BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| SHUTTLE EXPRESS, INC.,Petitioner and Complainant,v.SPEEDISHUTTLE WASHINGTON, LLC, Respondent. | DOCKET NOS.TC-143691 & TC-160516SPEEDISHUTTLE WASHINGTON, LLC’S MOTION FOR SUMMARY DETERMINATION OF SHUTTLE EXPRESS’ FORMAL COMPLAINT |

### Pursuant to WAC 480-07-380(2), Respondent, Speedishuttle Washington LLC d/b/a Speedishuttle Seattle (“Speedishuttle”), files this Motion for Summary Determination of the Formal Complaint of Petitioner, Shuttle Express, Inc. (“Shuttle Express”).

# **INTRODUCTION AND SUMMARY**

### The instant Motion is brought by Speedishuttle directed to Shuttle Express’ Formal Complaint alleging predatory pricing by Speedishuttle, which is part of this consolidated proceeding in which Shuttle Express alternatively seeks to cancel Speedishuttle’s certificate or otherwise restrict Speedishuttle’s ability to operate as an auto transportation service in King County, Washington.

### Throughout this proceeding, Speedishuttle has questioned Shuttle Express’ motives in bringing its Petition for Rehearing and Formal Complaint, as it appears that Shuttle Express is attempting to use litigation before the Commission in an attempt to reinterpret WAC 480-30-140 and raise the bar for entry into the auto transportation industry in Washington following the Commission’s 2013 rulemaking for this industry.[[1]](#footnote-1) More specifically, it appears that Shuttle Express is attempting to use this litigation to eject Speedishuttle from the market, doing so by increasing the literal cost of entry, attempting to cancel Speedishuttle’s certificate, and/or retroactively amending WAC 480-30-140 such that, irrespective of a finding that an applicant will not provide the same service, it only authorizes new entrants in a territory served by an existing auto transportation company if the new transportation company will serve only those passengers who could not have been served by an incumbent carrier (which ostensibly Shuttle Express will argue do not exist). The deliberate and concerted effort by which Shuttle Express is seeking to exclude Speedishuttle from the marketplace is magnified by Shuttle Express’ comments in ¶ 51 of its Motion to Compel filed September 13, 2016, which alludes to an intention to remove Speedishuttle from the marketplace no later than the summer 2017 travel season.

### Shuttle Express believes it is entitled to monopoly or a quasi, “qualified” monopoly status under RCW 81.68. However, the Commission’s policy statement with respect to its 2013 rulemaking demonstrates that it intended for the auto transportation industry in Washington to become more competitive, including the provision of flexibility on prices and market adaptability, and did so in part by streamlining the application process.

### Nonetheless, this application docket for Speedishuttle has ultimately been the antithesis of streamlined. Speedishuttle has faced unrelenting, recurring efforts to cancel or restrict its certificate by Shuttle Express even after the March 30, 2015 Final Order granting Speedishuttle its unrestricted permit, despite the lack of any judicial appeal by Shuttle Express of that benchmark ruling. One such effort by Shuttle Express can be now found in the remedy it seeks with respect to its boilerplate allegation on predatory pricing in its Complaint (through which Shuttle Express has also attempted to obtain all of its competitor’s proprietary financial information in discovery).

### In the lone remaining issue in its Formal Complaint,[[2]](#footnote-2) Shuttle Express alleges that Speedishuttle is providing its services at fares that are below cost, which Shuttle Express alleges constitutes predatory pricing in violation of RCW 81.04.110 and RCW 81.28.010. Shuttle Express further requests that as a result, Speedishuttle’s certificate should be cancelled, or alternatively, Speedishuttle should be subject to regulated minimum fares and regular financial monitoring and reporting through proceedings in which Shuttle Express, a *de facto* competitor of Speedishuttle, would no doubt seek to actively participate.

### While Speedishuttle will prove below that Shuttle Express’ Complaint should be denied as a matter of law because its tariff practices cannot constitute predatory pricing, any relief that permits Shuttle Express to participate in the regulation and control of a *de facto* competitor would be inherently anti-competitive and would preserve for Shuttle Express an unprecedented advantage in the regulated, intrastate auto transportation industry.

### Under these facts, the Commission should find the remedy sought by Shuttle Express in its Complaint unavailable as a matter of law. Notwithstanding this resolution, it is unnecessary for the Commission to reach a determination on Shuttle Express’ requested remedy, because, as Speedishuttle will demonstrate, Speedishuttle is a start-up and therefore the mere fact that its costs currently exceed its generated fares does not constitute actionable conduct under the laws of the state of Washington.

