auto transportation companies, RCW 81.68.040, was expressly construed by the Washington Court of Appeals in *Pacific N.W. Transp. v. Utils. & Transp.*[62] That proceeding involved an application to provide auto transportation service by Sharyn Pearson and Linda Zepp d/b/a Centralia-SeaTac Airport Express, who proposed to offer a direct service from Thurston County to Sea-Tac Airport, which the incumbent provider, Capital Aeroporter, had not been providing. Based on evidence that Capital Aeroporter's service was not as direct, expedited or convenient as the public expects, the Commission granted the application, finding that Capital Aeroporter would not provide service to its satisfaction. Capital Aeroporter challenged that finding both in the superior court and the Court of Appeals as to whether its failure to provide a more direct and convenient service was sufficient to establish it had not provided service to the satisfaction of the Commission.[63] The Court of Appeals ultimately affirmed the Commission's order, holding that, in determining whether a carrier will provide service to the satisfaction of the Commission, the Commission was granted the discretion to do so in any logical and reasonable way supported by the evidence.[64] Importantly, the Court of Appeals doubled down on that interpretation, rejecting a point made in the concurring opinion which had argued that past conduct should not be sufficient to judge future conduct when dealing with the issue of a new type of service, holding simply "[t]he Commission has fact-finding discretion, which it may exercise in any way supported by the record."[65]

[62] 91 Wn. App. 589 (1998).
[63] *Id.*
[64] *Id.* at 597.
[65] *Id.* at 602 (also noting that the proposed distinction is inconsistent with the public interest because it would leave existing carriers with little incentive to provide satisfactory service until challenged by a potential competitor).

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41 Based upon that broad discretion, and in order to provide some objective criteria upon which it would be exercised,[66] otherwise clarify and streamline the application process, afford companies rate flexibility, and promote competition in the auto transportation industry,[67] the Commission issued General Order R-572 in Docket TC-121328 in 2013 (the "2013 Rulemaking").

42 The 2013 Rulemaking (ironically now for this proceeding) sought to streamline the application process in a variety of ways, one of which significantly was to limit the issues to be heard in an auto transportation application docket. Through its revisions to WAC 480-30-116(3), for example, the Commission limited the issues in a contested application to "whether the objecting company holds a certificate to provide the same service in the same territory, whether the objecting company provides the same service, and whether an objecting company will provide the same service to the satisfaction of the commission." The Commission subsequently interpreted this provision in this proceeding as not requiring a determination of whether the objecting incumbent provider was providing service to the satisfaction of the commission if the Commission first found that the applicant did not propose to provide the same service as the objecting incumbent.[68] Thus, if the Commission, in enacting its broad discretion as the fact-finder, concludes that an applicant does not propose to provide the same service as that provided by the incumbent, the application may be granted without a further finding that the objecting incumbent will not provide that service to the Commission's satisfaction, even if the services overlap.

[66] Order 04, ¶ 32.
[67] Order 04, n. 3.
[68] Order 04, ¶ 17 (stating "[a]ll three elements must be present for the Commission to deny an application to serve a given route.").

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43 Shuttle Express now directly turns this premise on its head, claiming that even though the Commission found Speedishuttle did not propose to provide the same service as Shuttle Express, because Speedishuttle provides service to passengers who could have used Shuttle Express, the Commission was required to first find that Shuttle Express would not provide that service satisfactorily, consistent with its self-serving rendition of the overarching "public interest."

44 This position is fundamentally flawed for a number of reasons. For one, this argument conspicuously ignores that, in formulating the criteria for evaluating whether an applicant proposed to provide the same service, by revised rule, the Commission expressly included criteria by which it previously judged whether an incumbent provided service to the satisfaction of the Commission, in relying precisely upon that same administrative discretion broadly granted to it by the legislature.

45 Those objective, non-exclusive criteria for determining whether one of the existing certificate holders provides the same service relied upon by the Commission in granting Speedishuttle's certificate are set forth in WAC 480-30-140(2). The criteria, among other things, consider:

> (a) The certificate authority granted to the existing companies and whether or not they are providing service to the full extent of that authority;
> (b) The type, means, and methods of service provided;
> (c) Whether the type of service provided reasonably serves the market;
> (d) Whether the population density warrants additional facilities or transportation;
> (e) The topography, character, and condition of the territory in which the objecting company provides service and in which the proposed service would operate;
> (f) For scheduled service, the proposed route's relation to the nearest route served by an existing certificate holder. The commission views routes narrowly for the purpose of determining whether service is the same. Alternative routes that may run parallel to an objecting company's route, but which have a convenience benefit

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to customers, may be considered a separate and different service; and

(g) Door-to-door service and scheduled service in the same territory will not be considered the same service.

46 As discussed above, in *Pac N.W. Transp.*, the UTC found that the protestant would not provide service to the satisfaction of the Commission because it did not offer a more direct route for passengers travelling between Sea-Tac Airport and Thurston County. The Court of Appeals affirmed that decision as being fully within the Commission's discretion. The Commission, to this day, continues to evaluate the directness of routes for purposes of satisfactory service,[69] but also now distinguishes among services using similar criteria in WAC 480-30-140(2)(f). This overlap of criteria again demonstrates that in formulating and implementing its "same service" criteria, the Commission relied upon the same legislatively-authorized broad discretion it previously exercised under prior rule when determining whether a new service would have been provided to the Commission's satisfaction. As a result, contrary to Shuttle Express' mantra, it is highly doubtful that the Commission could run afoul of that discretion when granting an application based upon its articulated same service standards, as expressly and/or implicitly repeatedly contended to the contrary by Shuttle Express.

47 Additionally, Shuttle Express' transparent argument that RCW 81.68.040 could not possibly authorize the Commission to certificate more than one provider who offers "functionally the same" or "essentially the same" service is not supported by the Commission's prior interpretations of the very statutory language by which Shuttle Express claims it is entitled to a (non-existent) service monopoly.

[69] WAC 480-30-140(3)(iii).

