

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC.,
Petitioner and Complainant,
v.
SPEEDISHUTTLE WASHINGTON, LLC,
Respondent.

SPEEDISHUTTLE WASHINGTON LLC
d/b/a SPEEDISHUTTLE SEATTLE,
Complainant,
v.
SHUTTLE EXPRESS, INC.,
Respondent.

DOCKET NOS.
TC-143691, TC-160516 & TC-161257
SPEEDISHUTTLE WASHINGTON, LLC'S
MOTION IN LIMINE TO EXCLUDE
PREFILED TESTIMONY

1 Pursuant to WAC 480-07-375, Respondent, Speedishuttle Washington LLC d/b/a Speedishuttle
Seattle ("Speedishuttle"), files this Motion in Limine to Exclude Prefiled Testimony in order to
exclude irrelevant and otherwise inadmissible testimony and evidence.

I. INTRODUCTION AND SUMMARY

2 Speedishuttle files this Motion in Limine to seek exclusion of evidence which exceeds the scope
of issues to be determined by the Commission and the Administrative Law Judge, as already
ruled upon by same, in the instant consolidated proceeding on Shuttle Express' Petition for
Rehearing and Formal Complaint. This Motion also seeks to exclude prefiled testimony which is
inadmissible on other enumerated grounds.

3 By Order 08, the Commission previously ruled that the scope of rehearing would be significantly
limited in contrast to the original rehearing petition and complaint. Subsequent rulings by
Administrative Law Judge Pearson also articulated and refined the scope of this consolidated

proceeding. Despite these clear limitations, Shuttle Express has now proffered voluminous prefiled testimony (including that of a purported expert) on December 21, 2016, the overwhelming majority of which does not relate to the issues to be determined by the Commission.

4 Much of the testimony submitted by Shuttle Express is also plainly inadmissible under the Rules of Evidence, and appears to be proffered in an underhanded attempt to “ring a bell that cannot be un-rung” and taint this proceeding with testimony, which even if excluded, will have been read by the Administrative Law Judge and possibly the Commission. This is done in a number of ways, including by presenting testimony that is inflammatory, prejudicial, and objectively and demonstrably false.

5 However much Speedishuttle would like to set the record straight and demonstrate its own good faith, doing so at present will require Speedishuttle to submit a voluminous response, as disproving an inaccuracy or falsehood is often more time consuming than creating one. Yet most of the inaccuracies (and frankly, most of the testimony submitted by Shuttle Express) are made in the context of subject matters the Commission has previously ruled would not be considered. Thus, responding to the testimony at issue will effectively enable Shuttle Express to create a distraction and distortion and unnecessarily protract the hearing on this consolidated proceeding.

6 Shuttle Express will likely respond to this Motion with some attempt to defend the veracity of its prefiled testimony. Thus, it is important to note that this Motion is not filed to challenge or demonstrate the truth of any particular fact to be determined (and ironically such a response by Shuttle Express would only bolster the point of this Motion). Instead, the pertinent issue raised in this Motion is: will the Commission and Administrative Law Judge permit this proceeding to

be diverted by endless litigation over immaterial issues and topics that have already been excluded? In order to avoid that waste of time and expense, Speedishuttle moves at this pivotal juncture to have the irrelevant and otherwise inadmissible testimony identified below properly excluded.

II. RELEVANT PROCEDURAL BACKGROUND

A. The Commission previously ruled that Speedishuttle’s proposed service was not the same service as that offered by Shuttle Express and articulated what it considered to be Speedishuttle’s “business model”

7 On March 30, 2015, the Commission entered Order 04 in the Docket No. TC-143691, granting Speedishuttle’s application for authority to provide “door-to-door auto transportation services between SeaTac International Airport and points in King County, Washington.” In Order 04, the Commission found Speedishuttle’s “business model” represented a different service from that offered by Shuttle Express, describing in ¶ 21 of Order 04:

[T]he totality of these features demonstrate that the proposed service uniquely targets a specific subset of consumers seeking door-to-door service to and from the airport: those who are tourists, tech-savvy, or non-English speaking. Speedishuttle’s business model thus includes luxury vehicles, significantly increased accessibility for non-English speaking customers, individually-tailored customer service, tourism information, and Wi-Fi service.¹

8 The Commission then issued Speedishuttle unrestricted Certificate C-65854 on April 13, 2015.

B. The Commission previously determined that Speedishuttle’s operating authority and UTC rules permit it to provide walk-up service at Sea-Tac Airport

9 Subsequently, Shuttle Express complained to the Commission that Speedishuttle had commenced providing walk-up service at SeaTac airport. Apparently, then believing that Speedishuttle’s provision of walk-up service might potentially violate the operating authority

¹ Order 04 also separately found that Shuttle Express did not reasonably serve the entire market, in ¶22, which in and of itself, supports the issuance of Speedishuttle’s certificate.

issued in Certificate C-65854, on November 4, 2015, the Commission issued a Notice Proposing Amendment of Order 04.

10 After receiving arguments from Speedishuttle, Shuttle Express and the Commission Staff, on December 14, 2015, the Commission filed its Notice of Determination Not to Amend Order 04. In that unappealed ruling, the Commission noted that Commission Staff argued that Speedishuttle applied for “DOOR TO DOOR PASSENGER SERVICE...” without limitation to pre-arranged versus walk-up service.² The Commission went on to find that because its rules make no distinction between “prearranged” and “walk-up” door-to-door service, “the rules do not prohibit Speedishuttle from offering ‘walk-up’ service...”³ Shuttle Express sought neither administrative nor judicial review of that ruling.

C. Shuttle Express incorrectly continues to treat this proceeding as a lawsuit in superior court, wherein the issues of evidence are as broad as the issues raised in its pleading, but the Commission previously ruled it would not permit relitigation of the BAP.

11 The instant consolidated proceeding on Shuttle Express’ Petition for Rehearing of Speedishuttle’s certificate application and its Formal Complaint was initiated by a petition filed by Shuttle Express on May 16, 2016 (the “Petition for Rehearing and Formal Complaint” or, when discussed separately, the “Petition for Rehearing”).

12 In the first 16 pages of its Petition for Rehearing and Formal Complaint dedicated to its Petition for Rehearing,⁴ Shuttle Express set forth its various bases for rehearing. Those various theories can be summarized as:

² Notice not to Amend Order 04, p.3 ¶1.

³ *Id.* p.4, ¶1.

⁴ *See* Petition for Rehearing and Formal Complaint, pp. 1-16.

- 1) The Commission's decision in Order 04 was incorrect in its ruling that Speedishuttle's service was not the same as that provided by Shuttle Express;
- 2) Speedishuttle provided walk-up service after Order 04 was issued despite testimony that it did not intend to offer walk up service;
- 3) Speedishuttle is not offering multi-lingual greeters;⁵
- 4) Multilingual service may be offered to only a *de minimis* number of passengers;
- 5) Speedishuttle was not complying with the 20-minute departure guarantee discussed at the hearing; and
- 6) Post-hearing passenger volume declines for Shuttle Express establish that Speedishuttle is serving passengers who were previously served by Shuttle Express and somehow this makes Speedishuttle's service the same service as Shuttle Express.

Shuttle Express also stated it was uncertain whether Speedishuttle was actually providing Wi-Fi or TV in its vans.⁶

13 Speedishuttle's Answer to the Petition for Rehearing and Formal Complaint set forth various arguments, among other issues, establishing that Shuttle Express' Petition for Rehearing constituted a collateral attack on the Commission's ruling in Order 04 and was not based on new evidence or changed circumstances and should not be permitted.