### Apart from its position as a start-up, an even more fundamental basis demonstrating that Speedishuttle is entitled to summary determination, is that the undisputed facts support Speedishuttle services only a small segment of the market for airport transportation in its territory. This, alone, is dispositive because it demonstrates that Speedishuttle is incapable of predatory pricing as a matter of law.

### Because the relief requested by Shuttle Express would also provide Shuttle Express inappropriate regulatory oversight of a competing auto transportation company, and because the undisputed facts support that Speedishuttle has not engaged in any acts of predatory pricing, Speedishuttle moves the Commission for an order denying all relief requested in Shuttle Express’ remaining Formal Complaint.

# **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

## Relevant Chronological History

### **Background Relevant to Shuttle Express**

### Though the instant proceeding is focused on Speedishuttle’s conduct, a simple comparison of Speedishuttle’s current market position as a startup to Shuttle Express’ own well-documented startup period is enlightening and will assist the Commission in understanding why Shuttle Express’ predatory pricing Complaint is fatally flawed.

### Shuttle Express originally came into existence as a part of San Juan Airlines, Inc., a commuter airline, and has been operating as an airporter service in Washington since on or about September 1987. After being notified it was required to obtain a certificate of public convenience and necessity from the WUTC *before* commencing operations, Shuttle Express finally applied for a certificate on October 13, 1988.[[3]](#footnote-3)

### In its initial application, Shuttle Express sought authority to provide service between airports in the Seattle Commercial Zone and points within the Seattle Commercial Zone. In 1991, not long after obtaining its initial certificate in April 1989, Shuttle Express sought to expand its certificate authority to cover points in Pierce County as well. The initial order in that proceeding, however, ruled that Shuttle Express’s extension should be denied for lack of financial fitness. Shuttle Express, on review, contended that it should not be held to making a profit during its start-up phase, and sought to demonstrate its financial fitness through an alternative measure. *See*, Exhibit A.[[4]](#footnote-4) The Commission ultimately agreed that Shuttle Express’ ongoing operating losses were not by themselves a sufficient basis to determine that Shuttle Express lacked the financial fitness to expand its territory, especially in light of Shuttle Express’ representations that it needed only to increase its passenger volume to become profitable and that its owners would continue to support its operations financially until it reached profitability, and granted an extension to Shuttle Express’ certificate territory.[[5]](#footnote-5) Despite its efforts at expansion, Shuttle Express’s financial losses apparently continued to mount for some time. *See,* Exhibit B.[[6]](#footnote-6)

**ii. Background Relevant to Speedishuttle’s Entry into the Market**

### Although its founders are thoroughly experienced in operating an auto transportation company through its sister company in Hawaii, Speedishuttle is a relatively new auto transportation entrant in the State of Washington, having only filed its application for auto transportation authority for door-to-door service from SeaTac International Airport to points in King County with the Commission on October 10, 2014.

### Despite the fact that Speedishuttle’s auto transportation application was submitted more than one year after the Commission’s rulemaking in Docket TC-121328, which again was aimed to streamline and simplify the application process and limit the scope of the objections an objecting incumbent provider could make, Shuttle Express made a herculean effort to prevent Speedishuttle from obtaining authority to provide any regulated service in King County. The Commission is familiar with these efforts, but a short summary of that proceeding bears discussion here.

### When Shuttle Express first appeared in Speedishuttle’s application case, it did so by filing a motion to strike the prehearing conference notice, arguing that a full adjudicative proceeding with full blown discovery was required by law. Shuttle Express’ Motion was denied and eventually, a contested brief adjudicative proceeding on Speedishuttle’s application commenced.

### Following the hearing on Speedishuttle’s application an Initial Order, Order 02, was entered in January 2015 rejecting the objections of Shuttle Express and Capital Aeroporter and granting Speedishuttle’s application. Shuttle Express next filed two petitions on February 9 and 10, 2015 seeking to reopen the hearing record and introduce new evidence. These motions to reopen were denied and after Petitions for Administrative Review were considered, Speedishuttle’s application was ultimately granted by Order 04 on March 30, 2015. Following the entry of Order 04, Speedishuttle was issued unrestricted Certificate C-65854, authorizing door-to-door auto transportation service between SeaTac International Airport and points in King County.