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48 In short, Shuttle Express' overarching theory as to presumptive, exclusive or "qualified" service territories under RCW 81.68.040 is fundamentally flawed as a matter of law. *In fact, there is no inherent or assumed monopoly service territory granted an incumbent provider auto transportation company under that statute*. Indeed, as the Commission has recently clarified in interpreting overlapping service grants and entry under RCW 81.77.040, in almost identical language to RCW 81.68.040:

> To issue a certificate to an additional service provider, the Commission must find that the existing 'company *or companies* serving the territory will not provide service to the satisfaction of the commission.' (Emphasis added.) The legislature obviously contemplated that more than one company could serve a particular territory, and thus RCW 81.77.040 cannot be interpreted to establish a presumption of a single monopoly provider. A plain reading of the language, moreover, indicates that any lack of Commission satisfaction with how the incumbent company provides service – not just with 'flawed' or 'deficient' service – would justify authorizing an additional provider.
>
> The legislature knew how to confine the Commission's inquiry to service quality provided by a single provider if it had intended to do so. The statutory provision limiting competitive entry for ferry service, for example, states that the Commission may not grant a new entrant such authority 'unless the existing certificate holder has failed or refused to furnish reasonable and adequate service.' We interpret as intentional the difference in the comparable language in these two sections of RCW Chapter 81 and construe RCW 81.77.040 accordingly. The legislature did not create a 'presumption' of monopoly or limit competitive entry to instances of service failures in that section. Rather, it has given the Commission discretion to determine the appropriate number of solid waste collection service providers who should be authorized to operate within a particular service territory consistent with the public interest.[70]

49 RCW 81.68.040 simply does not corroborate Shuttle Express' unceasing rendition of entry bars it would like this Commission to employ.

[70] Citing *Pacific NW Transp. Servs. v. WUTC*, 91 Wn. App. 589, 597, 959 P.2d 160 (1998) (interpreting the same language in RCW 81.68.040 as not specifying how the Commission is to make the determination of whether the existing companies will not provide service to the satisfaction of the Commission). Order 10, *In re Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington*, TG-120033 (July 2013), ¶¶ 7, 8.

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ii. There is Similarly No Basis for Limiting Service to Customer Types

50 Moreover, contrary to Shuttle Express' arguments that a new provider must naturally be limited to serving a different discrete subset of the population than is served by the incumbent, the criteria used to evaluate whether an applicant proposed to provide the same service as the incumbent provider signify that the Commission may authorize a new provider as "not the same" despite the fact that an incumbent provider may well be able to provide service to the same passengers. For example, WAC 480-30-140(2)(f) authorizes the Commission to consider convenience benefits, such as the route taken, when it comes to scheduled service. Thus, scheduled service providers may face overlapping competition from other scheduled service providers who opt to provide more convenient routes (e.g., non-stop service) despite the fact that both could possibly transport the same passengers. Additionally, the Commission is permitted to consider the type, means and methods of service provided, whether the population density warrants additional facilities or transportation, and whether the type of service provided reasonably serves the market. WAC 480-30-140(2)(b)-(d). Each of these factors contemplates the possibility that the applicant will compete with an incumbent, while conversely there are no rules suggesting that an applicant who receives a certificate under WAC 480-30-140(2) must not transport passengers who could have been transported by the incumbent. Thus, it seems obvious that the Commission's rules authorize competition for passengers served by the incumbent even when the Commission grants a certificate to provide a different service than the incumbent.

iii. Pursuant to Commission Rules and the Commission's Findings in Order 04, Speedishuttle is not in Fact Providing the Same Service as Shuttle Express

51 As discussed above, the Commission found in Order 04 that based upon the totality of the following features, Speedishuttle was not proposing to provide the same service as Shuttle

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Express: "complimentary onboard Wi-Fi and television, a multilingual website, the use of multilingual personal greeters, and departure time guarantees."[71] As has been well established in this proceeding, Speedishuttle is providing the services it said it would. Thus, there is no basis upon which the central findings in Order 04 should now be overturned. Nonetheless, Shuttle Express has made a number of arguments as to why Speedishuttle's service is the same as Shuttle Express, including its unrelenting argument that Speedishuttle's service features do not differentiate it, that passengers who use Speedishuttle could have used Shuttle Express, and that Speedishuttle engages some of the very wholesalers who once used Shuttle Express. As discussed below, these arguments once again fail to establish that that Speedishuttle's service is the same as Shuttle Express.

a. Again, this is a Collateral Attack on Order 04

52 To start, in attempting to prove that Speedishuttle's service features do not differentiate it from Shuttle Express, it is inarguable that this constitutes a direct, collateral attack on the Commission's findings in unappealed Order 04, which the Commission ruled in Order 08 it would not permit, and rightfully so. The post-application challenge Shuttle Express is making, by which every separate finding of the Commission is tested, reanalyzed and then challenged on rehearing, is against public policy since allowing these challenges would invite rehearing on every finding of fact in potentially every Final Order the Commission enters. Moreover, as pointed out by the Commission Staff attorney in his cross-examination of Don J. Wood, there are no Commission Staff members responsible for such a retrospective institutional review,[72] and

[71] Order 04, ¶ 19.
[72] Wood, TR. 356:20 – 359:9.

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thus the Commission expects its findings of fact to be final absent subsequent proof of dishonest or misleading motive to the contrary.

b. Transporting the Traveling Public Does not Make Speedishuttle's service the same as Shuttle Express'

53 Second, as a factual matter, Shuttle Express' attempt to establish that Speedishuttle is providing the same service as Shuttle Express completely disregards the Commission's findings and rules in favor of its own unilateral interpretation. For example, Shuttle Express facilely claims that Speedishuttle is providing the same service as Shuttle Express because it is not targeted to a subset of consumers, but instead targets the general traveling public to the feigned surprise of Shuttle Express.[73] This disingenuous argument ignores that the Shuttle Express always understood Speedishuttle would serve the general public and in fact previously argued for a certificate restriction that would require Speedishuttle to provide service to every person in Speedishuttle's service territory that requested it rather than one limiting it to serving particular demographics.[74] Also, contradicting this supposed surprise is testimony by Shuttle Express' witnesses who did not believe Speedishuttle would serve only a specific subset of the general public.[75] This argument also disregards that WAC 480-30-216(1) prohibits any company operating motor vehicles under WAC 480-30 in a way which discriminates among passengers by race, color, creed or national origin. Thus, the Commission must have understood that Speedishuttle would serve the general public and made its finding that Speedishuttle did not propose to provide the same service without regard to whether that service would be limited to a particular subset of the general population. And, as discussed above, the Commission was

[73] Petition for Rehearing, ¶ 20.
[74] Shuttle Express' Petition for Administrative Review, ¶ 48.
[75] Kajanoff, TR. 435:8-20; Marks, TR. 583:24 – 584:13.

