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WASHINGTON STATE SUPREME COURT

64428-9
NO. 82887-3

EVERGREEN TRAILS, INC., d/b/a GRAYLINE OF SEATTLE

Appellant,

v.

KING COUNTY

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. ISSUES ON REVIEW

1. May a commercial bus company sue Metro, a municipal bus service, for inverse condemnation due to an alleged loss of profits where Metro did not regulate the commercial bus company or take or damage its property?

2. When a metropolitan municipal corporation adds more buses on its long-established bus route and uses only part of that route for some runs, must it, pursuant to RCW 35.58.240, buy-out a commercial bus company which operates on a different route and provides a different type of service?

II. STATEMENT OF THE CASE

A. **UNDISPUTED SUBSTANTIVE FACTS**

1. **Metro's Suburban Predecessors**

Commercial bus companies, not municipalities, provided the earliest mass transportation in suburban King County, beginning in 1913 at the latest. CP 434. In 1919, the City of Seattle began a municipal, intra-city transit system, known later as "Seattle Transit", while commercial bus companies continued to serve communities beyond the City's borders. CP 401-404.

The State Legislature enacted transportation legislation in 1921 that required most commercial bus companies to obtain certificates of public convenience and necessity, and to submit to state regulation. Laws 1921, ch. 111, §§ 1(c), 4, Transportation By Motor Vehicles Act ("1921 Act"), RCW 81.68 et seq. Originally, the Public Service Commission or its department of public works performed this regulatory role under the 1921 Act. Laws 1921, ch. 111 §1(c).

In September 1921, the department of public works issued certificate 166 to the Seattle-Tacoma Union Stage Line, granting authority for its preexisting dual route service between Seattle, the general area where the Sea-Tac Airport would stand decades later, and Tacoma. CP 440, 512, 517, 1072-1076. By 1923, the department had transferred this dual-route authorization to Park Auto Transportation, the owner of certificate 208. CP 445, 452. On July 28, 1926, the department also authorized Park Auto to acquire certificate 16, and to merge certificate 208 into it. CP 457-459. The department issued a new consolidated certificate 16 in the name of Park Auto Transportation that included authorization for this dual route service between:

Seattle and Tacoma, Washington, via both the "Valley Road" and the "High Line Route" via Des Moines, Washington....

CP 457, 461. Park Auto changed its name to the North Coast Transportation Company, and the department changed certificate 16 accordingly later that year. CP 463.

a. North Coast Transportation (1926-1948)

North Coast continued to provide mass transportation service between downtown Seattle, the area of the future airport, and Tacoma. CP 468, 479, 483, 485-486. Starting in 1930, North Coast operated from the "Central Terminal" located at the north end of downtown Seattle, at 8th and Stewart. CP 485, 495. North Coast developed a vast network and boasted of its "convenient, frequent and rapid transportation." CP 483.

North Coast obtained approval to use the "new Pacific Highway" on July 25, 1929, and the department amended certificate 16 accordingly. CP 497-498, 500. By 1935, the "Pacific Highway" was no longer new and North Coast had extended its various Pacific Highway routes from Blaine to Vancouver. CP 503. The Pacific Highway, known later as "Highway 99", served as the

state's primary north-south route prior to the construction of I-5. CP 506.

In March 1942, the Port of Seattle selected the future site for its Sea-Tac Airport which happened to be located on North Coast's route. CP 512, 517, 1072-1076. The Port completed its original runways in 1944. CP 513. North Coast then provided mass transportation between downtown Seattle and the new airport. CP 1072-1073.

b. Greyhound (1948-1965)

North Coast sold its certificate 16 and its operation to the Greyhound Corporation two years later, in 1948. CP 495, 519, 522. The Central Terminal at 8th and Stewart soon sprouted a large neon "Greyhound" sign. CP 495. Via its route 11, Greyhound provided the mass transportation ("local commuter type service") between Seattle and the airport until 1965. CP 437, 530, 539, 545.

c. The Metropolitan Transit Corporation (1965-1972)

In 1965 Greyhound sold off the local parts of its certificate 16 authority, and its local service, including route 11, to the Overlake Transit System, the owner of certificate 484. CP 437. By then, as today, the Washington Utilities and Transportation Commission ("WUTC"), the successor to the Public Services Commission, regulated commercial

companies under the 1921 Act. CP 528, 856, ¶6. Overlake promised the WUTC that it would adopt all of Greyhound's local routes and services. CP 530. The WUTC approved the sale, finding that it had issued no other certificates for local mass transportation. CP 534, ¶5.

No other common carrier has authority issued from this Commission to engage in the type of transportation here being considered along the involved routes.

Id. (emphasis supplied). The WUTC transferred Greyhound's local authority into Overlake's certificate 484. CP 536, 995.

With its purchase of Greyhound's local service, Overlake in 1965 consolidated mass transportation in suburban King County. CP 437, 531. Overlake had previously purchased both the Seattle Transit System, and the Lake Shore Lines, companies with roots that extended back to the 1920's, which themselves had before gobbled up smaller operations. Id. Overlake merged its three large bus companies and formed the new "Metropolitan Transit Corporation" later that year. CP 423, 434-435, 437.

With this merger, Metropolitan Transit provided virtually all suburban mass transportation in King County. CP 901, 911-912, 914-915. King County's most populous suburban communities depended solely on Metropolitan for bus service. CP 915, 917-918.

Although hardly a glamorous means of transportation, the Metropolitan buses had become a way of life for thousands of King County residents. For some, commuting by bus made it possible to get by without the necessity of a second car. For others, easy accessibility to the bus lines had been the deciding factor in choosing their home. Sometimes the bus meant the only way to get to medical appointments or shopping areas. Sometimes, especially in the case of senior citizens, the bus meant the only link to the outside world.

CP 938.

d. Metropolitan Transit Route 7

Via its route 7, Metropolitan Transit provided the only mass transportation between downtown Seattle and the airport. CP 534, ¶5. With limited stops, route 7 service was fast -- travel times of 30-34 minutes. CP 904-906. Route 7 served downtown, the area south of downtown (the "SODO District") stopping at Boeing Field, and beyond at Riverton Heights, before reaching the airport. CP 904.

By May 1971, route 7 traveled in part via I-5, and with limited stops and minimal turns, its downtown-airport service took only 30 minutes. CP 906, 911.

e. The Near Collapse of Metropolitan Transit

As the 1970's began, Metropolitan Transit was in dire economic straits. CP 422-423, 425. It "faced imminent and total collapse" along with

Seattle's municipal system, Seattle Transit. CP 422, 750. Bus ridership declined steeply after World War II, due to increasing automobile ownership, tremendous growth in suburban population, and industrial dispersion. CP 409-410, 899. The bus systems thus curtailed services, causing an even greater loss of riders. CP 899.