### Speedishuttle began providing service consistent with its Certificate C-65854 in May 2015. However, rather than being simply permitted to operate the auto transportation service authorized by Certificate C-65854, Speedishuttle has been subjected to prolonged litigation and continuing challenges by Shuttle Express ever since summer of 2015, materially increasing Speedishuttle’s costs of service to operate in Washington.

### First, at the instigation of Shuttle Express,[[7]](#footnote-7) Speedishuttle was ultimately required to respond to bench requests on a closed record and a proposed amendment to Order 04 relating to its post- hearing decision to provide walk-up service at the airport. The Commission ultimately determined that walk-up service was authorized by Speedishuttle’s certificate, but not before considerable additional legal expense was incurred by Speedishuttle.[[8]](#footnote-8)

### Subsequently, the instant consolidated proceedings were initiated by Shuttle Express in May 2016, again, with the ultimate goal of excluding Speedishuttle from the market through cancellation of its certificate. The history of the omnibus proceeding is well documented in this docket and will not be repeated here, but it unquestionably demonstrates that Speedishuttle has been forced to incur considerable time, effort and monetary expense to defend itself from Shuttle Express litigation challenges almost from the day Shuttle Express’ objections were denied by Final Order 04 in March, 2015.

## Background Specific to Shuttle Express’ Predatory Pricing Complaint

### As of the time this Motion is filed, Speedishuttle has operated in Washington for just over 20 months. In that time, although its passenger volumes have steadily increased, it has admittedly not yet reached a point of profitability.

### Compared to Shuttle Express, Speedishuttle’s operations in Washington remain relatively small. Indeed, Shuttle Express alluded to those size differences at the Open Meeting held September 28, 2016 in the proceeding on Shuttle Express’ Petition for Exemption; (Docket TC-160819). At that meeting, counsel for Shuttle Express explained that he didn’t believe there would be other companies applying for exemptions [from WAC 480-30-213] because “[i]n King County there’s only, there’s really only one major company with an autotrans certificate and that’s Shuttle Express. And then there’s a new entrant, which is Speedishuttle. And there’s a couple of really tiny ones, um, and they don’t have county-wide authority. Only the two companies have it.” *See,* the excerpt of the unofficial transcription of audio recording of open meeting, attached as Exhibit D-2.

### To elaborate on Shuttle Express’ explanation, Shuttle Express reported transporting 241,529 passengers in 2015. *See,* Exhibit C.[[9]](#footnote-9) Conversely, Speedishuttle booked just 61,721 passenger reservations between May 2015 and August 2016. *See,* Exhibit D-3.[[10]](#footnote-10) Similarly, Shuttle Express’s website claims a fleet of “more than 85 10-passenger shuttle vans” are used in its Share Ride service. *See*, Exhibit D-4.[[11]](#footnote-11) Speedishuttle’s Washington fleet now utilizes just 18 passenger vehicles. *See,* Exhibit D-5.[[12]](#footnote-12)

### To recap, Shuttle Express filed its conjoined petition for rehearing and formal complaint against Speedishuttle in May 2016, just one year after Speedishuttle commenced service. In Shuttle Express’ formal complaint, the only remaining aspect of the proceeding at issue is its allegation that Speedishuttle offers fares below cost, which Shuttle Express alleges constitutes predatory pricing.

### More specifically, Shuttle Express requested in ¶ 50 of its Complaint, that the Commission direct Speedishuttle “to cease and desist from offering service below cost, including both direct costs and a reasonable allocation of indirect, joint, and common costs.” By this prayer for relief, Shuttle Express essentially asks that the Commission require Speedishuttle to raise its prices so that they exceed average total cost.

# **STATEMENT OF undisputed facts**

### Speedishuttle bases its Motion for Summary Determination on the undisputed facts set forth in ¶¶ 27-29, below, and the evidence set forth in ¶ 30, below.

### Shuttle Express is the largest company providing regulated intrastate auto transportation service between SeaTac International Airport and points in King County, Washington by size of fleet, volume of passengers, and gross revenues. *See,* Exhibit D-2, D-3, D-4 and D-5.

### Shuttle Express’s operations to provide service between SeaTac International Airport and points in King County Washington did not make a profit at least between 1989 and 1993. *See,* Exhibits A and B.[[13]](#footnote-13)

### As noted above, since commencing operations to provide service between SeaTac International Airport and points in King County, Washington in May 2015, Speedishuttle admits it has not yet made an operating profit.