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legally authorized to permit Speedishuttle to serve the public without reaching a finding of whether Shuttle Express provided or would provide service to the Commission's satisfaction.

c. Shuttle Express' Market Data Analysis is not Probative of Any Fact and Cannot Establish Passenger Demographics Served Whatsoever

54 Shuttle Express next takes this flawed argument a step further, claiming that in addition to serving the general public, Speedishuttle's service does not serve previously unserved passengers in meaningful numbers. By this argument, Shuttle Express claims that had Speedishuttle's service truly increased access to a new and previously unserved demographic, there surely should have been an increase in the aggregate number of persons transported when combining the trip counts for Speedishuttle and Shuttle Express, but that instead the total number has declined.[76] This premise is erroneous and simply cannot support the conclusion Shuttle Express would have us draw from it.

55 The data Shuttle Express actually relies upon here is trip data taken from the Port of Seattle for both Speedishuttle and Shuttle Express.[77] While it is true that the combined trips between Shuttle Express and Speedishuttle in 2016 decreased relative to Shuttle Express' total trips in 2015, the data provided is not meaningful as trip totals are not a reliable measure of passengers.

56 These data are simply not probative because Shuttle Express includes <u>all</u> its trips in its data, not just door-to-door trips.[78] Whether Shuttle Express lost scheduled service trips and/or charter trips is irrelevant to the analysis, and without separating numbers, absolutely no meaningful comparison between Shuttle Express' door-to-door service and Speedishuttle's door-to-door service can be made.

[76] Petition for Rehearing, ¶25; WAM-1T. 11:1 – 12:15.
[77] Marks, TR. 593:19-25.
[78] Marks, Exh. WAM-1T at 11:4-8.

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57 Trip numbers are also truly useless data points for comparisons because each trip has a variable number of passengers, and any company increasing its efficiencies as Speedishuttle is, actually increases total passenger counts more than trip counts and its passenger counts can actually increase while trip counts decline.[79]

58 Perhaps more importantly, trips are not a measure of passenger demographics at all. Nothing about trends in trip counts can tell you whether the passengers are tourists, non-English speakers, tech-savvy, or implicate any other relevant demographic. Indeed, within the total number of passengers traveling at any point in time, one demographic might actually be increasing while others are decreasing. Thus, trip counts are reflective of nothing regarding passenger demographics, and once more, Shuttle Express witness Paul Kajanoff admitted he had no information about the specific demographics of Speedishuttle passengers.[80]

59 Finally, assuming *arguendo* that the total number of passengers using auto transportation services between Sea-Tac Airport and points in King County has actually decreased, it is entirely plausible, if not likely, that Speedishuttle had an increase in ridership of previously unserved passengers contemporaneous with Shuttle Express' even greater decrease in overall ridership, resulting in that decline. This is due both to an increase in competition from other modes of transportation around the same time Speedishuttle entered the market[81] and because Shuttle Express directly contributed to its own trip count decline through use of independent contractors and/or cancellation of auto transportation trips, which trips were not counted in Shuttle Express'

[79] Kajanoff, TR. 402:1-10.
[80] Kajanoff, TR. 409:15-19.
[81] As discussed by Shuttle Express witness Wesley Marks, Shuttle Express began to see a decline in its passenger volumes as early as 2013, well before Speedishuttle entered the market, which he attributed to competition from other modes of transportation. More recent declines in Shuttle Express business can be attributed to additional modes of transportation including people driving and parking at the airport, an expansion of light rail, and TNCs like Uber and Lyft. WAM-1T. 4:9 – 5:5.

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totals.[82] Thus, in order to know whether Speedishuttle actually increased ridership for previously unserved passengers, it would first be necessary to understand more specifically why Shuttle Express lost passengers (and to which mode of transportation) and Shuttle Express does not begin to meet its burden of proof on this subject.

60 None of Shuttle Express' witnesses had any specific information tending to demonstrate whether passengers who might have used Shuttle Express chose to use Speedishuttle versus one of the many other options. Mr. Marks agrees that TNCs and light rail both saw dramatic increases in passengers during the same time period as Speedishuttle's market entry.[83] Again, without filling in this vital gap in information, there is simply no way of using trip or passenger count trends to determine whether Speedishuttle's service transports the same passengers as would have used Shuttle Express.[84]

d. Use of a Walk-Up Kiosk Does not Change the Service Provided

61 Shuttle Express further argues that Speedishuttle is providing the same service as Shuttle Express because, by using a walk-up kiosk, passengers do not take advantage of Speedishuttle's multilingual website or a multilingual greeter. However, this position ignores that those passengers might still opt to receive service from a multilingual driver, use complimentary Wi-Fi, ride in a larger and more luxurious Mercedes, which features Speedishuttle TV, providing tourism information about the sights and attractions in the Seattle area. This premise also ignores the finding the Commission made that Speedishuttle's service features would serve passengers who were tech-savvy or tourists, neither of whom necessarily depend on a

[82] Kajanoff, TR. 432:14 – 433:19.
[83] Marks, TR. 596:15 – 599:7.
[84] Additionally, these data cannot help the Commission determine whether the market can sustain more than one provider, because it does not explain why Shuttle Express lost passengers and whether it could compete with other modes of transportation to regain passengers.

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multilingual website or on multilingual greeters. Finally, this fails to consider that Speedishuttle does not operate scheduled service, and thus there is no chance Speedishuttle's passengers will be placed on a van with passengers who paid a lower fare for a scheduled service, but who ultimately receive the exact same service to the exact same location, a practice regularly engaged in by Shuttle Express.[85]

e. Similarly, Neither does use of Wholesalers Change the Service Provided

62 Shuttle Express also claims that because Speedishuttle's wholesalers are in some cases the same as those who once sold Shuttle Express' service, the passengers are receiving the same service.[86] Wholesalers do not dictate what service is provided, even if the wholesaler may have otherwise sold a trip for Shuttle Express instead of Speedishuttle. More importantly, Speedishuttle was supported at the application hearing by the very wholesalers whom Shuttle Express complains were once receiving service from Shuttle Express.[87] Thus, the Commission understood that Speedishuttle would engage those wholesalers at the time it issued Order 04 and obviously did not believe their prospective use made Speedishuttle's service the same as Shuttle Express'.

f. Nothing in this Proceeding May Disturb the Commission's Finding that Shuttle Express does not Reasonably Serve the Market

63 Beyond finding that Speedishuttle is actually providing the service it proposed to provide, the Commission may and should continue to authorize Speedishuttle to operate without restriction based upon the its prior finding in Order 04 that Shuttle Express' service does not reasonably serve the entire market due to its use of independent contractors, which it needed to fulfill the

[85] Marks, Exh. WAM-3T at 4:3-9; Marks, TR. 647:5-15.
[86] Marks, Exh. WAM-1T at 15:4 – 16:3.
[87] Roemer, Exh. HJR-1T at 40:17-24.