14 Commission Staff also filed an Answer to the Petition for Rehearing and Formal Complaint, taking the position that rehearing should be permitted, but limited to a brief adjudicative proceeding on the issues of whether Speedishuttle promised to, but is failing to provide multilingual greeters at Sea-Tac Airport, in-vehicle televisions and wireless internet, and guaranteed 20-minute departure times.⁷

⁵ Speedishuttle never represented it would offer multi-lingual greeters, instead it would do its best to hire multilingual reception teams. (See Transcript in Docket No. TC-143691, at 24, 147).

⁶ *Id.* at p. 10, ¶c.

⁷ See Staff Response to Shuttle Express Petition for Rehearing, p. 7, ¶16.

15 Following the filing of Staff's Response to the Petition for Rehearing, Shuttle Express filed a Motion to Strike the responses. In that motion, Shuttle Express took the position that its Petition for Rehearing was equivalent to a Complaint in superior court, for which an answer admitting or denying each paragraph of the Petition for Rehearing was required.⁸ Therefore, Shuttle Express argued, Commission Staff's Response (and Speedishuttle's) to the Petition for Rehearing was akin to a post-hearing brief and inappropriate at that stage in the proceeding and should be stricken. After considering the Responses, that motion was denied.

16 Administrative Law Judge Pearson initially granted the Petition for Rehearing without limitation on the scope of issues raised by the Petition for Rehearing in Order 06. However, Speedishuttle and Shuttle Express took issue with Order 06 and sought administrative review. Shuttle Express objected to the determination that the Commission has discretion to grant rehearing, arguing that it was a matter of statutory right, while Speedishuttle, among other arguments, asserted that the rehearing was tantamount to yet another attempt to reopen the application for purposes of relitigation.

17 The Commission, by Order 08, addressed both of these assertions. It found that Shuttle Express had no automatic right to rehearing, and ruled it was within the discretion of the Commission to permit.⁹ However, on administrative review, it also noted approvingly the concerns of Speedishuttle and Staff regarding the scope of the rehearing and ruled that it would be limited:

24 We nevertheless share the concerns Speedishuttle and Staff express about the scope of rehearing. We will not allow Shuttle Express to relitigate the BAP. The Commission will not alter its conclusion that the business model Speedishuttle described in its application

⁸ See Motion to Strike "Answers" to Petition and Complaint of Shuttle Express, Inc., ¶¶ 11-14. The administrative law judge has repeatedly drawn distinctions between Superior Court rules on discovery and standing in this proceeding. (See, ruling of December 2, 2016 and i.e., ¶11 of Order 12/05/02, January 5, 2017).

⁹ Order 08, ¶28.

and during the evidentiary hearings represents a different service than the service Shuttle Express provides. Nor will we permit a collateral attack on our rules that do not distinguish between “prearranged” and “walk up” door-to-door service. At the same time, however, the Commission based its conclusions in Order 04 on the totality of the circumstances, and Speedishuttle’s and Staff’s proposal to limit rehearing to an examination of the individual components of the business model is at odds with that approach.¹⁰

18 Subsequent to the Commission’s ruling in Order 08, the scope of the rehearing has been challenged and repeatedly relitigated by Shuttle Express in the context of discovery motions and discovery conferences seeking records which Speedishuttle asserted were irrelevant to the scope of this proceeding. In each instance, the Administrative Law Judge ruled that the scope of the issues to be determined by the Commission in this consolidated proceeding was narrower than the scope of records sought by Shuttle Express. At the initial September 27, 2016 discovery hearing, Administrative Law Judge Pearson ruled:

...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 that we're looking at.¹¹

19 At the most recent discovery conference, on December 28, 2016, Administrative Law Judge Pearson reiterated this limitation despite an equivalent oral request for reconsideration by Shuttle Express.

20 Though Shuttle Express transparently disregards rulings when it comes to the evidence it offers, in arguing that Speedishuttle’s unclean hands affirmative defense should not be considered,

¹⁰ Id., ¶24 (emphasis added)(Order 08 is pending judicial review in King County Superior Court by Speedishuttle on other grounds).

¹¹ Transcript of Telephonic Hearing, Volume III, pages 168-199, at p. 185: 6-14.

Shuttle Express itself duly acknowledged in Petitioner’s Answer to Motion to Consolidate, of December 30, 2016, that the Administrative Law Judge “indicated the Commission intends to limit the issues in these dockets to what service Speedishuttle is actually providing and whether the service being provided is what the Commission intended.”¹² Shuttle Express went on to further recognize “...the Commission has made it clear that it wants to keep the issues narrow—narrower than both parties have sought.”¹³

21 Although Shuttle Express seemingly now acknowledged the limitation in the scope of this proceeding in that pleading, one of the other positions it took opposing the consolidation motion is dramatically inapposite. There, Shuttle Express argued, at ¶2 of its Answer:

[a]s the direct testimony filed herein on December 21st makes clear, what is at stake in these dockets is the ultimate survival of share ride as a public service in King County. Speedishuttle is losing prodigious amounts of money and will likely never be profitable in its current business model. Worse, Speedishuttle’s entry into the market has put Shuttle Express into a loss situation. The current duopoly is not sustainable in the long term.

22 When Speedishuttle responded by letter to point out that Shuttle Express was “at it again” and had, in its Answer in Opposition to Motion to Consolidate, relied upon unfounded arguments outside the record,¹⁴ Shuttle Express, always routinely getting the last word, responded by its own letter and once again demonstrated that it believes that the scope of issues are those defined by Shuttle Express’ pleadings rather than the Commission’s Order. Indeed, it opined there: **“[w]hat is ‘at stake’ or ‘at issue’ is necessarily framed by the pleadings and subsequent related filings” and “...[s]ince these facts have been and will be offered into evidence, they frame the issues that will be under consideration, regardless of the objections and**

¹² Petitioner’s Answer to Motion to Consolidate, ¶4.

¹³ *Id.* at ¶5.

¹⁴ Letter, on behalf of Speedishuttle Washington, LLC , from David Wiley, dated December 29, 2016.

responsive testimonies that are likely to come.¹⁵ Truly, who does Shuttle Express believe is in charge of determining evidence here? While the Commission, in Order 12 Granting Motion to Consolidate, subsequently indicates it did not consider these arguments, they remain stark reflections of the parties' disparate understandings of the present evidentiary parameters of the hearing.

D. The Public Interest Doctrine is not a shield for interjecting irrelevant evidentiary issues or theories that are already excluded

23 Shuttle Express' overarching, recurring claim of late is that the power to regulate in the public interest under Title 81 RCW subordinates any attempts to limit the evidence or otherwise observe previous rulings limiting the issues in this proceeding. Not only are such arguments now contrary to the law of the case, they morph "the public interest" into "Shuttle Express' interest," singularly advancing its version of market sustainability as if it were an existing issue in the proceeding and not the collateral attack on both the BAP and the 2013 Rulemaking that it is.

24 Indeed, both the Commission and the administrative law judge each repeatedly admonished Shuttle Express as to the narrowed scope and collateral attack holdings, including, as recently as mid-December, in Order 10/03 §12. Shuttle Express simply does not want to hear it. It inhabits its own reality, rhetorically responding to its own pleading allegations, interweaving unadmitted prefiled testimony accusations in argument and tirelessly advocating for its self-serving perception of the public interest. Through its fixation on monopoly service entitlement, it advances its never-ending quest to refocus this proceeding on the market sustainability theory upon which it failed to succeed at the BAP.

¹⁵ Letter, on behalf of Shuttle Express, Inc., from Brooks E. Harlow, dated December 30, 2016 (emphasis added).