# **Evidence in support of motion for summary determination**

### Speedishuttle offers the following exhibits, which are attached hereto and incorporated as if fully set forth herein:

**Exhibit A:** A true and correct copy of Order M.V.C. No. 1899, *In re* *Application D-2589 of San Juan Airlines, Inc.*, (Mar. 6, 1991);

**Exhibit B:** A true and correct copy of Commission Decision and Order Granting Administrative Review; Modifying Initial Order; Assessing Penalties, *Everett Airporter Services, Inc. v. San Juan Airlines,* Docket TC-910789, (Jan. 7, 1993);

**Exhibit C:** A true and correct copy of Shuttle Express, Inc.’s 2015 Annual Report filed with the Commission on April 27, 2016;

### **Exhibit D:** Declaration of Blair I. Fassburg;

### **Exhibit D-1:** A true and correct copy of an e-mail chain with emails from Jimy Sherrell to Steve King and from Steve King to others addressing the provision by Speedishuttle of walk-up service, dated June 2015;

### **Exhibit D-2:** Excerpt of unofficial transcript of audio recording taken of the open meeting held by the Washington Utilities and Transportation Commission on September 28, 2016;

### **Exhibit D-3:** A true and correct copy of Speedishuttle’s response to Shuttle Express’ Data Request No. 4;

### **Exhibit D-4:** A true and correct copy of printout of the Share Ride Fleet page from Shuttle Express’ website; and

**Exhibit D-5:** A true and correct copy of Speedishuttle’s response to Shuttle Express’ Data Request No. 8.

# **ARGUMENT AND AUTHORITY IN SUPPORT OF SUMMARY DETERMINATION**

## Predatory pricing defined

### As discussed below, the Commission does not appear to have ever established standards of proof by which a claim for predatory pricing claim must be made. In economic theory, predatory pricing can be explained simply as “pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.”[[14]](#footnote-14) In expanding on that simple definition, the United States Supreme Court has explained that actionable predatory pricing is a strategic scheme by which a business rival prices its products in an unfair manner with the object of eliminating competition and thereby gaining and exercising control over prices in the relevant market, followed by a rise in prices sufficient to recoup the loss sustained.[[15]](#footnote-15)

## There is no Commission authority whatsoever Supporting Shuttle Express’ alleged standard for predatory pricing

### Shuttle Express’s complaint for predatory pricing is alleged to have been brought pursuant to RCW 81.04.110 and RCW 81.28.010 and “other laws and regulations.” However, there is a dearth of authority to support that either statute authorizes a formal complaint for predatory pricing. Neither of the cited statutes contains the words “predatory pricing” nor expressly requires that fares must exceed any measure of cost. To be precise, RCW 81.04.110 provides, in pertinent part, that when two or more public service companies are in competition in any locality in the state either can allege:

### …the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, remunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly...

### Similarly, RCW 81.28.010 provides, in pertinent part:

### All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier subject to regulation by the commission as to rates and service, or by any two or more such common carriers, must be just, fair, reasonable, and sufficient…

### Shuttle Express apparently takes the position that these statutes prohibit fares below cost. In the Complaint, that is indeed Shuttle Express’ lone factual assertion regarding its predatory pricing allegation. However, nothing specifically found in RCW 81.04.110 or 81.28.010 supports that “fares below cost” are prohibited and there exists no other authority which suggests that an auto transportation company operating pursuant to RCW 81.68 must set all regulated fares above “cost.”

### Simplistic allegations of the nature lodged by Shuttle Express might possibly have been supportable had this proceeding related to a different regulated industry. For example, in the telecommunications industry (at least in prior years), the Legislature required that prices or rates charged for competitive telecommunications services must cover their cost.[[16]](#footnote-16) However, there is no similar statute contained in RCW 81.68 and the economic theory for what constitutes predatory pricing accepted by the United States Supreme Court is a far more exacting standard.

## Prior Commission precedent also supports the determination that Speedishuttle is not engaged in predatory pricing

### Assuming *arguendo* that either RCW 81.04.110 or 81.28.010 prohibits predatory pricing, the Commission nevertheless has expressly found that the fact a regulated auto transportation company suffered operating losses during its startup period did not support an allegation of predatory pricing.