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obligations it had made to its customers.[88] This finding, which is based upon one of the express "same service" criteria set forth in WAC 480-30-140(2), remains unchallenged both in law and in fact and thus continues to predicate the original grant of Speedishuttle's application.

C. Shuttle Express Has Failed both Then and Now to Provide Service to the Satisfaction of the Commission

i. Service to Satisfaction of the Commission Standards

64 As discussed above, because the legislature granted the Commission the discretion to determine what it finds to be satisfactory service in any rational way,[89] exercising that discretion may also involve determining how many service providers may operate in a given territory.[90] To that aim, the Commission has adopted other non-exclusive criteria for evaluating whether an auto transportation company has provided satisfactory service, which are set forth in WAC 480-30-140(3). Of the criteria in WAC 480-30-140(3), those critical to this proceeding are as follows:

> (a) The determination of whether the objecting company is providing service to the satisfaction of the commission is dependent on, but not limited to, whether the objecting company:
>
> (ii) Has made a reasonable effort to expand and improve its service to consumers within the same territory or the same subarea within the territory, for door-to-door service, or along the same route, for scheduled service, in which the service is proposed;
>
> (iii) Provides the service in a manner that is convenient, safe, timely, direct, frequent, expeditious, courteous and respectful, meets the advertised or posted schedules, fulfills commitments made to customers, meets consumer preferences or needs for travel, is responsive to consumer requests by reviewing the company's tariff and certificate in response to requests and when reasonable, proposing changes to the commission, and meets other reasonable performance expectations of consumers;

[88] Order 04, ¶22.
[89] *Pac N.W. Transp.*, 91 Wn. App. at 597.
[90] Order 10, *In re Application of Waste Management*, Docket TC-120033 (Jul. 2013).

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(iv) Has provided the same service as proposed by the applicant in the same territory or the same subarea within the territory, for door-to-door service, or along the same route, for scheduled service, in which the service is proposed, at fares competitive with those proposed by the applicant.

(b) Whether an objecting company will provide service to the satisfaction of the commission is based on the objecting company's performance regarding the criteria in (a) of this subsection prior to the date an application for proposed service is filed with the commission. The consideration period will depend on the circumstances, but will generally be for no more than one year. The commission will take into consideration extraordinary events, such as severe weather or unforeseeable disasters, when weighing the performance of an objecting company and consumer response to that performance. The commission will also take into consideration whether the testimony shows a pattern of behavior and whether the company has policies and procedures in place to mitigate or resolve alleged or actual service issues.

(emphasis added).

65 In reaching its findings, the Commission may thus consider a number of service-related expectations which this record invariably reflects Shuttle Express has failed to meet, including efforts to expand and improve service, fulfilling commitments made to customers, and providing services at competitive prices to those offered by Speedishuttle. Pursuant to Commission precedent, a provider that commits repeat rule violations, which the record unquestionably establishes Shuttle Express has committed, also does not provide satisfactory service.[91]

[91] Order M.V.G. No. 1402, *In re R.S.T. Disposal Co., Inc. d/b/a Tri-Star Disposal*, App. No. GA-845; 851 (Jul. 1989) at ¶ 9, p. 3 and ¶ 17, p. 4.

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ii. The Commission Could Have and May Now Find that Shuttle Express Would not Provide Service to its Satisfaction at the Time it Granted Speedishuttle's Certificate Application

66 As noted by the Administrative Law Judge, in Order 17, the closed record on Speedishuttle's application already contains ample evidence of Shuttle Express' past violations.[92] That evidence now serves to support a finding that Shuttle Express will not provide satisfactory service. During the brief adjudicative proceeding on Speedishuttle's application, Speedishuttle requested that if the Commission did not find that Speedishuttle proposed a different service than Shuttle Express, that it find that Shuttle Express would not provide service to the satisfaction of the Commission.[93] The Commission declined to reach that issue, despite having an ample record on which it could have done so, finding that superfluous. But it nonetheless did make a finding now germane to that issue. That is, the Commission found that Shuttle Express' long-standing use of independent contractors and the problems with its service it claimed to suffer when it ceased doing so demonstrated that it did not reasonably serve the market.[94] This finding, and the factual support on which it was made, now support a finding that as of the date of Speedishuttle's application, Shuttle Express would not provide service to the satisfaction of the Commission.

67 Factually recall, the Commission found that Shuttle Express did not reasonably serve the market because it admitted that when it ended its use of independent contractors it was unable to adequately serve its customers:

> Mr. Kajanoff's claim at hearing that Shuttle Express has "never turned away door-to-door business for inability to have a vehicle available"[10] is contradicted by Shuttle Express's owner, Jimy Sherrell, in a declaration he submitted in support of the company's

[92] Order 17, ¶ 17.
[93] Wiley, TR. 142:9 - 18; Speedishuttle's Answer to Shuttle Express' Petition for Administrative Review of Order 02, ¶¶ 9, 25-28.
[94] Order 04, ¶ 22.

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> petition for exemption from Commission rules in November 2013. In his declaration, Mr. Sherrell stated that without the use of a contracted rescue service, "Sometimes we have to ask people to drive their own car and park so they do not miss their flight. This costs us a high fee in parking reimbursement. And while that is some compensation, it is not delivery of the service the passenger requested. We would much rather provide their ride to the airport and we could have if rescue service were still allowed." By the company's own admission when it sought the exemption, Shuttle Express was unable to reasonably serve the market for a 10-year period without relying on outside assistance.[95]

68 Discussed above, the Commission may also find that poor service quality and problems with timeliness, such as those issues described in Jimy Sherrell's declaration, support a finding of unsatisfactory service.[96]

69 More importantly, the very use of independent contractors by Shuttle Express over what the Commission Staff was able to determine through its investigations in Dockets TC-072228 and TC-120323 was an extremely protracted period of time, combined with statements made by owner Jimy Sherrell, demonstrate that Shuttle Express is simply unwilling to follow Commission rules. This too further establishes that Shuttle Express will not provide service to the Commission's satisfaction.