E. Shuttle Express continues to expand the scope of this proceeding through its prefiled testimony

25 As noted, on December 21, 2016, Shuttle Express submitted prefiled testimony in this consolidated proceeding from Paul Kajanoff, Wesley Marks, Jason Deleo and Don Wood. The subject matter of the testimony submitted unquestionably exceeds the scope of the rehearing as defined by the Commission, and exceeds even the issues raised in Shuttle Express’ “pleadings” (the Petition for Rehearing and Formal Complaint). Thus, Speedishuttle is necessarily compelled to file this Motion in Limine.

III. ANALYSIS

A. Purpose and basis for this Motion

26 Motions in limine, that is pre-hearing motions to exclude objectionable evidence, are expressly authorized in Commission proceedings by WAC 480-07-375(1)(d). While motions in limine are not common in Commission proceedings, neither is the abject refusal of a Petitioner to accept the delineation of the hearing issues as articulated by the Commission and the administrative law judge.

27 This Motion is filed in hopes of a pre-hearing ruling on the admissibility of irrelevant evidence proffered by Shuttle Express and designed to increase the efficiency of the hearing process in this consolidated proceeding, by permitting consideration of these issues well in advance of the hearing and additional testimonial phases, rather than occupying valuable time during the hearing.

28 As discussed briefly above, this Motion was necessitated by the filing of voluminous testimony on issues outside the scope of the rehearing by Shuttle Express. As has also been the case throughout Shuttle Express’ frequent attacks on the veracity, character, and service of

Speedishuttle, much of that irrelevant evidence is inaccurate, and in many instances can be readily controverted through documentary evidence. Were the irrelevant testimony submitted by Shuttle Express permitted into evidence, in order to draw out and rebut the numerous inaccuracies made by Shuttle Express and to demonstrate Speedishuttle's own veracity and good faith, Speedishuttle would be required to file equally (if not more) voluminous response testimony and exhibits on the same irrelevant subject matters. However, the time spent by both sides, staff and the Administrative Law Judge dealing with this testimony would be wasted, as none of the testimony at issue bears on any of the pertinent remaining issues to be adjudicated by the Commission.

29 Thus, Speedishuttle seeks a ruling excluding irrelevant subject matters, and the testimony relating to those subjects matters, now, so that the limitation on the scope of evidence may be reiterated before Speedishuttle prepares and files its own response testimony and exhibits, which would both enlarge the volume of material for the Administrative Law Judge to analyze and expand the topic and issues for the Commission to sift through in seeking credible and material evidence. Moreover, in the process of responding, Speedishuttle might conceivably also waive its objections to the admissibility of the objectionable evidence proffered by Shuttle Express.

B. Legal basis for exclusion of irrelevant and time-wasting evidence

30 The instant Motion in Limine is filed to exclude evidence which is irrelevant to the instant proceeding pursuant to Washington Rules of Evidence 401-403. Washington Rule of Evidence 402 states:

[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

Relevant evidence is defined by Washington Rule of Evidence 401, which provides relevant evidence is:

[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

31 The Commission may also exclude otherwise relevant evidence in order to avoid wasting time pursuant to Rule of Evidence 403.

32 Here, Speedishuttle will demonstrate that the evidence at issue is completely irrelevant, and due to its inaccuracy, necessarily leads to a time-consuming and wasteful process of examination of responses and/or rejoinders to that proffered testimony.

C. Scope of this proceeding

33 As set forth above, the Commission determined in Order 08 that: it would not permit Shuttle Express to relitigate the brief adjudicative proceeding which ultimately led to the issuance of Order 04; permit a collateral attack on its rules which do not distinguish between prearranged or walk-up service; or permit a reconsideration of whether the business model described in Order 04 constituted the same service as that provided by Shuttle Express.¹⁶ Instead, as further clarified by the Administrative Law Judge, this proceeding will focus on “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.”¹⁷

¹⁶ Order 08, ¶24.

¹⁷ While Speedishuttle maintains its challenge to the premise that its unrestricted certificate can be retroactively restricted, or that it was ever intended to be restricted narrowly to the business model described in Order 04 and has challenged Order 08 by pending judicial review, it moves forward in this proceeding with the understanding that this ruling frames the scope of admissible evidence at the hearing and intends to present its own evidence demonstrating that its service in actuality aligns with the service proposed at the application hearing.

34 While the Commission and Administrative Law Judge Pearson have indicated the rehearing would focus on the service actually provided by Speedishuttle, Shuttle Express' initial Petition for Rehearing raised only a handful of bases for its assertions that Speedishuttle had not followed through with providing the service features it testified about in its application hearing. As addressed above, those bases again are:

- 2) Speedishuttle provided walk-up service after Order 04 was issued despite testimony that it did not intend to offer walk up service;
- 3) Speedishuttle is not offering multi-lingual greeters;
- 4) Multilingual service may only be offered to a *de minimis* number of passengers; and
- 5) Speedishuttle was not complying with the 20-minute departure guarantee discussed at the hearing.

35 The Commission previously ruled in its Notice of Determination not to Amend Order 04 that Speedishuttle was permitted to provide walk-up service and that it would not reconsider that ruling. Thus, this issue is not within the scope of this proceeding and evidence thereon should conclusively be excluded on that basis as well as on the basis of a collateral attack on the ruling in Order 08 as quoted in ¶18, above.

36 With respect to multi-lingual greeters, Shuttle Express has actually acknowledged that Speedishuttle never represented it would provide multi-lingual greeters, noting:

But at the airport, the only commitment was to 'do our best to hire multilingual receptive teams.' Application Case, Transcript at 24. This was the extent of Respondent's proposal to offer a 'different' service and what the Commission had reason to believe it was granting.¹⁸

The argument made here by Shuttle Express highlights why its complaint about Speedishuttle's conduct is misplaced. "Do our best" is not equivalent to "will only hire," and "receptive teams"

¹⁸ See Shuttle Express' Petition for Rehearing, ¶15.

are not necessarily “greeters.” Thus, Speedishuttle’s testimony cannot and should not even be reinterpreted to facilely suggest that it committed “to hiring only multilingual greeters.” Thus, whether it hired multilingual “greeters” should also not be within the scope of this proceeding.

37 Moreover, in raising the number of multilingual passengers actually transported by Speedishuttle, Shuttle Express’ complaint unquestionably constitutes a collateral attack on the Commission’s findings in Order 04. The Commission determined there that the provision by Speedishuttle of its multilingual website and efforts to attract multilingual receptive teams provided “significantly increased accessibility for non-English speaking customers” and thereby, as a factor among the totality of features, demonstrated that Speedishuttle would not offer the same service as Shuttle Express.¹⁹ Thus, the issue of whether Speedishuttle has transported any particular number or percentage of multilingual passengers, again, is not within the scope of this proceeding.

38 Finally, in order to make its argument regarding the 20-minute departure guarantee, Shuttle Express points (correctly) only to the Initial Order in the Application Case. This is because the Final Order, Order 04, failed to mention departure times as a factor which the Commission determined to be a part of what it considered different about Speedishuttle’s service. Thus, this issue too, can and should be excluded from the scope of this proceeding.