### As noted, this issue was previously addressed in a proceeding involving a complaint filed by Everett Airporter Services Enterprises, Inc. (“Everett Airporter”) against Shuttle Express over Shuttle Express’ fares. In that proceeding, Everett Airporter challenged the fares set by Shuttle Express and filed a complaint alleging (among other things) that Shuttle Express’ losses established predatory pricing. Although Shuttle Express’ operating losses were duly acknowledged in its Order, the Commission concluded that it “does not guarantee profitability nor mandate that a carrier achieve an approved operating ratio when it approves tariff rates. The Commission merely affords a carrier the opportunity to achieve profitability. Operating losses do not prove that the carrier’s pricing is predatory.” [[17]](#footnote-17) Thus, Shuttle Express was not found to be engaged in predatory pricing (despite being penalized for other violations).[[18]](#footnote-18)

### The premise the Commission applied to Shuttle Express in that instance applies with equal logic to Speedishuttle in this case. If an auto transportation company is not yet achieving a profit, it follows that its fares do not exceed its costs. Thus, if an auto transportation company is not required to achieve a profit during its startup period, consequently it is not required to assess fares in excess of its costs. Thus, the Commission does not require that Speedishuttle achieve a profit during its startup phase and the stipulation or finding that it has not cannot support a claim of predatory pricing, again, as a matter of law.

### While Speedishuttle’s present failure to achieve a profit is justifiable for no greater reason than it is a startup, it is also important to reemphasize that its startup costs have been significantly exaggerated due solely to the multiplicity of actions by Shuttle Express in its unceasing efforts to bar Speedishuttle first from entering the market and then its subsequent attempts to force Speedishuttle out of the market, which have significantly increased Speedishuttle’s legal expenses and, consequently, its overall costs to operate.

## Federal predatory pricing law, as adopted by the Washington legislature and courts, supports the premise that Speedishuttle’s minor market share eliminates the possibility of it engaging in predatory pricing

1. **Federal law bases for predatory pricing complaints are similar to RCW 81.04.110**

### While Commission precedent above should serve as ample authority to find that Speedishuttle’s startup losses do not in and of themselves establish predatory pricing, federal predatory pricing authority also exists (which Washington has treated as authority in the context of the Consumer Protection Act, RCW 19, et seq.) and further signals that Speedishuttle is entitled to summary determination here.

### Federal law provides two statutory bases of authority to enable a predatory pricing cause of action against a competitor. One, found in the Sherman Antitrust Act[[19]](#footnote-19), and the other found in the Robinson-Patman Act[[20]](#footnote-20). Although these two provisions afford slightly different protections to competition, both have been held to authorize a cause of action for predatory pricing under federal law, and both utilize nearly identical standards for establishing a cause for predatory pricing.[[21]](#footnote-21)

### While both the Sherman and Robinson-Patman Acts thus provide protection from predatory pricing, the latter’s protections are based on language more akin to that contained in RCW 81.04.110. The Robinson-Patman Act, in pertinent part, prohibits a person from discriminating in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition, or tending to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition.[[22]](#footnote-22) Compared to the applicable portions of RCW 81.04.110, which permit complaints with the Commission relating to the assessment of fares that are “unreasonable, remunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly,” it appears the goals of the Robinson-Patman Act are similar to that of RCW 81.04.110. Accordingly, federal predatory pricing decisions here should inform the Commission’s determination.

### **Federal law standards for predatory pricing demonstrate Speedishuttle is incapable of engaging in predatory pricing**

### The operative elements necessary to establishing a claim for predatory pricing under federal law were again set forth by the United States Supreme Court in *Brooke Group*. After the decision in *Brooke Group*, the plaintiff in a predatory pricing case brought under the Robinson-Patman Act has been required to prove each of the following elements:

### The prices complained of are below an appropriate measure of costs[[23]](#footnote-23); and

### The competitor has a reasonable prospect of recouping the losses incurred while prices were low.

### *Brooke Group*, 509 U.S. 209; Am Jur 2d Monopolies, Restraints of Trade, Unfair Trade Prac. § 186 (2nd 2015).

## Recoupment is difficult to establish and frequently a basis for summary disposition

### *Brooke Group* involved an appeal by the defendant following a 115 day jury trial which resulted in a judgment finding the defendant had engaged in predatory pricing. The plaintiff, a cigarette manufacturer with a minor market share, alleged its competitor, with just 11-12% market share, had engaged in a scheme to raise the market price of generic cigarettes by lowering its own price below cost. Though the defendant had been shown at trial to have lowered its prices below an appropriate measure of its cost, the Supreme Court found that the plaintiff failed to establish a claim for predatory pricing because the defendant’s market share was simply inadequate to cause a competitive injury through the likelihood of later recoupment.