70 For example, rather than accepting that it was prohibited from using independent contractors and acknowledging fault, Mr. Sherrell argued the problem was that the Commission didn't know how to regulate Shuttle Express.[97] The Commission took note of Mr. Sherrell's posture when it found that Shuttle Express had committed a knowing violation of WAC 480-30-213 in Docket TC-120323 after he also stated "I chose to put it in place, hoping that it would be ignored, and it

[95] Order 04, ¶ 22 (internal citations omitted).
[96] *See* Exh. WAM-40X, Declaration of Jimy Sherrell, ¶ 4, noting the practice ended when the Initial Order was entered in Docket TC-120323, on November 1, 2013.
[97] Exh. WAM-29X, Order 04, Docket TC-120323.

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wasn't, so I paid a fine and I discontinued the service."[98] The Commission should now take these findings one step further and find here that Shuttle Express was not serving to its satisfaction.

iii. Shuttle Express' Post-Application use of Independent Contractors and Violations of Commission Rules and State Law Demonstrate that it is Either Blatantly Disregarding Commission Orders and Previous Pledges to the Commission, or is Woefully Failing to Serve its Customers, or Both

a. Shuttle Express' use of Independent Contractors Either Willfully Violated Commission Rules or Resulted in a Monumental Service Failure

71 If Shuttle Express gambled that it would get away with its independent contractor program in the past, it doubled down on that bet in 2013 and beyond, using independent contractors to transport passengers on 40,727 trips between January 16, 2014 and September 29, 2016.

72 Caught red-handed once again, Shuttle Express now claims inconsistently that it effectively changes its customers' mode of transportation and is not transporting the passengers who reserved service on one hand, and argues it does not cancel those reservations and is actually providing satisfactory, lawful service on the other.[99] Shuttle Express, again, cannot have it both ways, however, because these positions are actually mutually exclusive. Either Shuttle Express failed to serve passengers who had made a total of 40,727 reservations, or it did so in yet another prolonged violation of Commission rules by using an independent contractor on each of those occasions.

73 About the former point there should be no argument. If Shuttle Express could provide service to each of its reserved passengers using its own vehicles and drivers, absent a rule authorizing

[98] Order 03, ¶ 30, Docket TC-120323 (Mar. 2014).

[99] Marks, Exh. WAM-3T at 30:4-10 (compare: "The limo option enables us to carry that passenger quickly and at a small loss, while providing them an upgraded travel experience" to "Shuttle Express effectively changes the mode of transportation from auto transportation to the contractor's licensed mode of transportation, to the benefit of the company and the public").

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otherwise, it should have done so. And, if it could legally avoid responsibility from the fact those passengers were ultimately transported on vehicles owned by independent contractors, Shuttle Express only did so by cancelling their reservations and failing to serve them in its own right, which is not satisfactory service.

74 The evidence, however, suggests that Shuttle Express did not cancel the 40,727 reservations by which its passengers were transported in the vehicles of limousine drivers.[100] Instead, Shuttle Express merely offered those passengers who had made reservations for auto transportation service on Shuttle Express' shared ride vans an option to ride in a vehicle owned and driven by an independent contractor at the same price, to and from the same place, without any change in payment method.

75 Moreover, the independent contractors used by Shuttle Express are actually the very same drivers used by Shuttle Express for its limousine service, each of whom has an independent contractor agreement with Shuttle Express and are selected by Shuttle Express when service is needed.[101]

76 The only real difference between this practice and the one for which Shuttle Express was penalized in 2014 is that it now places each auto transportation reservation into a different vehicle. However, much like the Commission's findings in Docket TC-120323, the facts of Shuttle Express' operations weigh heavily in favor of a determination that Shuttle Express was operating non-owned vehicles operated for Shuttle Express by an independent contractor. Thus,

[100] Pratt, Exh. DP-1T at 4:18 – 5:4 (Wes Marks and Paul Kajanoff told Dave Pratt that Shuttle Express did not cancel its customers' reservations and credit card payments are not cancelled).

[101] Kajanoff, TR. 489:4-16; Marks, TR. 635:10 – 636:1. Albeit, independent contractors whose names Shuttle Express refused to provide to Staff investigators in 2017. Pratt, TR. 871:21-25, 872:1-16.

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the resulting violation should be no different than when each limousine carried multiple reservations, regardless of the limousine driver's license to carry single reservations.

77 There are additional facts which demonstrate Shuttle Express was well aware of the defect in its independent contractor program. Had Shuttle Express truly believed its independent contractor program was legal, it might have reviewed its change in practices with the Commission, seeking permission rather than forgiveness, exactly as it promised to do in its Petition for Administrative Review in Docket TC-120323.[102] But it did not. Or, it might have truthfully and completely Speedishuttle's Data Request No. 1 which sought information regarding the last time Shuttle Express provided either "rescue service" or service to an airport passenger subject to WUTC jurisdiction by an independent contractor. Instead, Shuttle Express answered evasively that it last used "rescue service" to transport an airport passenger subject to WUTC jurisdiction on January 13, 2014, in accordance with the conditional exemption granted in Docket TC-132141,[103] refusing to admit that Shuttle Express had actually been using independent contractors to transport airport passengers who reserved shared ride service from Shuttle Express continuously since its conditional exemption ended in 2014. As Dave Pratt testified for Staff, [104] and Paul Kajanoff effectively acknowledged,[105] that was hardly a truthful response.

78 In fact, it was only when the Commission Staff initiated its own investigation into Speedishuttle's Complaint that Shuttle Express finally "coughed up" the requested information about its continued use of independent contractors. And, as noted above, Shuttle Express

[102] Exh. WAM-28X, Petition for Review of Initial Order of Shuttle Express, Inc., ¶ 85.
[103] Exh. HJR-19.
[104] Pratt, Exh. DP-1T at 3:19; 4:5.
[105] Kajanoff, TR. 468:19 – 469:6.

essentially thumbed its nose at the Commission in doing so, refusing to fully cooperate with the Commission Staff's investigation by producing complete information.[106]

b. Shuttle Express' Concierge Payments Constitute a Violation of State Law

79 Shuttle Express also claims its regular payments to hotel concierge staff do not violate the law, as alleged by Speedishuttle, but failed to provide any real explanation as to why. At least initially, no Commission Staff member offered any testimony on this issue either, but Staff did respond to Bench Request 5 from the Administrative Law Judge regarding its opinion about the legality of Shuttle Express' practice. That response indicated, in part, that pursuant to the Commission's order in *Everett Airporter*, RCW 81.28.080 forbids a carrier from rebating any portion of a fare except pursuant to a Commission order and that commission payments are not proper to individuals whose regular vocations do not involve similar agencies or services, concluding that the Commission was concerned about hotel staff who serve as ticket agents.[107] Speedishuttle agrees with each of these arguments, which form the basis of Speedishuttle's Complaint.

