

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re the Application of  
SPEEDISHUTTLE WASHINGTON, LLC  
d/b/a SPEEDISHUTTLE SEATTLE  
For a Certificate of Public Convenience and  
Necessity to Operate Motor Vehicles in  
Furnishing Passenger and Express Service as  
an Auto Transportation Company

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SHUTTLE EXPRESS, INC.,

Complainant,

v.

SPEEDISHUTTLE WASHINGTON, LLC  
d/b/a SPEEDISHUTTLE SEATTLE,

Respondent.

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SPEEDISHUTTLE WASHINGTON, LLC  
d/b/a SPEEDISHUTTLE SEATTLE,

Complainant,

v.

SHUTTLE EXPRESS, INC.,

Respondent.

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DOCKETS TC-143691, TC-160516,  
TC-161257 (*consolidated*)

**POST-HEARING REPLY BRIEF OF COMMISSION STAFF**

July 14, 2017

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## I. INTRODUCTION

1 Staff of the Washington Utilities and Transportation Commission has reviewed the  
initial post-hearing briefs of Shuttle Express and Speedishuttle. Below, Staff will briefly  
respond to two points raised by Shuttle Express.

## II. ARGUMENT

### A. Staff Opposes Shuttle Express’s Proposed Restrictions on Speedishuttle’s Unrestricted Certificate

2 Staff recommends that the Commission take no action with respect to Speedishuttle’s  
certificate. Accordingly, Staff opposes both of Shuttle Express’s proposed restrictions  
detailed at pages 41-43 of its initial post-hearing brief.

3 First, Shuttle Express wants the Commission to prohibit Speedishuttle from  
accepting “walk-up” passengers.<sup>1</sup> The Commission already denied this request in its Notice  
of Determination not to Amend Order 04.<sup>2</sup> There, it explained that Speedishuttle is  
authorized to provide “door-to-door” service. The Commission’s rules make no distinction  
between “prearranged” and “walk-up” door-to-door service.<sup>3</sup> For this reason, it was—and  
still is—arbitrary to limit Speedishuttle’s authority to “prearranged” passengers.

4 Second, the company wants Speedishuttle to guarantee that every passenger will be  
met in the main terminal by a “greeter” who speaks the passenger’s “native language.”<sup>4</sup> This  
restriction would also be arbitrary, since the Commission has no rule that defines “greeter”  
or “native language.” Further, enforcement would be a nightmare. The Commission  
regulates the rates and safety of auto transportation providers. Staff is not equipped to

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<sup>1</sup> Shuttle Express Initial Post-Hearing Brief, pp. 42-43, ¶ 85 (June 19, 2017).

<sup>2</sup> Docket TC-143691, Notice of Determination not to Amend Order 04, pp. 3-4 (Dec. 14, 2015).

<sup>3</sup> See Notice of Determination not to Amend Order 04, pp. 3-4.

<sup>4</sup> Shuttle Express Initial Post-Hearing Brief, p. 43, ¶ 86.

evaluate the subjective adequacy of individual “greetings,” an issue that has no connection to rates or safety.

**B. The Commission Should Not Assume that Speedishuttle’s Unrestricted Certificate Directly Threatens Shuttle Express’s Viability**

5 Shuttle Express claims, “Because in the current market both carriers are now both losing money this means that one or maybe both carriers must ultimately fail if the status quo is maintained.”<sup>5</sup> Staff questions the implied premise that Speedishuttle’s unrestricted certificate directly threatens Shuttle Express’s viability. First, Shuttle Express faces competition from many other sources. Its own witness, Don Wood, acknowledged that customers “can choose from other kinds of transportation providers” including taxis, limos, TNCs, public transportation, and personal vehicles.<sup>6</sup> Moreover, as Staff witness Mike Young explained Shuttle Express might be losing money due to its own inefficiency:

Q. [By Shuttle Express counsel] Do you think it would be in the public interest if, as a result of this competition, either SpeediShuttle or Shuttle Express were to cease doing share ride business to Sea-Tac Airport?

A. [By Mike Young] Well, it would be my position that if one of the companies ceased operation that would be their decision based on their management and would not be because of anything the Commission has done or not done.

Q. What if it were based on financial constraints of the competition?

A. Again, I think that’s the purview of the company management to –

Q. Let’s put aside the cause. Would it be in the public interest, for whatever reason, for one or both of those companies to cease providing share ride services?

[Discussion between counsel and ALJ omitted]

A. Although I find it unlikely that both companies would cease business on the exact same day, assuming—my assumption would be that the less

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<sup>5</sup> Shuttle Express Initial Post-Hearing Brief, p. 39, ¶ 77.

<sup>6</sup> Wood, Exh. DJW-3T at 10-16.

efficient operator would go out of business. In any event, the certificate would be available for other providers.<sup>7</sup>

To summarize, the Commission should not assume a direct correlation between Speedishuttle's entry into the market and Shuttle Express's purported decline.