In July 1970, Metropolitan Transit sought WUTC approval to discontinue some of its suburban service. CP 646. City and County officials, civic clubs and other organizations protested. CP 648. Responding to the public outcry, the WUTC conducted an investigation and found that Metropolitan Transit was:

...having serious financial difficulties and that some operating changes should be made if the Company is to provide transportation service.

Id.

In February 1971, the WUTC issued an even more dire warning -- Metropolitan Transit would fail altogether without a tax subsidy. CP 650. The WUTC approved an emergency fare increase, but cautioned that this would not stop Metropolitan's demise.

The recent history of local bus operations in this state has seen only those with some form of local subsidy or municipal ownership continue, while others have disappeared. This Commission cannot require private ownership to continue service without the assurance of

reasonable earnings. Privately owned systems in Bremerton, Yakima, Spokane, Everett, Olympia and Vancouver are continuing by virtue of municipal operations with subsidy. Bus service was discontinued in the Tri-State area, Aberdeen, Hoquiam and Cosmopolis....

Several thousand citizens ride Metropolitan Transit Corporation buses every day. Simultaneously with the grant of this fare increase we are obliged to advise the people and the leaders of the communities involved that this fare increase is granted at a time when immediate cessation of service appeared imminent, and it is done not as a solution to the problem but to provide a little time.

Id. (emphasis added).

In spite of substantial fare increases, Metropolitan Transit's revenue continued to decline, while support for a new municipal system grew. CP 937.

f. Legislative Action

Between 1958 and 1970, local voters rejected four successive bond proposals calling for a young local government, the Municipality of Metropolitan Seattle, or "Metro", to add a municipal transportation system to its existing functions. CP 412-422, 425, 750-751. Formed in 1958, Metro was the only metropolitan municipal corporation ever established in Washington.

CP 412, 867, ¶73. Later, in 1994, Metro merged into King County.

CP 674, 1506, ¶7.

The legislative scheme required Metro to obtain separate voter approval for any of the six possible functions of a metropolitan municipal corporation, including public transportation. CP 411; RCW 35.58.050. After the fourth losing transportation vote in 1970, Metro's officials did not want to again face the 60% supermajority hurdle required for a bond issue; they needed legislative authority for an alternative local tax based upon a simple majority vote. CP 425, 750-751.

The legislature responded in May 1971 by enacting SB 690 and 691. CP 956-966, 1109-1123. With this legislation, Metro was authorized to begin a mass transportation system with a simple majority vote, and impose a local sales tax of three-tenths of one percent (which the legislature later raised to nine-tenths). CP 425-426; RCW 35.58.245; RCW 82.14.045 (formerly 35.58.2711). The legislature also expanded Metro's boundaries to those of King County. CP 426; RCW 35.58.040.

Via SB 690, the legislature created an incentive for the failing Metropolitan Transit, and any other commercial mass transportation service, to remain in operation. CP 937-938, 963.

Adding the last sentence to RCW 35.58.240, the legislature required Metro to buy out its commercial predecessors that already offered service when Metro began service. CP 963.

2. Metro Bus Service

a. Metro's Buses Roll

On September 19, 1972, King County voters finally approved a municipal transportation plan, and sales tax, authorizing Metro to acquire and consolidate Metropolitan Transit, and the municipal Seattle Transit, to create a unified system, with express service linking major activity centers. CP 968-974, 976-977. On December 28, 1972, the WUTC authorized Metropolitan Transit to transfer its certificate (number 484) and all of its operations and assets to Metro. CP 1000. The WUTC also announced that as a municipal carrier, Metro would be exempt from the agency's regulation under the 1921 Act. CP 999-1000.

Four days later, on January 1, 1973, Metro began its mass transportation service, merging Metropolitan Transit and Seattle Transit. CP 428, 431, 781-796, 798-802. Metro subsequently purchased all of Metropolitan Transit's assets, including its certificate 484. CP 1002-1006, 1008-1022.

b. Metro's Downtown-Airport Service

Metro's original downtown-airport service, route 432, and all of its subsequent airport routes, mimicked Metropolitan Transit's route 7. CP 886, 1164, ¶¶8-9; CP 1532-1551. Starting at a bus stop adjacent to the Greyhound Terminal at 8th and Stewart, Metro's route 432 buses headed west on Stewart and then directly south down Second Avenue, coincidentally in the shape of a backwards "7". CP 883. Travel time was about 41 minutes. CP 1532. Like Metropolitan Transit route 7 before, route 432 also provided limited service to the area south of downtown, including a stop at Boeing Field. Id. In January, 1978, Metro modified and renumbered route 432 as route 174, and it remains in service today. CP 1164, ¶¶11-14; CP 1174-1175.

On September 10, 1983, Metro introduced a second downtown-airport bus -- route 191 -- which like Metropolitan Transit's final route 7 service, traveled in part via I-5. CP 1165, ¶16. Again, Metro used the same Stewart to Second Avenue backwards "7" routing downtown, made limited stops and few turns. CP 1178. Travel times were approximately 46 minutes from 9th and Stewart to the airport. Id.

c. Metro Route 194

On September 6, 1986, Metro modified and renumbered route 191 as route 194. CP 863, ¶¶29-43. Improved routing near the airport -- a greater length of travel via I-5 -- reduced route 194 travel time to 32 minutes. CP 863, ¶¶33-34; CP 1183-1185. Downtown, route 194 follows essentially the same backwards "7" routing as route 191 before it. Id. Thus, route 194 buses largely avoid competing traffic, crowds and make a total of only 6 turns. CP 833-836, ¶¶46, 53, 66-76. Route 194, like route 191 before it, also serves the SODO District, and communities south of the airport -- Des Moines and Federal Way. CP 838, ¶¶94-95.

d. Infrastructure Improvements

In spite of the area's increased traffic congestion, route 194 remains fast today in part due to massive infrastructure improvements that Metro and the state made in the 1990's. CP 1166, ¶¶32-37. Metro opened its Downtown Transit Tunnel in 1990, a 1.3-mile public bus corridor underneath Pine Street and Third Avenue. CP 429-430, 490. By traveling in the tunnel, weekday route 194 buses avoid competing vehicular and pedestrian traffic and utilize fast backwards "7" routing with only two turns through downtown. CP 834-835, ¶¶53-56; CP 1189.