80 However, Staff then reached the conclusion that Shuttle Express was merely paying commissions for referrals, not payments for ticket sales.[108] This finding by Staff appears to disregard Shuttle Express' Commission Agreement.

81 Shuttle Express' Commission Agreement contains a number of statements which demonstrate that those concierges who "make referrals" are in fact ticket agents of Shuttle Express. In its first paragraph, the Agreement includes the statement "thank you for your partnership with Shuttle Express" and it goes on to include the program terms: "you earn 10% commission on any service

[106] Pratt, TR. 848:5-14; Pratt, Exh. DP-1T at 13:13-17.
[107] Staff Response to BR 5.
[108] *Id.*

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you book at retail rate" and "[t]he preferred booking method is online through your hotel's portal."[109] Taken together, these demonstrate that the hotel concierge staff are not merely "adjuncts" advising customers and hotel patrons about Shuttle Express' service, but instead are actually making the reservation on behalf of the customer, using the hotel's portal to Shuttle Express' reservation system, which is precisely how other ticket agents reserve service online.[110] Thus, despite Commission Staff's conclusion, the available evidence demonstrates that Shuttle Express has in fact used hotel concierge staff as ticket agents and continues to do so in violation of RCW 81.28.080.[111]

c. Combining Scheduled Service and Door-to-Door Service Results in Multiple Violations of Commission Rule and State Law, at Pricing Above Competitive Levels

82 Finally, Shuttle Express also admits it has been routinely combining its door-to-door passengers and scheduled service passengers on the same vehicles, justifying that service as being essentially all door-to-door service, since all stops on a scheduled route are flag-stops.[112] Nonetheless, as identified by the Administrative Law Judge at the hearing, and confirmed by Commission Staff in response to Bench Response No. 4, this practice may result, as it should in the instance cited by Speedishuttle Witness Jack Roemer,[113] in a violation of WAC 480-30-281(2)(b)(iv), which requires a company to list all flag stops in its time schedule. The purpose of that rule is to ensure customers have all available information needed to make decisions about

[109] *Id.*
[110] Exh. HJR-25T, 11:21 – 12:11.
[111] The precise number of payments made by Shuttle Express to concierge staff is unknown, but based upon Shuttle Express data response to Speedishuttle, Exhibit HJR-17, it has made payments to 26 individual concierges (not including hotels themselves), with payments totaling in the thousands of dollars.
[112] Marks, Exh. WAM-3T at 4:3-18.
[113] Roemer, Exh. HJR-1T at 9:13-24.

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their travel, and this practice by Shuttle Express simply makes it impossible for its customers to have that information.

83 While the violation of WAC 480-30-281(2)(b)(iv) may be viewed as technical, the practice of combining scheduled service and door-to-door service, while charging two different prices for what is ultimately literally the same service in these instances (both are transported on the same vehicle), also establishes that Shuttle Express may also be engaged in rate discrimination in violation of RCW 81.28.180. That statute prohibits a common carrier from charging different prices of different people for contemporaneous transportation of a like kind under the same or substantially similar circumstances. Wesley Marks testified that its combined scheduled service and door-to-door service will sometimes transport one person at the lower scheduled service price and another person at the higher door-to-door price from and to the same location on the same vehicle.[114] Thus, not only is Shuttle Express combined service a violation of Commission rules, it also invites and, indeed, has apparently led to violation of the State's price anti-discrimination laws.

84 Beyond establishing additional compound rule violations, this practice also demonstrates that Shuttle Express' door-to-door service to the downtown zip codes could actually be offered at a lower price than Shuttle Express currently charges. Thus, whereas Shuttle Express complains Speedishuttle's lower fares to downtown Seattle constitute "predatory pricing," Shuttle Express' operating procedures reveal that Speedishuttle's service is simply offered at a more competitive price than Shuttle Express. As the Commission rules expressly provide under WAC 480-30-140(3)(a)(iii), if an applicant such as Speedishuttle proposes to provide service at a lower price

[114] Marks, TR. 657:13 – 660:4.

than the incumbent, that fact actually also weighs in favor of a finding that the incumbent, Shuttle Express, is not providing service to the Commission's satisfaction.

D. The Shuttle Express Complaint: Predatory Fares/Pricing Below Cost

85 In addition to its rehearing premise that Speedishuttle is providing the "same service," Shuttle Express alleged in its complaint (merely on "information and belief") that Speedishuttle has provided services at fares below cost, claiming that practice constitutes predatory pricing and is "unreasonable, insufficient, unremunerative, discriminatory, illegal, unfair, insufficient, and tending to oppress the complainant, and in violation of RCW 81.04.110, RCW 81.28.010, and other laws and regulations."[115]

86 While Speedishuttle recognizes that the complaint statute, RCW 81.04.110, permits a complaint to be brought against a competitor based upon a broad and/or "loose" range of allegations, due process still requires that the actual basis of the complaint be raised/noticed through the pleadings and again, the Commission has limited the scope of the issues in this proceeding through Order 08. Thus, despite Shuttle Express' subsequent attempts to bootstrap or otherwise modulate its position, the only allegations the Commission may consider with respect to Speedishuttle's prices are whether Speedishuttle's fares are factually below cost (and, if so, whether that fact establishes any wrongdoing by Speedishuttle), and whether Speedishuttle has engaged in predatory pricing. As discussed below, Shuttle Express utterly failed to establish that Speedishuttle's fares are unlawful. Instead, Shuttle Express has deflected the basic notice/due process concern by repeatedly arguing that the real problem is that King County cannot support (sustain) more than one provider and thus seeks to eliminate Speedishuttle from the market.

[115] Petition for Rehearing, ¶41.