6 Further, to the extent Shuttle Express is losing money, cancellation or restriction of Speedishuttle's certificate isn't the only option. The company could reduce costs. Or it could file a rate case to increase its base fare.<sup>8</sup> Finally, it could attract more customers by improving its service. The company may not be as powerless as it suggests.

**C. The Commission Should Penalize Shuttle Express for its Use of Non-Owned Vehicles and Non-Employed Drivers**

7 In this proceeding, Staff alleged that Shuttle Express committed 40,727 violations of WAC 480-30-213 when it used non-owned vehicles and non-owned drivers to provide regulated auto transportation service on 40,727 occasions between January 15, 2014, and September 30, 2016. Shuttle Express admits that on each occasion, the customer or customers initially requested regulated auto transportation service.<sup>9</sup> (The two-year statute of limitations reduces the number of actionable violations to 35,351.)

8 Shuttle Express continues to argue that the Commission lacks jurisdiction over "single stop" referrals.<sup>10</sup> It argues, "Because the single-stop transportation is provided in a limousine, by a limousine carrier, the Commission has no jurisdiction over it."<sup>11</sup> This claim fails because RCW 81.68 and WAC 480-30 make no distinction between "single-" and

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<sup>7</sup> Young, Tr. at 834:18-836:4.

<sup>8</sup> WAC 480-30-420.

<sup>9</sup> Pratt, Exh. DP-3 (Shuttle Express Response to UTC Staff Data Request No. 2); Shuttle Express Initial Brief, p. 47, ¶ 96.

<sup>10</sup> Shuttle Express Initial Post-Hearing Brief, p. 48, ¶ 97.

<sup>11</sup> Shuttle Express Initial Post-Hearing Brief, p. 48, ¶ 98. Note that nothing in the record confirms that each of the 40,727 trips in question was "provided in a limousine, by a limousine carrier."

“multi-stop” trips.<sup>12</sup> Under RCW 81.68.010, the defining feature of “auto transportation” is transportation between fixed termini or over a regular route. An auto transportation service *may* make multiple stops if multiple parties request separate pick-up/drop-off points. But the service still qualifies as auto transportation, and is regulated as such, if the vehicle only has one party on a particular trip. The number of stops is immaterial provided the service otherwise meets the definition of auto transportation.

9 Shuttle Express also argues that the Commission cannot penalize single-stop referrals in these consolidated dockets because Staff knew of identical violations in Docket TC-120323 and declined to pursue penalties.<sup>13</sup> This claim fails because the Commission speaks through its orders, and its final order in that docket never expressly ruled that single-stop referrals comport with WAC 480-30-213.<sup>14</sup> Shuttle Express cannot demonstrate a change in the agency’s official position, much less an unreasonable one that evidences a due process violation. *Cf. FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012) (invalidating FCC’s retroactive application of a formal policy change).

10 Beyond that, Staff disputes that it affirmatively conceded the lawfulness of single-stop referrals in Docket TC-120323.<sup>15</sup> Shuttle Express refers to a “meeting” in which Staff allegedly “agreed single-stops were legal.”<sup>16</sup> But the company cites no record evidence to corroborate this hearsay, and Staff witness Dave Pratt recalls no such meeting.<sup>17</sup>

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<sup>12</sup> Pratt Exh. DP-6T at 3:14-16 (“The Commission should keep in mind that ‘single reservation,’ single stop,’ and ‘multi stop’ are not defined in WAC 480-30.”).

<sup>13</sup> Shuttle Express Initial Brief, p. 49, ¶ 100.

<sup>14</sup> *WUTC v. Shuttle Express, Inc.*, Docket TC-120323, Order 04, Final Order Denying, in part, and Granting, in part, Petition for Administrative Review and Assessing Penalty (Mar. 19, 2014).

<sup>15</sup> Pratt, Exh. DP-6T at 3:6-7 (“In the previous case, Staff chose not to pursue violations for single stop trips. But we never came out and said that the single stop trips were lawful.”).

<sup>16</sup> Shuttle Express Initial Post-Hearing Brief, p. 50, ¶ 101.

<sup>17</sup> Pratt, Exh. DP-6T at 4:12-23.

Shuttle Express also points to the following exchange from the hearing in

Docket TC-120323 between the Administrative Law Judge and Staff witness Betty Young:

Q. [By Judge Torem] So is it Commission Staff's position, then, that anytime Shuttle Express dispatches somebody for regulated service, and it's in a vehicle operated by them under their certificate, it has to be an employee of the company?

A. [Betty Young] That's what the Commission's rules require, yes.

Q. [Judge Torem] If an independent contractor drives, for whatever reason, it's a violation of this particular rule [WAC 480-30-213(2)]. Is that the Commission's position?