The State Department of Transportation ("DOT") completed its SODO Busway in 1991, a second public bus-only corridor just south of downtown. CP 1166, ¶35. The Busway provides a straight (and level) north-south route between South King and Spokane Street with minimal competing vehicular or pedestrian traffic. CP 835, ¶64; CP 836, ¶¶74-76. All route 194 buses serve the SODO District via the Busway. CP 837, ¶92; CP 1166, ¶¶29-31, 35-36. The DOT also added high occupancy vehicle lanes to I-5, minimizing, particularly for buses, the impact of the region's increased traffic. CP 1166, ¶37.

e. Route 194 Service Characteristics

With route 194, Metro provides fast stop and go service at public bus stops; Metro's drivers do not handle baggage, leave their seats, process credit cards, or make change. CP 832-833, ¶¶33-34, 42. Passengers simply drop money into a fare box, swipe a bus pass or show the driver a bus pass. CP 832, ¶37. Route 194 passengers must carry any luggage themselves and leave it on the floor or an empty seat. CP 833, ¶41.

Metro uses city buses that are low to the ground without stairs. CP 839, ¶107. Designed for shorter distance travel, city buses accommodate standing passengers with a wide aisle, plus poles and straps to hang onto.

Id. ¶108. Their lower floor sacrifices comfort but enables faster loading and unloading than on long distance coach buses with elevated seating compartments. Id. ¶¶110, 112-113. There are no luggage compartments on Metro's city buses. Id. ¶109.

Route 194 serves the masses -- students, workers, travelers (typically those with few or no bags), greeters meeting incoming travelers, and many riders transferring to other routes. CP 840-841, ¶¶124-135; CP 1168, ¶¶54-55. Metro's Sea-Tac bus stop is a transfer point for connections to Auburn, Burien, Federal Way, Highline Community College, Kent, Lakewood, Renton, Tacoma, Tukwila and West Seattle via various Metro and Sound Transit ST Express routes. CP 1168, ¶56. All Metro buses are open to the entire public. CP 866, ¶¶71-72.

f. Metro's 2003 Service Changes

In 2003, Metro made two minor changes to its route 194 service. CP 193, ¶¶13-15; CP 1167-1168, ¶¶47-53. See also, CP 1153-1157, ¶¶ 14-57. First, Metro added weekday runs during mid-day hours. CP 1167-1168, ¶¶42-48. With this change, Metro provides service every 12 - 15 minutes during peak weekday travel hours, and approximately every 30 minutes at other times. CP 837, ¶90; CP 847-854. Metro added these runs because of a public need, caused by population and workforce

growth, and evidenced by "standing loads", passengers in excess of seating capacity during peak weekday hours. CP 1509-1510, ¶¶41-48.

Second, in September 2003, Metro shortened some weekday route 194 runs via a "reduced itinerary". CP 838, ¶96; CP 847-854, 1510 ¶¶49-51. Alternate outbound route 194 buses return to Seattle from the airport without continuing south to Des Moines and Federal Way, on weekdays only between approximately 8:00 a.m. and mid-afternoon. CP 838, ¶96. All other route 194 buses continue south past the airport to serve the southern communities. CP 838, ¶96.

g. The End of An Era

After 23 plus years, Metro is discontinuing route 194 in February 2010. King County Ord. 2009-0284 (May 18, 2009). Route 194 will then be wholly obsolete with Sound Transit providing Link Light Rail service between downtown Seattle and the airport, and Sound Transit Express Routes 574, 577 and 5478 serving the communities south of the airport. King County Ord. 2009-0284, supra at Att. A thereto; CP 676-678, 862, ¶¶18-21.

3. Overlapping Hotel Service

The 1921 Act did not insulate North Coast, Greyhound, or any other commercial bus companies from competition. Where a public need

existed for additional service, the 1921 Act authorized "overlapping" certificates for other companies to operate in the same area, and even along the same route. RCW 81.68.040; CP 719, 857, ¶¶13, 21.

Commercial bus companies also had to contend with competition from non-certified carriers -- taxis, limousines, town cars, hotels' buses, airport-hotel flight crew transportation, company vehicles, and municipal bus services -- all exempt from the 1921 Act. RCW 81.68.010(3); WAC 480-30-011 (d)-(e); RCW 81.68.015; WAC 480-30-011; CP 856-857, ¶¶10-12, 21. Consequently, there have long been many types of downtown-airport service.

In 1946, a partnership operating as "Gray Line Tours" applied for a certificate that would overlap with North Coast's certificate. CP 1072-1073, 1075-1076. Specifically, the partners proposed a more upscale service between downtown Seattle and the airport that stopped at hotels and airline ticket offices. CP 1072-1074.

North Coast appeared before the Department of Transportation in those proceedings, and took no objection to the partners' application so long as the partners' overlapping certificate prohibited mass transportation. CP 1072-1073. The partners agreed and vowed to limit their operation to: (1) an exclusive service for airline passengers and flight

crews only; (2) that only stopped at hotels and transportation offices; and (3) that charged significantly higher fares. CP 1073, 1075-1076.

The Department found a public need for an additional, upscale service and approved the partners' application. CP 1074-1075.

Airline passengers are accustomed to deluxe accommodations and therefore deluxe ground transportation is necessary for this service. They would not be satisfied with ordinary bus line vehicles.

CP 1074. In March 1947, the Department issued the Gray Line partners an overlapping certificate that restricted their service as they had agreed:

Service hereunder is expressly limited to the transportation of airline passengers and flight crews...between Seattle-Tacoma Airport on the one hand and hotels and airline offices in Seattle and Tacoma on the other hand, at rates substantially higher than the fares of regular common carriers.

CP 1075-1076 (emphasis added).

Originally, the Gray Line partners operated via contracts with airlines, but later asked the Port for an exclusive ten-year written contract. CP 1059, ¶¶8-10; CP 1130-1131, ¶¶21-22. The Port granted the partners a concession contract to serve Sea-Tac Airport. CP 1059-1060, ¶11.

In 1963, as Gray Line Tours' concession contract was about to end, the Port solicited competing bids for a new centralized downtown-airport service. CP 1024, 1060, ¶13; CP 1131-1132, ¶¶23-24. Western Tours

submitted the high bid, and for a while operated simultaneously with Gray Line Tours, which refused to stop operating. CP 1104, ¶¶1-7; CP 1131-1132, ¶¶24-30. Following a lawsuit, Gray Line Tours ceased its operation and sold its overlapping certificate to the Port, which the Port then sold to Western Tours. CP 687, 689-693, 695-697, 1026, 1061, ¶21; CP 1132-1133, ¶¶30-32.