### As the Supreme Court explained, for the predatory pricing decision to be rational, the predator must have a reasonable expectation of recovering its loss through monopolistic profits.[[24]](#footnote-24) This prerequisite to recovery requires the plaintiff to show that the scheme will result in a rise in prices which can be sustained long enough to compensate for the amounts expended on the predation, “including the time value of the money invested.”[[25]](#footnote-25) The Supreme Court acknowledged that this would be difficult hurdle for a predatory pricing plaintiff, but it nonetheless required it because one goal of competition is lower prices, and an unsuccessful predatory pricing scheme could actually benefit consumers.[[26]](#footnote-26)

### The Supreme Court also offered two scenarios by which it would be particularly appropriate to dispose of a predatory pricing case by summary disposition: 1) where new entry is easy, and 2) where the alleged pricing predator does not have the excess capacity to easily absorb its rival’s market share or purchase new capacity.[[27]](#footnote-27)

### Decisions subsequent to *Brooke Group* have also ruled that summary judgment is appropriate where the plaintiff is unable to establish a reasonable likelihood of recoupment because there are low barriers to market entry or the defendant lacked sufficient market power to control prices.

### In *W. Parcel Express v. UPS of Am.*, 190 F.3d 974 (9th Cir. 1999), the 9th Circuit considered an appeal taken from a summary judgment granted by the Northern District of California in a predatory pricing case brought by Western Parcel Express against UPS. In its decision, the 9th Circuit focused much of its discussion on the necessity that the plaintiff establish the market power of the defendant, holding that the plaintiff is required to: “(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.”[[28]](#footnote-28) While the plaintiff in that matter insisted there were high barriers to market entry, the court found that because the defendant’s contracts could be terminated and were not exclusive, and because other competitors had entered the market, the plaintiff was unable to establish that the defendant had sufficient market power to recoup losses of lower prices. Consequently, the summary judgment on plaintiff’s predatory pricing complaint was affirmed.

### A similar approach has been used in Washington State, where federal laws have been followed with respect to the Consumer Protection Improvements Act. In *Seattle Rendering Works v. Darling-Delaware Co.*, 10 Wn.2d 15, 701 P.2d 502 (1985), the Washington Supreme Court considered the appeal of a predatory pricing complaint brought pursuant to (among other bases) the Consumer Protection Improvements Act, which permitted a state remedy for violations of federal predatory pricing law. The complaint was brought by one rendering plant against another and alleged that its below-cost pricing constituted predatory pricing. In reaching its decision to reverse the trial court and dismiss the plaintiff’s complaint, the Supreme Court of Washington held that a predatory pricing complaint required the plaintiff to prove that the defendant set its prices below average variable cost and that the defendant “had a substantial share of the market.”[[29]](#footnote-29) Because the plaintiff failed to prove either, a dismissal was required.

### **Speedishuttle is a relatively minor player in a transportation market which has relaxed entry barriers and relatively high competition; thus, summary determination is appropriate**

### Following the precedent in *Brooke Group*, it is fully appropriate to grant Speedishuttle’s motion for the sole reason that it is incapable of recouping its current losses through monopoly prices. This is true for any number of reasons, including that Speedishuttle is a much smaller service provider than Shuttle Express in volume of passengers and fleet size, the auto transportation industry in fares in Washington are regulated, and because the relevant market includes multiple alternatives which create economic disincentives to raise prices to monopoly levels.

### As noted above, Speedishuttle booked 61,721 passenger reservations in its first 16 months of service, while Shuttle Express transported more than 240,000 people in that same period. Similarly, Speedishuttle operates using just 18 vehicles to Shuttle Express’ more than 85 shared ride vans (not to mention numerous other vehicle types used in its other services). Therefore, in any head-to-head comparison, Speedishuttle lacks a substantial share of the market. On that point alone, it is entitled to summary disposition.

### Further, in determining whether Speedishuttle could ever recoup its current operating losses through monopoly prices, it is critical to remember that Speedishuttle’s maximum fares are determined by the Commission, which has afforded broad price flexibility to electing operators under WAC 480-30-420.[[30]](#footnote-30) Thus, the Commission can ensure that monopoly prices will not be achieved should one of the several airporter services exit the market.