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i. The Commission Must also Ensure the Benefits of Competition are Protected

87 Shuttle Express ostensibly claims it has demonstrated that Speedishuttle's fares are below cost through nothing more than the mere fact that Speedishuttle has yet to turn a profit.[116] As Speedishuttle has long argued in this proceeding, the failure of a company to make a profit is hardly an automatic bar or a prohibited practice, and this is particularly true when a company has only recently entered a particular market.[117] Indeed, when Shuttle Express first entered this market, it too faced substantial competition and ultimately required years before it increased its market share and passenger count to a sufficient level to be profitable.[118] In fact, it only reached its peak passenger volumes after buying out many of its competitors and eliminating many of the other choices then available to potential customers. Thus, the fact Speedishuttle has failed so far to make a cumulative profit is insufficient as a matter of law to establish that Speedishuttle has engaged in any harmful or wrongful competitive pricing practice.[119]

88 Ignoring for a moment that critical failure of Shuttle Express' complaint against Speedishuttle's fares, an even more fundamental problem exists with Shuttle Express' pricing complaint. That is, the very mechanism by which a company allegedly engages in predatory pricing is the same way in which competition often benefits consumers: lowering prices. And, unlike Shuttle Express' repetitive self-serving invocations of "the public interest" in seeking to overturn Order 04 here, the Commission has specifically articulated its desire for establishing competitive fares both through its "service to the satisfaction of the commission" criterion set forth in WAC 480-

[116] Kajanoff, Exh. PK-1T at 6:12-15; 7:1-16.
[117] *See, Everett Airporter Services Enter., Inc. v. San Juan Airlines, Inc.*, Docket No. TC-910789 (Jan. 1993).
[118] Exh. PK-8X. Order M.V.C. 1899, *In re San Juan Airlines, Inc. d/b/a Shuttle Express*, App. No. D-2589 (Mar. 1991).
[119] *Accord*, Pearson, TR. 780:22 – 781:2 ("It's too difficult, I think, this early in the company's operations to conclude that, because they're not making a profit, that must mean that they're pricing predatorily, because the record, clearly shows that Shuttle Express had losses for the first few years as well.")

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30-140 (3)(a)(iv)[120] and in a related note in the 2013 Rulemaking policy statement.[121] Thus, before an auto transportation company's fares may be considered "predatory, insufficient, unremunerative, unjust, illegal or tending to oppress a competitor," there must be some standard which distinguishes between permissible competitive fares and impermissible fares.

89 One such way to distinguish between permissible competitive fares and impermissible fares is to utilize federal predatory pricing law, which the United States Supreme Court has outlined in such a way as to balance those concerns.[122] As set forth previously in Speedishuttle's Motion for Summary Determination, and as corroborated by Shuttle Express-sponsored witness Don J. Wood,[123] federal predatory pricing law case law, as adopted by Washington courts, requires proof of two chief elements in order to find that a company has engaged in predatory pricing: 1) pricing below an appropriate measure of costs; and 2) a reasonable prospect of recouping losses through supra-competitive prices following the elimination of competition.[124]

90 The appropriate measure of cost analysis for whether a company has engaged in predatory pricing, again supported as well by Mr. Wood, is average variable cost.[125] Further, in order to demonstrate that the defendant had a reasonable prospect of recouping losses through supra-

[120] WAC 480-30-140(3)(a)(iv) provides: "Has provided the same service as proposed by the applicant in the same territory or the same subarea within the territory, for door-to-door service, or along the same route, for scheduled service, in which the service is proposed, at fares competitive with those proposed by the applicant." (emphasis added).

[121] Exh. WAM-39X. General Order R-572, p. 18, n. 12 (noting that if a company actually exercises annual increases in its maximum fares and then charges the maximum amount, it would cause customers to seek less costly options or encourage others to enter the market with lower fares, arguing that the incumbent's fares are not service "to the satisfaction of the Commission").

[122] *See Brooke Grp. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 226 113 S. Ct. 2578, 125 L.Ed.2d 168 (1993).

[123] Wood, TR. 354:2- 12.

[124] *Brooke Grp.*, 509 U.S. 209.

[125] *W. Parcel Express v. UPS of Am.*, 190 F.3d 974 (9th Cir. 1999).

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competitive pricing, the complainant must show that the defendant is able to control the market, for example, through high barriers to market entry.[126]

91 In this proceeding, there has been ample evidence produced and the conclusion appears unquestioned that there exists abundant competition for airport transportation.[127] Moreover, there is also no competent evidence to support a finding that Speedishuttle could ever recoup its operating losses through supra-competitive prices. In fact, the parties also appear to agree that Speedishuttle could never raise its prices to a level by which that could be accomplished due to the competitive forces which would continue to exist even if Shuttle Express ceased to operate in the relevant market.[128] Thus, by this standard, Shuttle Express cannot demonstrate Speedishuttle has actually engaged in predatory pricing pursuant to the only articulable legal standard for predatory pricing which balances both the interests of competition itself with those of the competitors.

ii. Can Fares Ever be "Predatory" under Flexible Fares Rules?

92 In addition to the impossibility that Speedishuttle violated federal standards for predatory pricing, during the hearing on these consolidated proceedings, the Administrative Law Judge appropriately posed the question of whether an auto transportation's fares can ever be "predatory" under an approved tariff for flexible fares.[129] That question was answered by Commission Staff member Mike Young, who indicated he did not believe that was possible, as

[126] *Id.*; *Seattle Rendering Works v. Darling-Delaware Co.*, 10 Wn.2d 15, 701 P.2d 502 (1985).
[127] Marks, Exh. WAM-1T at 4:10 – 5:5; Marks, TR. 509- 15 - 18.
[128] *See* Shuttle Express' Answer in Opposition to Respondent's Motion for Summary Determination, p. 6, n. 7, (arguing "the specter of future prices that are higher than a competitive market would support is difficult if not impossible in an industry whose prices and profits are subject to intensive regulation by a regulatory authority. Meeting the test of the Federal antitrust laws for actionable predatory pricing is likely impossible in a rate-regulated scenario").
[129] A premise originally advanced by Speedishuttle in its unsuccessful Motion to Dismiss the Complaint on June, 7 2016, ¶ 11(D), p. 5.

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the rates set forth in flexible fare tariffs continue to follow operating ratio ratemaking methodology.[130]

93 Bolstering Staff's testimony on this point is the recognition in the 2013 Rulemaking that flexible fares themselves were adopted pursuant to RCW 81.04.250, which authorized the Commission to prescribe tariffs using any standard, method or theory of valuation reasonably calculated to arrive at just and reasonable rates.[131] Given that the Commission authorized flexible fares through that authority, it follows that Commission approval of the use of flexible fares after initial review by its staff signals such fares are considered by the Commission to be just, reasonable, and sufficient and conversely, cannot be considered predatory, insufficient or unreasonable under state law.

iii. Shuttle Express Also Cannot Establish that Speedishuttle's Fares Violate Washington Laws or Rules

94 Even if the Commission should somehow reject use of federal predatory pricing standards or its own flexible fares' approval indicia, Shuttle Express cannot otherwise establish that Speedishuttle's fares are unreasonable, insufficient, unremunerative, discriminatory, illegal, unfair, or tending to oppress Shuttle Express because Speedishuttle operates on the same regulatory and ratemaking platform as Shuttle Express, and will attain profitability, as did Shuttle Express historically, upon gaining sufficient passenger load efficiency.