In July 1965, the WUTC issued Western Tours a new overlapping certificate (number 849) that restricted that company, like the Gray Line partners before, from providing mass transportation.

Service hereunder between Seattle and Seattle-Tacoma Airport is expressly limited to the transportation of airline passengers and flight crews between Seattle-Tacoma Airport on the one hand, and hotels and airline offices in Seattle and Tacoma on the other hand, at rates substantially higher than the fares of regular common carriers.

CP 696 (emphasis added). See also CP 1138-1141.

Western Tours provided very fast "Hustlebus" service, with travel times of 24 minutes or less, by stopping only once downtown, at the Olympic Airline Terminal. CP 1028,1030. Western also provided "first class" buses and a full compliment of services. CP 1030, 1033.

a. Evergreen Trails Cuts In

In 1984, eleven years after Metro began its mass transportation service, the appellant, Evergreen Trails, began another downtown-airport operation without approval from the Port, the WUTC, or Metro, and the Port sued to stop it. CP 861, ¶¶7-10; CP 1036, 1038. Initially, Evergreen mimicked Metro's "stop-and-go service". CP 1036, 1038.

In April 1985, however, Evergreen submitted the winning bid on the next Port concession contract, and offered a different type of service: door-to-door hotel service for an elite class of travelers. CP 701, 1040.

Evergreen's parent company explained:

We initiated this effort after repeated requests from downtown hoteliers for a quality and responsive competitive service between Sea-Tac and downtown. Also, being a major mover of passengers through Sea-Tac we desired to gain greater quality control over our passengers.

CP 701 (emphasis supplied).

Suffering financially, Western Tours sold its operation and overlapping certificate to Evergreen. CP 1042, 1045. Evergreen agreed to pay the Port 30% of its gross revenue, and the Port agreed to drop its lawsuit. CP 1042.

On June 7, 1985, the WUTC authorized Western Tours to transfer its overlapping certificate to Evergreen. CP 1048-1049. The WUTC then issued Evergreen a new certificate 819 that restricted Evergreen, like both the Gray Line partners and Western Tours before, from providing mass transportation:

Service hereunder is expressly limited to transportation of airline passengers and flight crews between Seattle-Tacoma Airport on the one hand, and hotels and airline offices in Seattle on the other hand, at rates substantially higher than the fares of regular common carriers.

CP 1052 (emphasis added).

b. Another Downtown-Airport Service

Just over two years later, in September 1987, Shuttle Express began a new downtown-airport service, along with airport service throughout the region, using shared vans. CP 705. Shuttle Express applied to the WUTC for a certificate that would overlap with Evergreen's certificate. CP 704-705. Evergreen and four other commercial companies intervened in the application proceedings, attempting to stop Shuttle Express. Id.

The WUTC found that Evergreen's service was inconvenient for many travelers, and that it failed to adequately serve the public, and found likewise for all of the intervenors. CP 713, 716.

The evidence shows that a substantial market for airport-related transport exists which is not adequately served by the intervenors.... The evidence shows that many airport patrons use the applicant's service because use of the intervenor's service involves substantial inconvenience.

Many travelers, especially senior citizens and women travelling alone, find considerable inconvenience in transporting luggage between intervenors' scheduled stops and parking places or residences. To these problems, safety considerations are added when a very late or early flight is involved. Transport to pick-up points can be inconvenient. Even if a parking place is found, leaving a vehicle unattended is not desirable. These problems are minimized for guests at hotels where intervenors stop. But many hotels are not directly served by the intervenors.

Many airport travelers would use private or non-regulated transit rather than the intervenor's scheduled service. Use of private transport would only add to airport congestion problems. Shuttle Express research shows that its customers are those who would otherwise drive themselves or take taxis to the airport.

The intervenors have left a substantial portion of the airport transportation market unserved.

CP 720. The WUTC granted Shuttle Express' application, and specifically rejected Evergreen's claim that the increased competition had caused it to lose money. CP 722, 724, 733-734.

In 1989, the Port issued a request for a new concession contract.

CP 757. Evergreen was the only company that responded. Id. Evergreen offered the Port upscale coach buses and other special amenities. CP

763. See also CP 766-767, 771.

Our equipment will be late model inter-city coaches with reclining seats, reading lamps, temperature control, public address system, restrooms, overhead luggage storage capacity for carry-on items, under bus storage capacity for larger items and two-way radio equipment.

CP 763. The Port awarded the new concession contract to Evergreen. CP 757.

c. Evergreen's Route and Service

Evergreen operates on a very different and far more circuitous route than any current or past Metro bus to the airport. Cf. infra at 11-13, and CP 830-842. Evergreen's buses do not stop at public bus stops like Metro, but rather stop at the entrances to eight upscale hotels -- the Madison Renaissance (6th Avenue at Madison), the Crowne Plaza (6th Avenue at Seneca), the Fairmont Olympic (Seneca at 4th), the Hilton (6th Avenue at

University), the Sheraton (6th Avenue between Pike and Pine), the Grand Hyatt (7th Avenue at Pine), the Westin (Westlake at 6th Avenue), and finally the Warwick (4th Avenue at Lenora). CP 830-831, 833, ¶¶21, 26, 47.

These hotel entrances are located on a variety of mostly one-way streets, so Evergreen's buses necessarily make a total of between 16 -23 turns through some of Seattle's most heavily congested intersections, clogged with crossing cars and pedestrians. CP 833-836, ¶¶46, 48-49, 67-69. Before turning, Evergreen's drivers must often wait for intersections to clear. CP 836, ¶¶68-69. These factors make Evergreen's service slower than Metro's. CP 830-831, ¶¶21-25.

Evergreen does not provide separate incoming and outgoing buses, so its service is slower for most airport passengers. CP 837, ¶¶82-87. All of Evergreen's buses travel northerly through downtown Seattle, simultaneously dropping off and picking up passengers. Id. ¶82.

Therefore, passengers who board at any of the first seven hotels travel away from the airport before Evergreen's buses turn around to travel in the opposite direction, south, toward the airport, via either I-5 or Highway 99, Id. ¶83. Metro provides separate inbound and outbound buses. Id. ¶87.

Evergreen's drivers also spend far more time at each stop compared to Metro. CP 831-833, ¶¶26-42. At any hotel with passengers, Evergreen's

drivers park, get out, greet passengers and then unload and load baggage into luggage compartments. CP 831, ¶27. Evergreen provides this amenity so its passengers do not have to carry their baggage onboard, or contend with baggage cluttering the seating compartment. Id. ¶28. See also CP 804-809. After loading the baggage and waiting until the last passenger has boarded, Evergreen's drivers close their luggage compartments, climb back onboard, drive to the next hotel, and repeat this process. CP 831, ¶29. Finally, at the last hotel, Evergreen's drivers walk the aisle collecting and selling tickets, before proceeding to the airport. CP 832, ¶30.