### Even without Commission oversight and regulation of fares, it is even less likely that such high fares could be sustained for a prolonged period of time due to the existing competition in the airport transportation industry. While the Washington auto transportation industry may be regulated and still subject to standards which limit entry, the Commission’s 2013 rulemaking unquestionably eased the bar for entry into the industry and, as discussed in the Commission’s accompanying policy statement, there already exists ample competition for airport transportation outside of the auto transportation industry, including through paid parking, public transportation (including light rail, King County Metro), charter services, taxis, town cars, limos, and increasingly, transportation networks such as Uber and Lyft. These alternative providers mean that consumers would never be forced into accepting higher prices from Speedishuttle, and thus it is inconceivable that Speedishuttle could ever recoup its operating losses through a subsequent period of increased fares.

### Because all of these facts, Shuttle Express cannot possibly establish a critical element of predatory pricing, and thus under federal standards as well, its claim should be summarily denied.

# **CONCLUSION and PRAYER FOR RELIEF**

### Shuttle Express’ formal complaint against Speedishuttle now asserts a single remaining factual basis for relief: that Speedishuttle is offering fares below cost. As addressed in this Motion, no available claim for relief exists under Washington law for “fares below cost.” Predatory pricing claims require a far more exacting standard of proof through establishment of fares below average variable cost and likelihood of recoupment through monopolistic pricing practices. As demonstrated above, Speedishuttle is currently a minor player in the SeaTac International Airport transportation industry which is already highly competitive, as expressly found by the Commission. Therefore, as a matter of law, Shuttle Express cannot establish any predatory pricing by Speedishuttle, and respectfully, the Commission should grant Speedishuttle relief through an order denying Shuttle Express relief on its claim for predatory pricing and dismissing the Complaint portion of the consolidated proceeding.

###  DATED this 21st day of December, 2016.

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|  | RESPECTFULLY sUBMITTED,By  David W. Wiley, WSBA #08614  dwiley@williamskastner.com  Blair I. Fassburg, WSBA # 41207 bfassburg@williamskastner.com Attorneys for Speedishuttle Washington, LLC |
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**CERTIFICATE OF SERVICE**

 I hereby certify that on December 21, 2016, I caused to be served the original and three (3) copies of the foregoing documents and attachments to the following address via first class mail:

 Steven V. King, Executive Director and Secretary

Washington Utilities and Transportation Commission

Attn.: Records Center

P.O. Box 47250

1300 S. Evergreen Park Dr. SW

Olympia, WA 98504-7250

I further certify that I have also provided to the Washington Utilities and Transportation Commission’s Secretary an official electronic file containing the foregoing documents and attachments via the WUTC web portal; and served a copy via email and/or first class mail, postage prepaid, to:

|  |  |
| --- | --- |
| Julian BeattieAssistant Attorney GeneralOffice of the Attorney GeneralUtilities and Transportation Division1400 S. Evergreen Park Dr. SWPO Box 40128Olympia, WA 98504-0128(360) 664-1192Email: jbeattie@utc.wa.gov | Greg KoptaDirector/Administrative Law Judge1300 S. Evergreen Park Drive SWP.O. Box 47250Olympia, WA 98504-7250(360)-664-1355gkopta@utc.wa.gov |
| Brooks HarlowLukas, Nace, Gutierrez & Sachs, LLP8300 Greensboro Dr. Suite 1200McLean, VA 22102(703) 584-8680Email: bharlow@fcclaw.com | Rayne PearsonAdministrative Law Judge1300 S. Evergreen Park Drive SWP.O. Box 47250Olympia, WA 98504-7250360-664-1136rpearson@utc.wa.gov |

Dated at Seattle, Washington this 21st day of December 2016.