A. [Betty Young] The independent contractors can provide other service, which is completely fine under their limo license or under their for-hire authority. That's regulated through the Department of Licensing. However, once it switches over into share ride service on Shuttle Express's regulated routes, that's where it violates Commission rules.<sup>18</sup>

This exchange does not aid Shuttle Express, because Staff nowhere agrees or concedes that single-stop referrals comport with WAC 480-30-213. In fact, Ms. Young reached the opposite conclusion. She identified a bright line prohibiting auto transportation companies from using contractors to provide *any* "regulated service."<sup>19</sup> In the present case, Shuttle Express again finds itself on the wrong side of that line.

To be sure, Ms. Young acknowledged that the Commission lacks jurisdiction over contractors who provide "other service . . . under their limo license or under their for-hire authority."<sup>20</sup> But Ms. Young was merely stating the obvious: The Commission, by definition, lacks jurisdiction over non-regulated providers (e.g., limousine operators) that provide non-regulated service (e.g., limousine service) from end-to-end—i.e., from start to finish. In contrast, the Commission retains jurisdiction whenever an auto transportation

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<sup>18</sup> Docket TC-120323, Transcript at 36:3-21 (Aug. 1, 2013).

<sup>19</sup> Docket TC-120323, Transcript at 36:14.

<sup>20</sup> Docket TC-120323, Transcript at 36:15-17.

company “dispatches somebody for regulated service.”<sup>21</sup> And under WAC 480-30-213, the company lacks discretion to dispatch non-owned vehicles driven by non-employed drivers.

12           The Commission affirmed Staff’s logic in its final order in Docket TC-120323. It explained that contractors may provide non-regulated service “*independently*” but not “*on behalf of* Shuttle Express.”<sup>22</sup> Based on this analysis, Shuttle Express knew or should have known that the number of stops is immaterial. Whether the service ultimately makes one stop or ten, an auto transportation company unequivocally *may not refer trips to contractors*.

13           Lastly, Staff takes issue with Shuttle Express’s claim that the Commission is engaged in “regulation by surprise.”<sup>23</sup> As the Commission recognized in Docket TC-120323—even before the current Staff investigation—Shuttle Express is the party playing hide-the-ball:

Shuttle Express has been discussing independent contract programs with Staff since 2004. The Company’s president sent letters to the Commission in August 2004 and February 2005 proposing to hire independent contractors as drivers of the vehicles used to provide auto transportation service, to which Staff responded that such a program would be unlawful. In 2006, Shuttle Express proposed a rule that would have allowed the Company to use a sub-carrier to perform the Company’s regulated auto transportation services, which the Commission rejected as inconsistent with RCW ch. 81.68. One year later, Staff discovered that Shuttle Express had expanded its operations by contracting with independent contractors to provide regulated auto transportation services, which resulted in Order 01 in Docket TC-072228.

Shuttle Express knew Staff’s views on the use of independent contractors to provide regulated auto transportation service. The Company agreed in Docket TC-072228 that such use is a violation of WAC 480-30-213 and pledged not to violate that rule again. The only substantial operational difference between the independent contractor program addressed in that proceeding and the “rescue service” at issue here is that the Company provided “rescue service” on an ad hoc basis, rather than a regular schedule. The contention that Shuttle Express did not know its “rescue service” violated WAC 480-30-213 is not credible.

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<sup>21</sup> Docket TC-120323, Transcript at 36:4-5.

<sup>22</sup> Docket TC-120323, Order 04, p. 7, ¶ 13.

<sup>23</sup> Shuttle Express Initial Post-Hearing Brief, p. 50, ¶ 101 n.165.

A prudent company would have consulted with Staff, and if necessary sought a ruling from the Commission, on the permissibility of the “rescue service” before initiating it, or at least when the Company became aware of Staff and the Commission’s concerns. Shuttle Express chose not to do so, despite the long history of the Commission and Staff rejecting the Company’s attempts to use independent contractors to provide regulated service. The clear implication is that, not having received the answer it wanted in the past, Shuttle Express decided to continue the program without asking, believing that seeking forgiveness would be preferable to requesting permission. Indeed, that was precisely the Company’s calculus when it began operating the program at issue in Docket TC-072228. Jimmy Sherrell, the Company’s president, testified that “I chose to put it in place, hoping that it would be ignored, and it wasn’t, so I paid a fine and I discontinued the service.”<sup>24</sup>

To summarize, Shuttle Express had ample notice before its current violations that *any* use of non-owned vehicles and non-employed drivers was suspect under WAC 480-30-213. When the company continued to refer single-stop auto transportation trips to contractors, it did so at its own peril.

### III. CONCLUSION

14 Staff continues to recommend that the Commission (1) take no action with respect to Speedishuttle’s certificate; and (2) penalize Shuttle Express for 35,351 violations of WAC 480-30-213.

DATED this 14th day of July 2017.

Respectfully submitted,

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<sup>24</sup> Docket TC-120323, Order 04, p. 11-12, ¶¶ 28-30; *see also* Pratt, Exh. DP-6T at 1:22-2:6 (discussing Staff’s frustration with the company’s repeated attempts to “outsmart the Commission”).