All of these amenities sacrifice travel time; Evergreen's buses take nearly one hour to travel from the first hotel to the airport, compared to only 32-34 minutes for Metro's route 194. CP 830-831, ¶¶21, 25.

Unlike Metro, Evergreen provides upscale "coach" buses with elevated seating compartments that allow room for expansive luggage compartments underneath. CP 838, ¶¶99-102. Designed for long distance travel, Evergreen's coach buses feature reclining seats, reading lights, individual air control, and a narrow aisle -- not designed for standing passengers or luggage. CP 838-839, ¶¶102-106.

Although Evergreen offered the Port more frequent service, it only provides service every 30 minutes throughout the day. CP 770-771, 837, ¶89. Unlike Metro, Evergreen's buses provide no service south of downtown, neither in the SODO District nor in the communities south of the airport. CP 838, ¶97.

Evergreen charges substantially more for its service -- \$11.00 for a one-way trip and \$16.00 for a round trip, compared to \$1.50 off-peak and \$2.25 peak hour fare for a one-way Metro trip. CP 841, ¶¶139-140.

With its substantially higher fares, Evergreen's service is out of the masses' reach; it primarily serves business people, travelers with substantial luggage, some flight crews and a generally older crowd. CP 840, ¶¶127-130; CP 1161. As Evergreen's general manager reported:

Our market is mainly business people to and from the downtown core.

CP 1161. Unlike Metro, Evergreen provides an additional shuttle van service at 25 locations for passengers who are not staying at one of the eight hotels on its route, for which it charges an additional fee. CP 839, ¶¶117-119.

Metro had never regulated Evergreen's operation, or established any terms or conditions governing that operation. CP 861 ¶¶7-10.

B. PROCEDURAL FACTS

In 2007, Evergreen sued King County complaining about route 194. CP 1629-1636. Evergreen did not complain that Metro improperly began route 194 (in 1986) or downtown-airport service in general (early 1970's). Rather, Evergreen complained that sometime after 1990, Metro improperly extended route 194 into its area and service. CP 1632-1633, ¶¶4-13.

Initially, Evergreen would not disclose the year in which it claimed that it suffered an incursion from route 194. CP 1633-1634, ¶¶9, 16; CP 812-813, 815-816. However, Evergreen later specifically identified 2003 as the year when it alleged that Metro extended route 194; Evergreen filed serial summary judgment motions espousing its 2003 incursion theory. CP 144-147, 1225-1228.

In its summary judgment motions, Evergreen pointed to Metro's 2003 service changes, the increased route 194 runs and reduced itinerary, and contended that those changes constituted an "extension" into its area and service. Id. See also CP 193, ¶¶13-15. Evergreen claimed that Metro had to purchase its certificate and operation pursuant to RCW 35.58.240. CP 1231-1235. Evergreen claimed that its certificate conveyed a monopoly, and that Metro's 2003 service changes inversely condemned its

certificate. CP 144-158. Evergreen sought damages of over \$13 million. CP 1230.

King County cross moved for summary judgment, and provided the trial court with a lengthy historical record, and a detailed comparison of route 194 with Evergreen's hotel service. CP 376-1195, 1505-1511. Evergreen did not dispute any of this evidence. CP 15-25, 1658-1663, 1669-1679.

The Honorable Ellen J. Fair ruled in King County's favor and dismissed. CP 6-9, 191-194. Judge Fair held that Metro did not extend its service under RCW 35.58.240 and did not inversely condemn Evergreen's certificate. Id. Since Evergreen had requested a separate jury trial on damages, to be held only if it prevailed on liability, neither party briefed damages issues, and Judge Fair made no damages ruling. Id. See also CP 1220, 1230, 1427, 1557.

Evergreen now challenges Judge Fair's rulings.

C. ARGUMENT

1. Metro Did Not Inversely Condemn Evergreen's Certificate

Evergreen claimed that Metro took or damaged its overlapping certificate without compensation, and pleaded inverse condemnation.

There was no legal or factual merit to this claim, and Judge Fair properly dismissed it for three reasons.

First, Evergreen failed to show that Metro directly or proximately damaged its property, a fatal flaw in any inverse condemnation claim. Second, contrary to Evergreen's claim, the WUTC did not grant it a transportation monopoly. Third, Evergreen's business expectations of higher profits and a greater business valuation are not legally cognizable property rights subject to an inverse condemnation claim. Evergreen may not sue for inverse condemnation of property rights that do not exist.

a. No Direct or Proximate Cause

Inverse condemnation is a claim in which a property owner alleges that the government took or damaged real or personal property, but failed to pay compensation or institute a condemnation proceeding, contrary to the Takings Clause of the Fifth Amendment and Article I section 16 of the Washington Constitution. 2A Nichols on Eminent Domain, §6.03[2], 3rd Ed. (2008); 27 Am. Jur. 2d Eminent Domain §§743-744 (citations omitted); U.S. v. General Motors, 323 U.S. 373, 378, 65 S.Ct. 357, 359-60, 89 L.Ed. 311 (1945); Dickgieser v. WA, 153 Wn.2d 530, 534-535, 105 P.3d 26 (2005).

To raise an inverse condemnation claim, a property owner must establish that a governmental activity was the direct or proximate cause of his or her loss. Phillips v. King County, 136 Wn.2d 946, 966, 968 P.2d 871 (1998) (citations omitted); Rains v. WA Dept. of Fisheries, 89 Wn.2d 740, 745-47 (1978). Washington courts recognize two types of governmental activity that can directly or proximately cause loss and subject a municipality to an inverse condemnation claim: (1) physical invasions or occupations of property, and, (2) regulatory takings that affect and limit the use of the property to such an extent that a taking or damaging occurs. Berst v. Snohomish County, 114 Wn. App. 245, 255-256, 57 P.3d 273, rev. denied, 150 Wn.2d 1015, 79 P.3d 445 (2003) (citations omitted). See also 10 A.L.R. Fed. 2d 231, What Constitutes a Taking of Property §2; 11 McQuillin Mun. Corp. §32.26.05 (3rd Ed.) (citations omitted); Ventures Northwest Limited Partnership v. State, 81 Wn. App. 353, 363, 914 P.2d 1180 (1996); 26 Am. Jur. 2d Eminent Domain §9.