39 In light of the totality of the above, Speedishuttle initially questioned why this proceeding had been authorized. The entire rehearing was ostensibly triggered by supposed violations of operating authority via the provision of walk-up service, and that issue had already been finally adjudicated by the Commission. The remaining portions of Shuttle Express’ allegations are

¹⁹ Order 04, ¶21.

based on reinterpretation, unilateral parsing of and outright revisions to the Commission's findings in Order 04 to contend that Speedishuttle was somehow required to perform something it never proposed and which the Commission never required it to do and which differentiation model restrictions were also expressly rejected by the Commission in Order 04.²⁰

D. Objectionable testimony and evidence

40 Thus, it is not altogether clear exactly which issues conceivably remain unresolved in this proceeding aside from Order 08's overall reference to rehearing on the issue of adherence to "the business model." But putting aside those basic concerns here, much of Shuttle Express' proffered testimony can be excluded on far simpler, indisputable grounds, because rather than treating the Commission's and Administrative Law Judge's rulings about the scope of this proceeding as benchmarks guiding the presentation and limitations on its testimony, Shuttle Express has instead used them simply as signposts or "exit ramps" for diversion to topics it seeks to retry on rehearing. This, in turn, leads to readily identifiable categories or topics of objectionable testimony, which can be described or categorized as follows, and which Speedishuttle separately analyzes below:

- 1) Testimony which collaterally attacks the "business model" in Order 04, attempting to establish that the service features in the business model do not actually distinguish Speedishuttle's service from that of Shuttle Express;
- 2) Testimony which collaterally attacks the Commission's findings in Order 04 by attempting to reopen and argue market sustainability;

²⁰ See, §25 Order 04. It should also be noted that Speedishuttle actively works to provide multilingual receptive teams, affording increased access to foreign language passengers, and attempts to depart the airport within 20 minutes, it simply now contends that it is not restricted by stealth limitations in its certificate in doing what it was never expressly required to do. In other words, there remain real due process concerns raised by these challenges.

- 3) Testimony which collaterally attacks the Commission's unappealed 2013 Rulemaking²¹ by which it identified standards for what is the "same service" and/or which attempts to reinterpret the inclusive same service standards set forth in WAC 480-30-140(2);
- 4) Testimony which relates to the provision by Speedishuttle of walk-up service at SeaTac International Airport;
- 5) Testimony which attempts to reinvent and/or reinterpret the testimony given at the hearing on Speedishuttle's application (which is its own best evidence);
- 6) Testimony which attacks the means, methods, benefits or manner of providing the service features included within the business model;
- 7) Testimony purporting to establish predatory pricing, but which addresses average total cost; and
- 8) Improper, ad hominem attacks on Speedishuttle's character.

1. Collateral attack on the Commission's finding in Order 04 relating to the "business model"

41 Voluminous testimony from multiple witnesses filed by Shuttle Express are directed squarely to a collateral attack on the Commission's determination in Order 04 that the "business model" proposed by Speedishuttle constitutes a different service from that offered by Shuttle Express. This is accomplished in a variety of ways, most prominently by claiming that the failure of Speedishuttle to reverse Shuttle Express' continued ongoing decline in passenger counts establishes that the service offered by Speedishuttle is the "same service" offered by Shuttle Express. Even if these market analytics could somehow prove that passengers who use Speedishuttle's service (as opposed to unregulated or alternative services) would have always opted alternatively to use Shuttle Express' service without Speedishuttle (which they do not), they do nothing to establish how Speedishuttle currently operates or implicate Speedishuttle's fares or its cost of service as being impermissible or unlawful.

²¹ General Order R-572, Docket No. TC-121328, (Aug 2013). ("The 2013 Rulemaking").

42 By way of example on this point, Shuttle Express submitted the prefiled testimony of Don Wood, Shuttle Express' retained expert witness,²² who stated the following:

At the time that these orders were issued, any knowledge of Speedishuttle's operations was purely conceptual and could only be based on the commitments made by Speedishuttle through its pleadings and sworn testimony. A *prospective* public interest finding could be made because Speedishuttle did not "*propose* to offer the same service Shuttle Express provides;" instead, the "entirely different business model" that Speedishuttle *proposed* to offer could result in service to previously unserved markets or market segments. At the current time, however, the knowledge of Speedishuttle's operations has moved from the conceptual to the empirical. It is possible to ascertain, as a factual matter, whether Speedishuttle is *actually* offering the same service that Shuttle Express provides and whether Speedishuttle is *actually* providing service pursuant to an "entirely different business model" that provides service to previously unserved customers. Put directly, the question of whether the service actually provided by Speedishuttle "is precisely the type of service differentiation contemplated by the new rules" can and should be answered by the direct empirical evidence now available.²³

Mr. Wood thus suggests that he can establish that the Commission was wrong in determining Speedishuttle's proposed service was different from that offered by Shuttle Express, once again evidence the Commission clearly ruled in Order 08 it would not allow.²⁴

43 Similarly, Mr. Wood attempts to further supersede the Commission's judgment in issuing Order 04 when he states:

Speedishuttle's "multilingual business model" consists of two key elements. First, Speedishuttle promises a multilingual website that would permit reservations to be made in Chinese, Japanese, and Korean in addition to English. The value of such a website would be to enable a visitor who is not fluent in English to make a reservation for prearranged service through the Speedishuttle

²² Don J. Wood is offered as an expert in regulated markets, but a review of his experience does not demonstrate that he has any understanding or experience in the regulated intrastate transportation industry.

²³ Exhibit ___ (DJW-1T), p. 7: 4-17.

²⁴ Order 08, ¶28.

website. In order to determine whether the promise of “significantly increased accessibility for non-English-speaking customers” has been met, it would be instructive to review how many customers have actually made reservations through the non-English pages of Speedishuttle’s website.

This opinion testimony attempts to challenge the finding made by the Commission in Order 04 that Speedishuttle’s multi-lingual website provides increased access to non-English speaking customers by inverting the Commission’s position. This witness challenges not whether Speedishuttle offers the multi-lingual website in actuality, but whether the website increases accessibility for multi-lingual customers. Whether the website has yet been effective in converting internet webpage traffic into reservations for non-English speaking passengers obviously does not inform the Commission on how Speedishuttle is operating, it challenges the Commission’s rationale in issuing Order 04, which, again, the Commission has said it would not allow.

44 Other significant examples of this type of testimony are provided in Shuttle Express’ attempt to redefine the “business model” in Order 04, by claiming that it required all personal greeters to be multilingual. Yet, as discussed above, the use of personal greeters is never discussed in Order 04. Instead, Shuttle Express’s testimony relies upon statements made in Order 02.²⁵ The same tactic is taken with respect to the departure times, which, again is never featured in Order 04.

45 Ironically, Wesley Marks in effect states that one of the primary purposes of his testimony is to collaterally attack the Commission’s decision in Order 04, stating “[a]lso, I will discuss how the operations of Speedishuttle are functionally the same as the longstanding operations of Shuttle Express...”²⁶ He then follows through on that statement, submitting testimony which attempts to

²⁵ Exhibit ___ (DJW-1T), p. 9: 17 – p. 10: 13.

²⁶ Exhibit ___ (WAM-1T), p. 2: 7-9.

demonstrate that the service features the Commission found differentiated Speedishuttle’s service were no different from those provided by Shuttle Express, albeit now almost two years after the original hearing.

46 One maneuver relied upon by Mr. Marks is to attack Speedishuttle’s focus on tourists, which again, were a demographic identified by the Commission as being part of Speedishuttle’s “business model” in Order 04. Marks challenges the Commission’s finding there by stating:

[f]or Speedishuttle to have attracted a new demographic to serve hotels and piers, they would have to do something more than just serve plain “tourists,” as that has always been part of the serviced market [sic] by Shuttle Express. Somehow the new service would have to be unserved “**tech-savvy** tourists.”²⁷

Again, this flatly contravenes the Commission’s ruling. Order 04 plainly stated that the proposed service would uniquely target a specific subset of consumers: “those who are tourists, tech-savvy, or non-English speaking.”²⁸ By slight of preposition, Shuttle Express attempts to substitute the Commission’s ruling with an interpretation of the business model that is more to Shuttle Express’ liking and to its omnibus original argument on Petition for Rehearing.