95 Indeed, Speedishuttle and Shuttle Express each operate shared ride, door-to-door auto transportation companies which, much like public transportation or commercial airlines, require a certain percentage of occupancy to make trips profitable.[132] Thus, inherently, the fare for an

[130] Young TR. 840:1-14.
[131] Exh. WAM-38X, ¶47.
[132] Wood TR. 348:17-20; Marks, Exh. WAM-3T at 30:1-5.

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individual passenger can well be set below the cost of making an individual trip.[133] Thus, rather than a practice which is "unremunerative, unfair, discriminatory, illegal, unfair or oppressive," this is a natural feature of the shared ride business model, which, like public transportation, provides slightly less convenient service than some other modes of transportation (e.g., taxicabs) in exchange for a reduced price. As with any company operating on that model, an insufficient number of passengers will inevitably lead to an operating loss. However, the solution to that problem is to increase passenger counts, not raise fares (which would be expected to trigger precisely the opposite effect).

96 Yet, rather than simply conceding this point and moving on, Shuttle Express has instead argued through lengthy conclusory and wholly incompetent testimony that operating losses are actually proof of unlawful practices and that Speedishuttle can never increase its passenger count enough to be profitable unless it takes away Shuttle Express passengers.[134] Moreover, the notion that auto transportation companies have reached a point of market saturation was previously expressly rejected by the Commission in the 2013 Rulemaking.[135] Nonetheless, Shuttle Express' argument again simply does not compute. When addressing fares, the question is not whether there is sufficient market demand to make Speedishuttle profitable. The critical question instead is: if given an opportunity to attract more passengers, are Speedishuttle's rates sufficient to yield a profit?

97 The available evidence to answer that question is a comparison of the load factors required for Shuttle Express to make a profit to that of Speedishuttle. As testified by Paul Kajanoff, that load

[133] *Id*, TR. 348:7-16.
[134] Kajanoff, Exh. PK-1T at 9:4-9. *See also*, Kajanoff, TR. 395:6-25, 396:1-16.
[135] Exh. WAM-39X, General Order R-572, ¶42, Docket TC-121328 (Aug. 21, 2013)("the Commission disputes the assumption on the part of some companies that markets have a fixed saturation point that has already been reached in all markets, or that a company does not have the ability or responsibility to adapt its service and business model to a changing competitive market").

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factor is approximately 3.5 passengers per trip for Shuttle Express to downtown Seattle,[136] while the answer for Speedishuttle is approximately 4 passengers for the same trip.[137] Given the extremely small difference between Shuttle Express and Speedishuttle's minimum load factors to achieve profitability and the fact that Shuttle Express has attained profitably at its minimum necessary load factor in the past, the answer to the crucial question of whether Speedishuttle can be profitable given time to increase its market share is a resounding: "YES."

98 While the weight of all the evidence clearly demonstrates that Speedishuttle's fares are not unlawful, Shuttle Express' litigation approach ultimately suggests that it never truly cared about whether Speedishuttle's fares were "below cost" in the first place. Instead, based upon the evidence it presented and arguments it has made, it appears that Shuttle Express is simply engaging in anticompetitive intransigency, complaining about the existence of a new competitor rather than improving service and recalibrating its pricing in response.

99 Had Shuttle Express truly been attempting to force Commission revisions to Speedishuttle's fares, it surely would have provided testimony and a comparison of fares for each zip code in which Speedishuttle's fares are lower than that of Shuttle Express (which information is readily available via each company's website) so that the Commission might more closely examine and potentially consider adjusting those fares in this or a subsequent complaint proceeding. That Shuttle Express did not bother to proffer evidence of any such evaluation smacks either of disinterest in the outcome of that analysis or a complete lack of enthusiasm for and confidence that the analysis would establish the original allegation which Shuttle Express "threw against the wall" in order to secure a hearing on its complaint.

[136] Kajanoff, TR. 466:16; 467:2.
[137] Roemer, TR. 820:4-17.

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100 What should be even more telling on this point to the Commission though is the remedy Shuttle Express highlighted in its Answer to Speedishuttle's Motion for Summary Determination in January, i.e. an apparent admission that it wasn't necessarily now seeking to raise Speedishuttle's rates at all, but instead simply seeking to eliminate Speedishuttle from the marketplace altogether in the name of the "public interest."[138] It is ironic indeed that this requested remedy for supposed anticompetitive behavior actually brings full circle the greatest anticompetitive goal of all: cancellation of Speedishuttle's extant certificate. But beyond mere irony, this is also proof positive that Shuttle Express is less concerned with whether Speedishuttle is making a profit, and far more concerned about attempting to maximize its own profitability through the elimination of competition, rather than, again, making service improvements or evolving its own pricing.

IV. CONCLUSION/REQUEST FOR RELIEF

101 The Commission originally granted this rehearing in order to consider whether Speedishuttle had in fact misrepresented the nature of its proposed service to the Commission, and if so, to determine what to do about it. The evidence submitted on that front unquestionably demonstrates that Speedishuttle has been fully transparent with its plans and has implemented them in good faith to the best of its abilities. In addition, nothing about alleged below-cost pricing has been established in this record. In stark contrast, this proceeding has revealed that Shuttle Express' past rule violations continued unabated from January 16, 2014 through September 29, 2016. Thus, Speedishuttle respectfully asks that the Commission reaffirm Order 04 in toto, find additionally that Shuttle Express, Inc. failed to provide service to the satisfaction of the Commission, hold Shuttle Express violated WAC 480-30-213 and RCW 81.28.080 and

[138] Shuttle Express Answer in Opposition to Respondent's Motion for Summary Determination, p. 10, n. 20.

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take all appropriate actions in acknowledging and enforcing identified rule violations against Shuttle Express.

DATED this 19th day of June, 2017.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2017, I provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document(s) via the web portal and provided an electronic copy to:

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Signed at Seattle, Washington the 19th day of June, 2017.

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