Under both the state and federal constitutions, it is insufficient for a claimant to merely assert that a lawful government action caused a depreciation in the value of his or her property. Pierce v. Northeast Lake Washington Sewer and Water District, 123 Wn.2d

550, 564-565, 870 P.2d 305 (1994) (depreciation in market value of claimant's adjacent property due to lawful construction of municipal water tower that blocked view cannot form basis for inverse condemnation claim) (citation omitted); Aubol v. Tacoma, 167 Wash. 442, 446-47, 9 P.2d 780 (1932) (constitutional guaranty that no private property shall be taken or damaged without just compensation does not authorize compensation for depreciation in market value caused by legal act); Conger v. Pierce Cy., 116 Wash. 27, 42, 198 P. 377 (1921) (private property may be damaged and its value lessened because it is located close to a public building, yet such damage is purely incidental and not recoverable); 32 McQuillin Mun. Corp. §32.26.05, supra at 379, 381.

...[I]f the resultant damage is merely consequential, there can be no recovery on the theory of a taking of property....Furthermore, action by a municipality resulting in competition causing injury to private business is not a "taking." In general, business losses do not constitute a taking unless the government takes action directed at the plaintiff's property.

32 McQuillin Mun. Corp. §32.26.10 supra at 385-387 (emphasis supplied).

Here, it was undisputed that Metro did not physically invade or occupy Evergreen's property. It was undisputed that Metro did not

regulate Evergreen's bus operation in any way. Evergreen claimed that Metro's 2003 service changes to route 194 caused more travelers to ride on route 194, which in turn caused a decline in Evergreen's ridership, and therefore depreciated the market value of its certificate. CP 1220, 1229, 1244. Evergreen alleged indirect, consequential damage by competition, not direct or proximate damage.

Judge Fair properly dismissed Evergreen's inverse condemnation claim because Evergreen did not show that Metro directly or proximately damaged its property.

b. No Monopoly

Although the absence of causation is fatal to Evergreen's inverse condemnation claim, Judge Fair also properly dismissed because the WUTC did not grant Evergreen a transportation monopoly. Metro could not take or damage a monopoly that does not exist.

First, Evergreen's certificate does not even purport to grant a monopoly right. It simply reads:

The following authority and Limitations was obtained from C-849, Western Tours, Inc., by Order M.V.C. No. 1498.

PASSENGER SERVICE

BETWEEN: Seattle and the Seattle-Tacoma Airport.

LIMITATIONS:

1. Service hereunder is expressly limited to the transportation of airline passengers and flight crews between Seattle-Tacoma Airport on the one hand, and hotels and air and water and ground transportation offices and facilities in Seattle on the other hand, at rates substantially higher than the fares of regular common carriers.
2. No express service may be rendered hereunder except in the carrying of baggage and excess baggage of passengers and flight crews.
3. No service may be rendered hereunder from, to or between intermediate points.

CP 1256-1257.

There are no words here like "exclusive", "sole", "only", or "monopoly", to suggest an exclusive right. Moreover, it was undisputed that this certificate authorized an overlapping service, not an exclusive right to operate. In fact, neither Evergreen nor the two previous concessionaires (the Gray Line Tours partners and Western Tours) ever enjoyed a monopoly. They operated in a market served variously by North Coast Transportation, Greyhound, the Metropolitan Transit Corporation, Metro, taxis, limos, hotel buses, and Shuttle Express.

Second, even if it wanted to, the WUTC could not legally grant Evergreen a monopoly. The WUTC only possesses those powers granted it by statute. In re Electric Lightwave, Inc., 123 Wn.2d 530, 537, 869 P.2d 1045 (1994), citing Cole v. WUTC, 79 Wn.2d 302, 306, 485 P.2d 71 (1971). The statute conferring authority on the WUTC to regulate auto transportation companies (the 1921 Act) gives the agency no right to grant monopolies; it merely conveys power to "supervise and regulate every auto transportation company in this state...." See RCW 81.68.020. The WUTC lacks authority to grant Evergreen an exclusive right. Accord Electric Lightwave, supra (the WUTC lacks authority under RCW 80.36.230 to grant exclusive rights to local exchange companies).

Third, it would be absurd to assume that WUTC staff meant to restrict Metro's service via Evergreen's certificate. The WUTC does not regulate Metro or any other municipal carrier, and has no authority to do so. It would also be absurd to assume that WUTC staff meant to contravene the legislature's authorization for Metro to provide mass transportation for the entire public. See RCW 35.58.240.

Fourth, article XII, § 22 of the Washington State Constitution manifests the state's abhorrence of monopolies in general and transportation monopolies in particular. Electric Lightwave, *supra* at 539; State v. WA Public Service Comm., 54 Wn. 2d 382, 385, 340 P.2d 784 (1959). Consequently, Washington Courts consistently reject claims that state transportation certificates grant a monopoly. See State v. Dept. of Public Works, 165 Wash. 444, 452, 6 P.2d 55 (1931) (holding that certificate of public convenience and necessity for ferry service does not confer a monopoly under Ch. 248, Laws of 1927, steamboat certificate law); State v. WA Public Service Comm., *supra* (common carrier permit does not confer monopoly under Motor Carrier Act, RCW 81.80.020); Black Ball Freight Service v. WUTC, 77 Wn.2d 479, 485, 463 P.2d 169 (1969) (under Motor Carrier Act, fact of increased competition alone has no legal significance since appellants are not entitled to immunity from competition).

Nonetheless, Evergreen urged the trial court to find that it held a monopoly based upon a Delaware utility case: Delmarva Power & Light Co. v. City of Seaford, 575 A.2d 1089 (1990). CP 19-21. There, Delmarva held a state franchise to build a utility

infrastructure along state roads and highways. It built such an infrastructure and then sold electricity to customers outside of the City of Seaford pursuant to a state certificate. The City later annexed territory in Delmarva's service area. When Delmarva customers switched to the City's utility, Delmarva sued for inverse condemnation. Delmarva, supra at 1091. The Delaware Supreme Court held that even though a statutory consent provision allowed the City to oust Delmarva, it could not do so without just compensation. Id. at 1103.

Delmarva is inapplicable here. Evergreen does not hold a state franchise nor has it constructed the infrastructure that it uses -- city roads, state highways, and the Port's Sea-Tac Airport. Metro did not annex territory or oust Evergreen. Transportation services, unlike electrical utilities, also operate simultaneously and side-by-side and can serve the same riders. Judge Fair correctly declined to follow Delmarva. Moreover, the Delaware Supreme Court flatly rejected monopoly arguments that Delmarva raised. Id. at 1096-98.