47 Similar attempts to collaterally attack the Commission’s finding in Order 04 are sprinkled throughout the testimony offered by Shuttle Express, including nearly all of the testimony submitted by Don Wood. The following table provides each page and line of testimony which Shuttle Express offers in a collateral attack on Order 04’s findings regarding “same service”:

Exhibit ___ (DJW-1T); Testimony of Don J. Wood

Page	Lines
5	13-20

²⁷ *Id.*, p. 20: 13-16 (emphasis in original).

²⁸ Order 04, ¶21 (emphasis added).

6	1-20
7	1-17
8	1-16
9	9-19
10	1-13, 19
11	1-18
12	1-15, 19
13	1-16
14	1-21
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22	1-5
23	12-21
24	1-24
25	1-18
26	1-26
27	1-21
28	10-15
29	1-20
30	1-20
31	1-18
32	1-19

Exhibit ___ (PK-1T); Testimony of Paul Kajanoff

Page	Lines
9	11-19
10	4-5
11	10-21
12	1, 3-8

Exhibit ___ (WAM-1T); Testimony of Wesley A. Marks

Page	Lines
2	7-12
5	6-20
6	1-21
7	1-21
8	5-17
9	1-6, 8-16

10	4-6, 9-11, 15-20
11	1-12
12	1-21
13	1-19
14	1-5
15	15-20
16	1-3
19	8-20
20	1-21
21	1-11
22	3-21
23	1-21
24	1-13

2. Attempts to reopen the application record by arguing about market sustainability

48 As part of an auto transportation application proceeding, the Commission is permitted to consider evidence regarding the sustainability of a particular service pursuant to WAC 480-30-140(b), which provides in part: “[t]he Commission will also consider whether increased competition will benefit the travelling public, including its possible impact on sustainability of service.” Shuttle Express fully participated in the BAP by which Speedishuttle’s certificate was granted, and had ample opportunity to submit evidence of sustainability of service at that time. After considering the evidence actually presented in the BAP, the Commission nevertheless determined that Shuttle Express’ objection should be overruled and Speedishuttle’s application should be granted.

49 Now, Shuttle Express attempts to inject into this rehearing (which again has been limited to determining what service Speedishuttle is actually providing) its contention that it has a natural monopoly under RCW 81.68 and that the market cannot sustain multiple providers. Shuttle Express’ analysis is fatally flawed and can never support the conclusion offered with respect to sustainability of service. This factor should be and has been excluded from this proceeding.

50 Not only does market sustainability exceed the scope of the Commission’s ruling on this proceeding in Order 08, the argument is not actually based on new evidence. In Docket No. TC-132141, the proceeding on Shuttle Express’ earlier Petition for Exemption from WAC 480-30-213(2) and WAC 480-30-456, Shuttle Express filed the Declaration of Jimmy [sic] Sherrell, which is attached hereto as Exhibit 1 and incorporated by reference herein. In that declaration, dated November 19, 2013, Mr. Sherrell stated, under oath, “[f]rom its inception, we have had to use some form of rescue service for its door-to-door service due to the unique type of operation that we are. This share ride door-to-door service we offer is not viable without rescue service.”²⁹ Similarly, in its recent Petition for Limited and Conditional Exemption, filed June 17, 2016, Shuttle Express represented to the Commission “[i]t has always been a challenge to provide a regulated share ride service in the Seattle area as an auto transportation company on a sustainable basis.”³⁰ In short, Shuttle Express’ increasingly alarming contentions about market sustainability are hardly new, unfamiliar or unique to this proceeding.

51 Despite Shuttle Express’ long insistence that a regulated door-to-door service is unviable without changes or exceptions to law and rule which it now seeks to blame solely on Speedishuttle, its testimony brazenly and retroactively attacks the Commission’s determination in Order 04 under the guise of “new evidence.”

52 Indeed, this retroactive interpretative assault is woven throughout the testimony submitted by Paul Kajanoff, who personally participated in the BAP. Curiously, Mr. Kajanoff’s testimony even alludes to its own irrelevance and inadmissibility when faulting the lack of data availability

²⁹ Declaration of Jimmy [sic] Sherrell, Docket No. TC-132141, ¶6, p. 2.

³⁰ In re Petition of Shuttle Express, Inc., Docket No. TC-160819, p. 4, ¶10.

in the Administrative Law Judge’s discovery rulings, which had sustained Speedishuttle’s objections to Shuttle Express’ Data Requests, stating...

We asked for more detailed statistical data [sic] on Speedishuttle’s trip and passenger counts in Data Request No. 6. Speedishuttle objected to that request, and provided no useful data. The ALJ denied our request to compel a substantive response. The data above came from a public records request to the Port of Seattle.³¹

Nonetheless, Mr. Kajanoff speculates that Speedishuttle is taking away downtown hotel business from Shuttle Express and allegedly somehow avoids serving the rest of King County, which Shuttle Express claims it requires in order to remain in operation (without demonstrating why that would be).³² Taken together with the testimony of Don Wood and Wesley A. Marks, Shuttle Express advances a conclusion that door-to-door share ride service cannot be sustained in King County if there are two providers. Again, this is hardly a novel or contemporaneous charge by Shuttle Express and it is unsupported by any facts assuming those facts were even material or relevant to this proceeding. Thus again, this irrelevant testimony should be excluded on multiple grounds.

53 The testimony here which should be excluded in attempt to reopen and relitigate the BAP is found at the following pages and lines:

Exhibit ___ (DJW-1T); Testimony of Don J. Wood

Page	Lines
28	2-21
29	1-20
30	1-20
31	1-18
32	1-19

³¹ See Exhibit ___ (PK-1T), p. 2: 3-6.

³² *Id.* p. 14: 12-14.

Exhibit ___ (PK-1T); Testimony of Paul Kajanoff

Page	Lines
2	16-19
3	1-13
4	1-11
5	1-20
7	20-23
8	1-21
9	1-20
10	1-21
11	1-21
12	13-22
13	1-16
14	1-14

3. Testimony collaterally attacking the 2013 rulemaking and reinterpreting the “same service” standards

54 Shuttle Express also attempts, through testimony, to reinterpret the meaning of the broad and inclusive standards by which the Commission determines whether a service proposed in an application constitutes the same service provided by an incumbent carrier under WAC 480-30-140. A good example of such attempt can again be found in the testimony of Don Wood, who testifies as follows:

Q. The Commission has adopted a number of factors to consider when considering an application for a second provider of transportation services in a given geographic area. What is your understanding of these factors?

A. As the Commission points out in Order 02, pursuant to WAC 480-30-140(2) it may “consider a number of factors to determine whether the service applied for is the same as existing service.”³³ It is my understanding that this code section contains an illustrative, though not exhaustive, list of factors that may be considered.

³³ Order 02, ¶14.

By applying these factors, the Commission can identify two primary categories of services that could be distinguished from an existing service. First, an applicant may commit to provide a service that meets the needs of a currently unserved market or market segment, so that an identified group of customers that the incumbent is either unwilling or unable to serve will directly benefit from the presence of the new entrant. Second, the applicant may commit to provide an enhancement to the core service that it can demonstrate will expand the size of the overall market to be served by the incumbent and new entrant.

It is important to note that granting the application of a new entrant to serve previously unserved markets or market segments does *not* mean that the market for the core service provided by the incumbent has ceased to be a natural monopoly. The ability of customers to continue to be able to obtain the core service (here, share ride services within and throughout the designated geographic area) continues to be an important element of the public interest to be considered.³⁴

55 Despite the additional objectionable legal conclusions in his testimony, by this, Mr. Wood seeks to engraft a new element to the same service standards: a requirement that the applicant demonstrate that the new service will expand the size of the overall market, which quite understandably was never proposed by the Commission in the 2013 Rulemaking. Contrary to Mr. Wood’s testimony, the Commission stated in the 2013 Rulemaking:

34 The court also found that “[t]he public is benefited by an incumbent carrier being motivated to improve its service.” Under this case, the Commission has the discretion and authority to interpret and apply these standards “in any logical and reasonable way supported by the evidence,” and there is public benefit in encouraging competition by motivating carriers to continually improve service.