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 Maggi Gruber

 Legal Assistant

1. General Order R-572, Docket TC-121328 (August 21, 2013). Shuttle Express has strategically ignored this rule revision throughout this proceeding and apparently believes is not effective as a matter of law. [↑](#footnote-ref-1)
2. The specific claims for relief asserted in Shuttle Express’ Formal Complaint are unclear, but any uncertainty about what claims were made was resolved by ¶24 of Order 08, in which the Commission ruled that it would not permit Shuttle Express to relitigate the BAP. As all other allegations made in the Formal Complaint consist of complaints about the BAP and thereby collaterally attack the Commission’s unchallenged ruling therein, the only remaining issue now is Shuttle Express’ allegation of predatory pricing. This was further clarified by the Administrative Law Judge in her ruling on Shuttle Express’ Motion to Compel, stating “[I] want to clarify the scope of the proceeding at this point, and just make it clear that it’s limited to, number one, whether Speedishuttle is providing the service the Commission authorized it to provide consistent with the business model approved by the Commission in Docket TC-143691, and whether Speedishuttle is providing service below cost as alleged in the Complaint in Docket TC-160516. And those are the only issues we’re looking at.” *See*,the September 27, 2016 hearing transcript at page 183, lines 4-13. [↑](#footnote-ref-2)
3. *See,* Order M.V.C. No. 1809, *In re San Juan Airlines, Inc. d/b/a Shuttle Express*, (Apr. 1989). [↑](#footnote-ref-3)
4. Order M.V.C. No. 1899, *In re Application D-2589 of San Juan Airlines, Inc. d/b/a Shuttle Express*, (Mar. 1991). [↑](#footnote-ref-4)
5. *Id*. [↑](#footnote-ref-5)
6. *Everett Airporter Services Enterprises, Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express*, Commission Decision and Order Granting Administrative Review; Modifying Initial Order; Assessing Penalties; Docket TC-910789 (Jan. 7, 1993). [↑](#footnote-ref-6)
7. *See,* e-mail chain attached hereto as Exhibit D-1. [↑](#footnote-ref-7)
8. *See*, Notice of Determination Not to Amend Order 04, *In re Application of Speedishuttle,* Docket TC-143691, (Dec. 14, 2015). [↑](#footnote-ref-8)
9. 2015 Annual Report for Shuttle Express, Inc. [↑](#footnote-ref-9)
10. Speedishuttle’s response to Data Request 4 of Shuttle Express. [↑](#footnote-ref-10)
11. Print-out of fleet information from Shuttle Express’s website. [↑](#footnote-ref-11)
12. Speedishuttle’s Response to Shuttle Express’ Data Request No. 8. [↑](#footnote-ref-12)
13. Speedishuttle has been seeking through discovery since September 7, 2016 an update on this loss chronology which it believes extends past 1993, but Shuttle Express has objected to and otherwise failed to answer Data Request No. 5, which is before the Commission presently on a Motion to Compel. [↑](#footnote-ref-13)
14. *Cargill, Inc. v. Monfort of Colo., Inc.,* 479 U.S. 104, 117, 107 S. Ct. 484, 493, 93 L.Ed.2d 427, 440 (1986). [↑](#footnote-ref-14)
15. *See Brooke Group v. Brown & Williamson Tobacco Corp*., 509 U.S. 209; 113 S. Ct. 2578 (1993). [↑](#footnote-ref-15)
16. RCW 80.36.330. [↑](#footnote-ref-16)
17. *Everett Airporter*, *supra*. [↑](#footnote-ref-17)
18. *Id.* [↑](#footnote-ref-18)
19. 15 U.S.C. § 2. [↑](#footnote-ref-19)
20. 15 U.S.C. § 13(a). [↑](#footnote-ref-20)
21. The sole difference in the standards is that under the Sherman Act the plaintiff has a higher burden of proof with respect to the likelihood of loss recoupment. *See Brooke Group*, 509 U.S. 209. [↑](#footnote-ref-21)
22. 15 U.S.C. § 13(a). [↑](#footnote-ref-22)
23. Although the U.S. Supreme Court did not specifically require the measure of costs to be average variable cost, numerous federal Circuit Court decisions, including decisions by the 9th Circuit, hold that to constitute predatory pricing, the plaintiff should establish that prices are offered below average variable cost, and that prices below average total cost are irrelevant to a predatory pricing complaint. *See Cal. Comput. Products, Inc. v. Int’l Bus. Machs. Corp*., 613 F.2d 727, 743 (9th Cir. 1979). [↑](#footnote-ref-23)
24. *Id.* at 225 (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*.,475 U.S. 574, (1986)(emphasis added). [↑](#footnote-ref-24)
25. *Id.* [↑](#footnote-ref-25)
26. *Id.* at 224. [↑](#footnote-ref-26)
27. *Id.* at 226. [↑](#footnote-ref-27)
28. *Id.* [↑](#footnote-ref-28)
29. *Id.* at 22. [↑](#footnote-ref-29)
30. Under which fare flexibility both Shuttle Express and Speedishuttle operate by prior Commission approval. [↑](#footnote-ref-30)