Judge Fair likewise correctly rejected Evergreen's monopoly argument, and dismissed its inverse condemnation claim.

c. No Legally Cognizable Property Right

While the absence of causation and of a transportation monopoly are both fatal to Evergreen's inverse condemnation claim, Judge Fair also properly dismissed because Evergreen's business expectations -- for more riders, profits, and a higher business valuation -- are not legally cognizable property rights.

In any inverse condemnation action, the claimant must show the taking or damaging of a fundamental attribute of property ownership -- a legally cognizable property right. Borden v. Olympia, 113 Wn. App. 359, 374, 53 P.3d 1010 (2002), rev. denied 149 Wn2d 1021, 72 P.3d 761 (2003).

An action for inverse condemnation must be based upon an injury to a right in private property and not merely a privilege. There can be no inverse condemnation if no property right exists.

Granite Beach Holdings v. State DNR, 103 Wn. App. 186, 205, 11 P.3d 847 (2000) (citations omitted).

Legally cognizable property rights include the right to possess, use, or dispose of property. 10 A.L.R. Fed. 2d 231, supra at §4.

Accord Manufactured Housing Communities of WA v. State, 142 Wn.2d 347, 366 (2000) (a right of first refusal is part of the "bundle of

sticks" that property owners enjoy as a vested interest of ownership); Keiffer v. King County, 89 Wn. 2d 369, 372, 572 P.2d 408 (1977) (property owner has a legally cognizable right of access to an abutting public highway -- an easement of ingress and egress).

Neither the state nor federal constitutions protect collateral interests that are incident to property ownership. 10 A.L.R. Fed. 2d 231, supra at §4 (citing U.S. v. General Motors, supra). See also Galvis v. DOT, 140 Wn.App. 693, 706-707, rev. denied, 163 Wn.2d 1041 (2008) (privilege to park in public right of way is not a compensable property right).

Inverse condemnation actions do not apply to those intangible property interests which are protected by procedural due process; nor does an action for inverse condemnation apply to the taking of services.

27 Am. Jur. 2nd §743, at 337.

Lost profits and business damages are generally considered intangibles and not "property" in the constitutional sense. 26 Am. Jur. 2nd §152, at 558. Thus, a firearms importer's investment-backed reliance on a federal import permit for assault rifles was not "property" that supported a taking claim under the Fifth Amendment. Mitchell Arms, Inc. v. U.S., 7 F.3d 212, 215 (Fed. Cir. 1993), cert. den. 511

U.S. 1106, 114 S.Ct. 2100, 128 L.Ed.2d 662 (1994). Similarly, a billboard owner with month-to-month tenancy had no property interest that entitled him to bring suit under the State Constitution against a transit agency after it purchased the building and evicted him. Clear Channel Outdoor v. Seattle Popular Monorail Authority, 136 Wn. App. 781, 784-785, 150 P.3d 649, rev. denied, 161 Wn.2d 1027, 169 P.3d 830 (2007). The landowner's business expectation that he would continue to maintain the billboard was not a legally cognizable property right. Id.

In order to be a protected property interest, the interest must be something more than a mere unilateral expectation of continued rights or benefits.

Id. at 784. Similarly, a ferry schedule does not "attach" to the land and is not a property right which can be taken or damaged so as to support an action for inverse condemnation. Litz v. Pierce County, 44 Wn. App. 674, 679, 723 P.2d 475 (1986) (citation omitted).

Although an owner has a general right to develop his or her property, that right does not include a collateral right over property which it does not own. Granite Beach Holdings, supra at 205-207. In Granite Beach Holdings, owners of a landlocked parcel sued the

State over its decision not to grant them an easement across abutting State property.

The appellants contend that the State is infringing upon their general right to develop their land to its fullest economic potential, which they claim would be in the form of a residential subdivision. They frame the issue as though they had an existing property right in an easement that is necessary for such development. That is not the case. The right to cross adjoining land is not a property right that is incident to the ownership of the land to be developed, unless the right is obtained from the adjoining landowner by agreement or other legal means....

...They [the owners] are properly left with the property rights that existed at the time the property was acquired. Accordingly, the State has taken nothing from them in refusing their request for an unlimited easement. The appellants' inverse condemnation claim was properly dismissed because the property right the appellants claim was injured does not exist.

Granite Beach Holdings, supra at 206-207.

Here, Evergreen likewise claimed injury to property rights that do not exist. Evergreen claimed a transportation monopoly. Evergreen claimed rights to the higher profits and business valuation that could follow if Metro began excluding airline passengers from route 194 buses.

Evergreen did not acquire any such rights when it contracted with the Port and purchased Western Tours' overlapping certificate. Evergreen continues to fully exercise its rights to possess, use, and may also dispose of its certificate. Metro has not taken or damaged Evergreen's actual rights.

Judge Fair properly found that Metro did not take or damage Evergreen's property, and dismissed Evergreen's inverse condemnation claim.

2. Metro Did Not Extend Its Transportation Function

Evergreen also claimed that with its 2003 service changes to route 194, Metro "extended" its transportation function into the area and service of the Evergreen hotel bus operation. CP 144-147, 1225-1228. Evergreen argued that Metro had to purchase its certificate and operation under the last sentence of RCW 35.58.240. Judge Fair correctly found no extension into Evergreen's area or service and dismissed this statutory claim. CP 191-194.

a. The Statutory Scheme

The last sentence of RCW 35.58.240 is part of the legislature's statutory scheme for metropolitan municipal

corporations. The legislature therein authorized Metro to provide mass transportation throughout King County following a successful simple majority vote. RCW 35.58.090, 35.58.100, 35.58.240(2). More specifically, the legislature gave Metro the sole authority to provide "local public passenger transportation service" within its boundaries, and subordinated commercial public transportation companies (such as Metropolitan Transit) to Metro. Id. See RCW 35.58.250.

b. The Purchase Requirement

With the last sentence of RCW 35.58.240, the legislature required Metro to buy-out the commercial public transportation companies that it replaced when it began serving the same areas or routes. This sentence reads:

In the event any metropolitan municipal corporation shall extend its metropolitan transportation function to any area or service already offered by any company holding a certificate of public convenience and necessity from the Washington utilities and transportation commission under RCW 81.68.040, it shall by purchase or condemnation acquire at the fair market value, from the person holding the existing certificate for providing the services, that portion of the operating authority and equipment representing the services within the area of public operation.

RCW 35.58.240 (emphasis supplied).