35 The Commission developed the standards in the proposed rules for reviewing applications with the intent to inform existing companies and applicants how the Commission would evaluate applications. The standards are based in part on the Commission’s

³⁴ Exhibit ___ (DJW-1T), p. 4: 10 – p. 5: 11 (emphasis added).

interpretation of the statutory requirements in RCW 81.68 and applications adjudicated over the past three decades, as well as an effort to increase opportunities to provide new or improved service to consumers within the limits allowed by the statute. The proposed rules are not intended to express a policy preference between types of service, for example, door-to-door service and scheduled service. Rather, the intent is to provide a clear framework for companies to make choices regarding how best to serve consumers and the Commission to evaluate those choices.

Mr. Wood's testimony here is undeniably a collateral attack and a reinterpretation of the Commission's 2013 Rulemaking and irrelevant to the issues to be determined in this proceeding.³⁵

56 The above excerpt, as well as similar reinterpretations and reinventions of the auto transportation rules are provided in the prefiled testimony submitted by Shuttle Express and located in the following places:

Exhibit ___ (DJW-1T); Testimony of Don J. Wood

Page	Lines
4	10-20
5	1-11
29	12-17

4. Testimony addressing walk-up service

57 As addressed repeatedly in these dockets, the Commission previously determined by unappealed notice that Speedishuttle was permitted to provide walk-up service at SeaTac International Airport. Undeterred by the Commission's unappealed final ruling, Shuttle Express has unrelentingly submitted voluminous arguments in numerous pleadings and in prefiled testimony

³⁵ While Speedishuttle continues to believe its new service will ultimately enhance accessibility for an expanding number of prospective regulated customers in a dynamically growing airport environment, Shuttle Express now *requires* a mandatory showing thereof in its reinterpretation of WAC 480-30-140's same service requirements. Again, this type of testimony is simply immaterial and irrelevant not only to the revised scope of this proceeding, but also to any current application of the subject rule.

attacking Speedishuttle's provision of walk-up service, blatantly ignoring the final adjudication of the issue it sought to use as a springboard for this proceeding.

58 Shuttle Express may well have predicated its original petition for rehearing on walk-up service, but the Commission previously considered and found this issue exceeds the scope of this contained proceeding as noted above and explicitly in Order 08. The testimony on walk-up service can be located at the following pages and lines and should be stricken:

Exhibit ___ (DJW-1T); Testimony of Don J. Wood

Page	Lines
8	1-16
15	14-20
16	1-19
17	1-18
18	1-12

Exhibit ___ (PK-1T); Testimony of Paul Kajanoff

Page	Lines
12	5-6
16	1-4

Exhibit ___ (WAM-1T); Testimony of Wesley A. Marks

Page	Lines
10	17-20
16	4-16
18	4-21
19	1-20

5. Reinterpretation of application case testimony

59 Speedishuttle's brief adjudicative proceeding case record was transcribed. Rather than relying upon that accurate and certified reflection of the testimony given as the best evidence, Shuttle Express' testimony of December 21, often provides instead its own rendition and reinterpretation

of that testimony. In doing so, it contorts the original meanings in order to attribute to Speedishuttle representations it never made.

60 One example of this type of misleading, irrelevant testimony can be found in the testimony of Don Wood concerning the testimony of Cecil Morton on Speedishuttle's personal greeters:

The second key element of Speedishuttle's plan is a commitment to meet all incoming passengers with a multilingual agent, and to escort them through SeaTac and to a Speedishuttle vehicle. The Commission relied on Speedishuttle's sworn testimony regarding this commitment: "Mr. Morton testified that all Speedishuttle customers are greeted outside the security gate by a company employee, escorted to the baggage claim, and then escorted to their shuttle. The Company plans to hire multilingual greeters to communicate with non-English speaking customers."³⁶ The Commission goes on to describe its understanding of this commitment that would distinguish the service of Speedishuttle from that of Shuttle Express: "Speedishuttle service includes a personal airport greeter for each customer at no additional cost."³⁷ In order to determine whether Speedishuttle has actually provided this "individually tailored customer service" to a previously unserved market, it is now instructive to examine whether Speedishuttle has met its commitment to meet all incoming passengers with a multilingual agent, and to escort those passengers from the security gate to their shuttle. Put directly, has Speedishuttle made good on its commitments to "provide services that would be very useful, if not critical, for non-English speaking and foreign travelers"?"³⁸

61 As discussed in paragraph 36 and 37, above, Shuttle Express previously acknowledged in its Petition for Rehearing that Speedishuttle had never promised it would provide multi-lingual greeters, but would do its best to hire multilingual receptive teams. Yet, it now pointedly and disingenuously reinterprets Cecil Morton's testimony to suggest he promised that every personal greeter hired would be multilingual.

³⁶ Order 02, ¶6.

³⁷ Order 02, ¶15.

³⁸ Exhibit ___ (DJW-1T), p. 9: 17 – p.10: 13.

62 Similar testimony, attempting to substitute and/or modulate actual application case testimony with Shuttle Express' self-serving revisions of that testimony can also be found in the following pages and lines:

Exhibit ___ (DJW-1T); Testimony of Don J. Wood

Page	Lines
9	17-19
10	1-13
17	16-18
18	1-5
19	2-4

Exhibit ___ (WAM-1T); Testimony of Wesley A. Marks

Page	Lines
5	15-20
6	1-10, 13-16
7	3-6

6. Testimony which attacks the means, methods, benefits or manner of providing the service features included within the business model.

63 While also serving as a collateral attack on the Commission's discretion in finding that Speedishuttle's proposed service was not the same as that offered by Shuttle Express in Order 04, much of Shuttle Express' prefiled testimony also attempts to challenge Speedishuttle's proposed services by revising or augmenting what it believes those focal services should be, attacking the benefits of those service features, or otherwise maligning Speedishuttle's existing service. Not only does this suggest Shuttle Express believes that it is entitled to a natural market monopoly by preserving the previous status quo at all costs and avoid engaging in the sort of market adaptability the Commission envisioned when it issued its final order in the 2013 Rulemaking, it is wholly irrelevant to the Commission's core issue in this proceeding of whether Speedishuttle is providing the service it proposed.

64 Yet another example of this genre of testimony is found in the testimony of Don Wood, who states:

Speedishuttle promised a number of specific features, addressed below. As an initial matter, it is important to note that these features do not change the underlying core transportation service being provided, and do not promise to expand the service to additional markets or market segments of previously-unserved customers (in the way that a multilingual service has the potential to do).³⁹

He then goes on to state:

Commitment to provide service using Mercedes Benz vehicles that offer Wi-Fi service to passengers. The Commission’s orders refer to Speedishuttle’s proposed use of “luxury vehicles” or “upscale vehicles,” but do not explain why the use of such vehicles was expected to be inherently more desirable than the use of clean, well-maintained vehicles made by a different manufacturer. The terms “upscale” and “luxury” are not defined in the Orders, and the Commission does not articulate a specific expectation regarding how the market for share ride services will be expanded by the specific use of vehicles from a single manufacturer. It is difficult, therefore, to objectively determine whether this particular feature has had the expected impact on the public interest.⁴⁰

65 Again and again, this type of testimony is not relevant to whether Speedishuttle is actually providing the service it proposed, but instead attacks the substance of the Commission’s ruling in Order 04 and even launches a veiled attack on whether Speedishuttle is providing an upscale or luxury vehicle by utilizing the Mercedes Benz Sprinter vans it proposed to use in its application case which Shuttle Express knows (in responses now a part of this record through discovery motions) is reality. This type of testimony ultimately also again retroactively challenges the weight given to the identified business model factors. While Shuttle Express might perpetually

³⁹ Exhibit ___ (DJW-1T), p. 12: 18 – p. 13: 3.