In this sentence, the legislature used the phrase “extend its metropolitan transportation function” referring to significant new undertakings by Metro, not minor service changes. The legislature did not use words like “service change”, “route improvement”, or “schedule change” to trigger the buy-out requirement.

The legislature added the buy-out requirement in May 1971 when the Metropolitan Transit Corporation was on the verge of failure. The public and civic officials were then very concerned about the impending loss of mass transportation service; the WUTC had already issued its dire warning about the company's demise. See infra at 7-8. By requiring Metro to purchase those companies that “already offered” service, the legislature gave Metropolitan Transit a strong incentive to remain in operation, a guaranteed buy-out at fair market value. The legislature did not require Metro to purchase companies that “previously” or “once” offered service. With this buy-out requirement, the legislature also protected Metropolitan Transit's large work force, as the statutory scheme already required Metro to retain the employees of any pre-existing system that it acquired. See RCW 35.58.265 (enacted 1965).

c. Metro Did Not Extend Its Function

In the case at bar, Evergreen specifically claimed that by adding route 194 runs and the reduced itinerary in 2003, Metro extended its metropolitan transportation function into the area and service of the Evergreen hotel bus operation. CP 144-147, 1225-1228. This claim was totally contrary to the undisputed facts.

As for area, it was undisputed that Metro entered in 1973, eleven years before Evergreen entered, in 1984. See infra at 10. Metro began county-wide service on January 1, 1973, merging Metropolitan Transit and Seattle Transit. Metro provided service between downtown Seattle and the airport via route 432. See infra at 11.

By 1983 Metro provided two downtown buses to the airport, routes 174 and 191, running on Highway 99 and I-5 respectively. Metro modified, and renumbered route 191 as route 194 in September 1986. It was undisputed that Metro did not extend its transportation function into a new area in 2003.

Neither did Metro extend its function into a new service in 2003. Metro merely changed its schedule, by providing more

frequent route 194 service during peak weekday hours. See infra at 14-15. Further, with its reduced itinerary, Metro actually contracted its route 194 service. Every other weekday route 194 bus, between approximately 8:00 a.m. and mid-afternoon, returned to Seattle from the airport, without serving the southern communities. See infra at 15. This contraction of service was hardly an extension of Metro's transportation function into a new service.

Moreover, Metro's route 194 service in no way resembles Evergreen's operation, so Metro could not have and did not expand into Evergreen's service. Metro provides a fundamentally different type of service than Evergreen. Metro provides ordinary stop and go service for the masses at public bus stops. Conversely, Evergreen provides upscale, more exclusive door-to-door hotel service, with baggage handling, along a very different route, using coach, not city buses.

In the trial court, Evergreen tried to create an impression that Metro modified route 194 in 2003 so that it became "substantively indistinguishable" from Evergreen's hotel service, arguing as follows:

Specifically, Metro's Route No. 194 airport service today (1) runs directly from Sea-Tac Airport to downtown Seattle and back, (2) allows airline passengers to board with their luggage, (3) has only limited and specified stops, and (4) has regular departures approximately every 15 minutes almost 24 hours a day.

CP 1225.

These assertions fudged the undisputed facts. Metro route 194 does not run directly from downtown Seattle to the airport and it never has. Route 194 first makes 5 or 6 stops downtown, and then 4 more in the SODO District. CP 834-837, ¶¶57, 60, 62, 92; CP 864, ¶¶40-47. Further, Metro has always allowed passengers to board with their luggage. CP 1153, ¶¶18-24. Neither did Metro reduce the number of stops on route 194. CP 1166, ¶¶30-31. Route 194 buses have always stopped at all designated stops. Id. Metro added route 194 runs only during peak, weekday hours, not "almost 24 hours a day". CP 837, ¶¶90. Otherwise, route 194 buses run approximately every 30 minutes. CP 847-854. Evergreen's assertions that Metro replicated its service were mere argument, contrary to the undisputed facts.

In the trial court, Evergreen also absurdly accused Metro of "invasive marketing conduct". CP 1227. Evergreen later

abandoned this claim before Judge Fair, and conceded that Metro's publicity did not constitute an "extension" of its transportation function. CP 193, ¶¶14-15. Regardless, Metro has publicized its service via bus schedules, a web page, and in 1996 and 1997, several "Fly Metro" brochures. CP 1152, ¶¶10-12. Transit systems worldwide publicize their services similarly, with printed maps, schedules, and sometimes posters, available to travelers and the general public. CP 841, ¶¶135-136.

Judge Fair correctly found that Metro did not extend route 194 into Evergreen's area or service in 2003, and dismissed Evergreen's statutory claim.

d. Avoid Absurd Results.

Judge Fair also ruled correctly because requiring Metro to buy-out Evergreen's operation under RCW 35.58.240 would result in a gross injustice and an absurdity.

It is a rule of such universal application as to need no citation of sustaining authority that no construction be given to a statute which leads to gross injustice or absurdity.

In re Horse Heaven Irr. Dist., 11 Wn.2d 218, 226, 118 P.2d 972 (1941).

Metro had no role whatsoever in Evergreen's serial concession contracts with the Port. Neither did Metro regulate Evergreen's operation. Even if Metro had wanted to influence the WUTC's regulation of Evergreen, Metro lacked standing to do so. CP 823-827, Brown's Limousine Crew Car, Inc., Order M.V.CH. No. 950, WUTC (July 18, 1983); CP 857, ¶¶15-18.

The WUTC found that Evergreen's service was inconvenient for many airport travelers, and that it failed to serve a large market for airport transportation. The Port, via its concession contract, and the WUTC, via its regulatory role, are the entities that could enable Evergreen to remodel its operation to better serve the airport.

Requiring Metro to buy-out Evergreen would also be an unjust and absurd use of tax revenue. King County residents voted to tax themselves to fund Metro's mass transportation system that serves the masses. See infra at 10. Local taxpayers did not agree to fund Metro's acquisition of an exclusive, upscale service that the masses may not use. Requiring a buy-out would unfairly burden local taxpayers, making them de facto guarantors of Evergreen's operation -- without consideration.

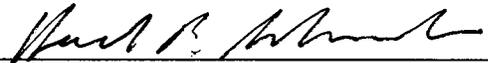
Metro did not extend its transportation function into Evergreen's area or service, and had no obligation under RCW 35.58.240 to acquire its operating authority or equipment.

III. CONCLUSION

Judge Fair properly ruled that Metro did not take or damage Evergreen's certificate, or extend its metropolitan transportation function. King County respectfully asks the Court to affirm those rulings.

DATED this 11th day of September, 2009.

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