⁴⁰ *Id.* at p. 13: 13 – p. 14: 6

seek to devalue the differentiation factors identified in Order 04, it has neither forum nor audience here to reargue those distinctions.

66 Additional examples of service feature critiques are contained in the testimony of Wesley A. Marks. Mr. Marks astoundingly and disingenuously claims that Speedishuttle has no idea whether it offers Wi-Fi service or its Speedi TV service in Washington. He does so by reinterpreting and misconstruing Speedishuttle's responses to data requests which have subsequently been included in this record in discovery motions practice which nevertheless affirmed these features are installed and operable, and instead simply opines Speedishuttle has no way to track customer usage information. But Mr. Marks is apparently not satisfied with this reality. He then goes on to challenge or otherwise qualify the Commission's previous finding regarding the benefit of these features, claiming that:

[i]f Wi-Fi service was to be considered to be a differentiation factor that is essential to attracting the tech-savvy customer demographic that Speedishuttle supposedly was going to serve, then some qualification and tracking of it would be necessary and customary. Features such as describing the network speed, bandwidth available, security on the network, and the stability of the connection would be critical to a true tech-savvy passenger seeking transportation...⁴¹

Here, Shuttle Express obviously recognizes Speedishuttle's Mercedes Sprinter vans are all in fact equipped with Wi-Fi. Because he cannot dispute that, he instead challenges the ultimate worth of the service and whether Speedishuttle has provided such additional qualitative features to the witness' liking.

67 Marks makes a similar attack on the actual foreign languages actually spoken by Speedishuttle's employees. Speedishuttle responded to data requests from Shuttle Express with information

⁴¹ Exhibit ___ (WAM-1T), p. 7: 15-18.

demonstrating it employed numerous multilingual workers. However, because now those facts do not support Shuttle Express' narrative, rather than questioning whether Speedishuttle retained multilingual employees, Mr. Marks instead challenges the particular languages spoken by those employees.⁴² However, the Commission never addressed the specific languages it conclusively considered to be "multi-lingual," nor could or would it have discriminated against or in favor of prospective foreign language passengers in the manner proposed by Mr. Marks. Thus, this testimony should also be excluded.

68 Marks even makes a similar attack on how Speedishuttle implemented SpeediTV. Though it was presented to the Commission as a means of providing tourism information, Marks now contends it is or should be used differently, stating:

The SpeediTV that was described in their business plan presented to the Commission and ALJ at the hearing again has turned out to be nothing more than a marketing tool for Speedishuttle and less like the luxury TV system that can be adjusted by users. Again relating this to the supposed un-served tech-savvy passengers, all information gleaned from SpeediTV should be available as splash page information when connecting to their Wi-Fi. Additionally, there is no mention of whether SpeediTV plays constantly in a loop of different languages so that all passengers can view and take in the benefits of information about the Seattle area.⁴³

Again, Mr. Marks utterly fails to demonstrate how Speedishuttle did not implement the proposed service features in its application case. Instead, he attempts to revise the ruling by alleging SpeediTV should expand, distinguish or augment service features it never proposed or promised.

69 In summary, the irrelevant testimony attacking the means/methods/benefits/manner of Speedishuttle service to be excluded on this ground can be found in the following pages and lines:

⁴² *Id.*, p. 9: 6-16, p. 10: 4 –16, p. 11: 1-11.

⁴³ *Id.* at p. 8: 10-17.

Exhibit ___ (DJW-1T); Testimony of Don J. Wood

Page	Lines
12	18-19
13	1-3, 13-16
14	1-18
23	2-3

Exhibit ___ (PK-1T); Testimony of Paul Kajanoff

Page	Lines
13	17-22
14	1-7, 15-21
15	1-12

Exhibit ___ (WAM-1T); Testimony of Wesley A. Marks

Page	Lines
7	7-11, 15-21
8	10-19
9	6-16
10	4-16
11	1-11

7. Testimony which discusses average total cost, a figure which the United States Ninth Circuit Court of Appeals conclusively found to be irrelevant to predatory pricing claims

70 In support of its predatory pricing complaint, Shuttle Express submitted testimony of Paul Kajanoff. However, it is difficult to comprehend exactly how this testimony relates to predatory pricing (the sole remaining complaint issue) at all. He begins that discussion by complaining about the format of Speedishuttle's financial data presentation in discovery and attempts to reinterpret those data based upon his own expectations and predictions, then, after extrapolating Speedishuttle's previously admitted operating loss to his own presumed level, bemoans the fact that Speedishuttle (a new entrant to the King County market) is currently losing money. He also (disputably) states that Speedishuttle's fares to downtown Seattle are lower than Shuttle Express' fares. Finally, he predicts Speedishuttle can never be profitable unless Shuttle Express loses

more passengers to Speedishuttle (ignoring all other potential sources of growth of passenger counts) without any logical explanation as to why.

71 Treating Kajanoff's testimony in the light most favorable to Shuttle Express and allowing it every possible inference does nothing more than establish that Speedishuttle continues to suffer an operating loss. Operating losses alone do not demonstrate the unit cost of providing service, nor the fare for that service, which is the bare minimum information necessary to establish whether fares are below average variable cost. Operating losses can be used to determine whether fares are above the average total cost, but again, the Ninth U.S. Circuit Court of Appeals (among numerous other courts) has held that average total cost is irrelevant to determining whether a competitor has engaged in predatory pricing.⁴⁴

72 Absent a discussion of average total cost in comparison to actual fares, Shuttle Express' testimony constitutes nothing more than an attack in a vacuum on the existence of competition. While Shuttle Express may desperately seek to return the auto transportation market to its pre-2013 regulatory state in order to regain its former status quo, its testimony is plainly irrelevant and legally incapable of establishing that Speedishuttle engaged in predatory pricing.⁴⁵

73 The objectionable testimony on this basis is found at the following pages and lines:

Exhibit ___ (PK-1T); Testimony of Paul Kajanoff

Page	Lines
6	12-16
7	1-23
8	1-21
9	1-20
10	1-21
11	1-12

⁴⁴ *Cal. Comput. Products, Inc. v. Int'l Bus. Machs. Corp.*, 613 F.2d 727, 743 (9th Cir. 1979).

⁴⁵ *See*, Speedishuttle Motion for Summary Determination of December 21, 2016.

8. Improper character attacks

74 In addition to the purely irrelevant testimony discussed above, Shuttle Express submitted testimony which it correctly couches as “character evidence,” but which is prohibited by Washington Rule of Evidence 404.

75 In one such instance, Paul Kajanoff submitted the following testimony:

Q: Do you question the character of Speedishuttle and should the Commission consider their character in fashioning a remedy in this docket?

A: Yes, I do.

Q: Why?

A: Lots of reasons. At a high level, it starts with the totality of the nature of service they proposed, which they led the Commission to believe would be different than ours and targeted so some niche of supposedly unserved tech-savvy passengers from China, Japan, and Korea who were incapable of booking on an English language website. We can see now that the whole premise of their application and consequent grant of authority was simply not true. We strongly suspect that the whole case was a fabrication. The best and most obvious example was the testimony that they would not serve “walk-up” passengers. But they made sure they were set up to do just that on their very first day of service at SeaTac. And the fact that four months after we asked for their correspondence from 2014 and 2015 that would show their true intentions, true business plan, and true target passenger demographic they still had not produced a single document until last Friday, after a two rulings by the ALJ. We know such documents exist, as we have seen a small segment of them from our public records request to the Port (some of which are attached to Mr. Marks’ testimony). The request should not have been hard. The inference is they are trying to hide something.

As Shuttle Express well knows, the Administrative Law Judge sustained Speedishuttle’s appropriate objections in discovery to Shuttle Express’ attempts to obtain pre-application communications. Now Shuttle Express attempts to turn that ruling that these records were

irrelevant to the proceeding into a “cover-up” by Speedishuttle. This type of ad hominem “hatchet job” type testimony serves no purpose other than to further the impermissible character attacks consistently made by Shuttle Express throughout this proceeding. Such evidence is inadmissible, intemperate and should be excluded.

76 The improper character attack testimony submitted by Shuttle Express is located at the following pages and lines:

Exhibit ___ (PK-1T); Testimony of Paul Kajanoff

Page	Lines
7	20-23
8	1-21
9	1-3
11	16-18
13	17-22
14	1-7
15	13-21
16	1-21
17	1-19

Exhibit ___ (WAM-1T); Testimony of Wesley A. Marks

Page	Lines
21	12-20
22	1-5

IV. CONCLUSION/PRAAYER FOR RELIEF


77 Shuttle Express has consciously, conspicuously and repeatedly disregarded the rulings of the Commission and the Administrative Law Judge regarding the scope of this proceeding and has now submitted voluminous prefiled testimony dedicated almost entirely to distorting facts into a narrative that fits the storyline preferred by Shuttle Express. Instead, Shuttle Express could have filed succinct testimony regarding the service features actually discussed in the business model

in Order 04, but admittedly that would not have supported its unrelenting position or view of the rules, the Commission's orders or the evidence in this rehearing and Complaint.

78 Speedishuttle now seeks to avoid the further protraction, exacerbation and distraction of this proceeding that would occur by responding to this improper testimony, and thus objects to its admission, and respectfully requests an advance ruling excluding all the cited testimony submitted by Shuttle Express, before preparing and submitting its own testimony and in affirmatively and appropriately limiting the issues remaining in this consolidated proceeding.

DATED this 17th day of January, 2017.

RESPECTFULLY SUBMITTED,

By 
David W. Wiley, WSBA #08614
dwiley@williamskastner.com
Blair I. Fassburg, WSBA # 41207
bfassburg@williamskastner.com

Attorneys for Speedishuttle Washington, LLC

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2017, 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:

<p>Julian Beattie Assistant Attorney General Office of the Attorney General Utilities and Transportation Division 1400 S. Evergreen Park Dr. SW PO Box 40128 Olympia, WA 98504-0128 (360) 664-1192 Email: jbeattie@utc.wa.gov</p>	<p>Greg Kopta Director/Administrative Law Judge 1300 S. Evergreen Park Drive SW P.O. Box 47250 Olympia, WA 98504-7250 (360)-664-1355 gkopta@utc.wa.gov</p>
<p>Brooks Harlow Lukas, Nace, Gutierrez & Sachs, LLP 8300 Greensboro Dr. Suite 1200 McLean, VA 22102 (703) 584-8680 Email: bharlow@fcclaw.com</p>	<p>Rayne Pearson Administrative Law Judge 1300 S. Evergreen Park Drive SW P.O. Box 47250 Olympia, WA 98504-7250 360-664-1136 rpearson@utc.wa.gov</p>

Dated at Seattle, Washington this 17th day of January 2017.



Lyndsay Taylor
Legal Assistant

EXHIBIT 1

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re Petition of

SHUTTLE EXPRESS, INC.,

For Exemption From WAC 480-30-213(2)
and WAC 480-30-456, Pursuant To
WAC 480-07-110

DOCKET _____

DECLARATION OF JIMMY
SHERRELL IN SUPPORT OF
PETITION FOR EXEMPTION

- 1 I, Jimmy Sherrell, am the President and CEO of Petitioner Shuttle Express, Inc. (“Shuttle Express” or “Petitioner”). I make this declaration based on personal knowledge and my experience operating and managing Shuttle Express for roughly 25 years.
- 2 I have reviewed the Petition and can generally attest to the truth of the factual statements contained in the Petition, most of which were addressed in the hearing on the Staff’s complaint against Shuttle Express this August. This declaration supplements that hearing with a few additional facts.
- 3 As I testified in August, rescue has always been essential to successful operation of Shuttle Express’s share ride service and always will be. Shuttle Express is not unique. I know that SuperShuttle, which has a very similar operation to ours and service in cities such as Dallas, Denver, Los Angeles, Minneapolis, Orlando, Phoenix, and over two dozen other cities also uses limousines or town cars in its operation. I have personally ridden SuperShuttle in Phoenix and had them substitute a limousine for their van on occasion.
- 4 Since the Initial Order came out on the Staff’s complaint, I directed Shuttle Express to voluntarily comply with the cease and desist. That compliance is already harming the traveling public by materially degrading Shuttle Express’s service. It is resulting in longer

wait times at the airport due to the need to redirect vans for inbound priority. Often a passenger becomes impatient and takes a taxi to get home. This forces them to pay a much higher fare and creates bad will for Shuttle Express. We cannot expect repeat business from people who have a bad experience like that. We now have to pick up people earlier due to bad routing to get a rescue from another van. Again, this makes our service less convenient and discourages repeat business. Passengers are now getting to the airport closer to their departure time, giving them high anxiety. 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 parking fee 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.

5 Compliance with the cease and desist during the Christmas and New Year holidays puts the traveling public at particular risk. Year-end and New Year holiday air travel volumes are particularly high. Compounding the challenges we face is winter weather, which often impacts air transportation, ground transportation, or both. Fog, snow and ice on the ground can greatly increase the need for rescue service. Many travelers who ordinarily would drive themselves to the airport will take Shuttle Express if there is snow or a threat of snow. Also, flight delays often result in unexpected demand at the airport at unexpected times.

6 From its inception, we have had to use some form of rescue service for its door-to-door service due to the unique type of operation that we are. This share ride door-to-door service we offer is not viable without rescue service. We also offer to pay airline change fees and penalties and parking for passengers. But these are poor substitutes for rescue service,

which provides the passengers with what they are expecting, which is an on-time ride to or from the airport.

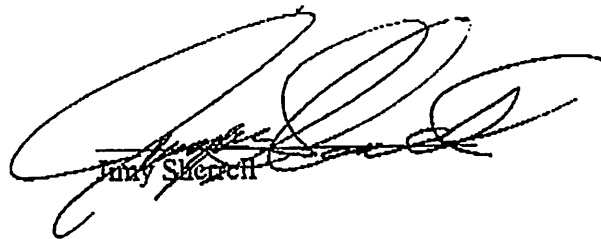
7 In contrast, although we also offer scheduled airporter service to locations such as downtown Bellevue and downtown Seattle, we do not use rescue service in our scheduled operations. Indeed, I believe we have the largest schedule operation the Commission regulates. The lack of need for rescue service in our scheduled operations is another illustration of the difference between door-to-door and traditional bus operations.

8 The independent contractors we use are all subject to background checks, inspections, drug tests, and strict contractual obligations. In addition to the DOL inspections, we do our own inspections of the contractors' vehicles. Our inspections and oversight go beyond the both what the DOL and Commission do.

9 In the case of rescue service, it is not practical for Shuttle Express to get written permission from passengers to release their names and addresses to the independent contractor. By its nature, the need for rescue service arises unexpectedly and arrangements are made at the last minute. We only allow limousine drivers to use the customer information to perform the rescue service.

I declare under penalty of perjury under the laws of the State of Washington that the statements in this declaration are true and correct to the best of my knowledge, information, and belief.

Executed at Renton, Washington, this 19thth day of November, 2013.



Jimmy Sherrell