

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application TC-143691

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

DOCKET TC-143691

SPEEDISHUTTLE WASHINGTON, LLC
d/b/a SPEEDISHUTTLE SEATTLE'S
("APPLICANT'S") RESPONSE TO
SHUTTLE EXPRESS'S MOTION TO
REOPEN THE RECORD

I PRELIMINARY STATEMENT AND BACKGROUND TO MOTION

1 On February 10, 2015, as a precursor to its Petition for Administrative Review filed the
next day, Shuttle Express, Inc. ("Shuttle Express") filed and served a Motion to Reopen the
Record in this proceeding. By its Motion, the Petitioners utterly fail to demonstrate any
circumstances meriting reopening under Commission rule or case law authority.¹

2 However, none of these strategic iterations should facilitate delays in the hearing and
post-hearing process nor frustrate the Commission's announced intent for this industry that its:

...current rules and processes...ensure that they recognize current competitive conditions.
It must also ensure that its processes are streamlined and efficient.²

3 Shuttle Express has ostensibly done everything possible to thwart that intent by: 1)
initially objecting to the forum and process by which this application and its objections were
considered; 2) simultaneously arguing that a full-blown traditional evidentiary hearing was
required and intending the discovery rule be invoked and now 3) in post-hearing proceedings,

¹ Admittedly, Shuttle Express has gone through various representation cycles in this proceeding, having initially retained counsel who challenged the brief adjudicative proceeding format for considering auto transportation applications in a Motion to Strike, unsuccessfully claimed the APA was being violated, then participated in the BAP hearing *pro se*, and now has new counsel for the post-hearing processes, all of which naturally impact the Objector's strategy for sustaining its opposition to this application.

² *In re Amending and Adopting Rules in WAC 480-30 Relating to Passenger Transportation Companies*, Docket TC-121328, General Order R-572 (Aug. 2013) ("Auto Transportation Rulemaking") at ¶25, p. 9.

moving to reopen the record and, in its Petition for Administrative Review, even seeking to schedule oral argument on its appeal. While no one suggests Shuttle Express lacks the due process right to avail itself of any and all procedural remedies, the effect of seeking such opportunities is unquestionably to delay and make far more burdensome and expensive Commission processes intended to be streamlined by the industry rule revisions in 2013.

4 The instant Motion to Reopen is classically such a tactic. Shuttle Express justifies the failure to present evidence reasonably available before hearing by defaulting to the premise that one of two Shuttle Express principals, (Paul Kajanoff's), temporary hearing defect somehow rendered the objector's case presentation incomplete. Putting aside the fact that the Objector's eleventh-hour request to the Commission for interpretive assistance at hearing was never served on the applicant, there is no question that Shuttle Express was in fact adequately able to represent itself at the BAP and adduce evidence in opposition to the application. Moreover, Shuttle Express never explains in its Motion nor even attempts to explain why it could not have produced the evidence it now seeks to inject into the record by the original exhibit filing deadline of Monday, December 29, 2014.³ It also never defends why it could not have attempted to introduce the information through the testimony at hearing of its other, non-hearing impaired representative, Wesley Marks, the financial officer of the company who testified on a wide range of topics and who clearly was a logical sponsor of such evidence.

³ Moreover that evidence is without foundation, does not clearly indicate on what basis scheduled service customers are excluded from the totals or what that period experienced with respect to attrition or growth in other of its regulated customer counts, etc. As noted, the objectors had Applicant's proposed exhibits for two weeks before the hearing and there is no reason why Shuttle Express could not have marshaled testimony and cross-examination in support of statistical data it now belatedly seeks to introduce.

II LEGAL ANALYSIS IN OPPOSITION TO MOTION TO REOPEN

5 As the parties are all aware, WAC 480-07-830 controls the reopening process at this juncture which, in relevant part, provides:

...In contested proceedings, the commission may reopen the record to allow receipt of evidence that is essential to a decision and that was unavailable and not reasonably discoverable with due diligence at the time of the hearing or for any other good and sufficient cause....

A. The Belated Request for a Hearing Interpreter in these Circumstances is Hardly “Good and Sufficient Cause” for Reopening.

6 None of the elements of the Commission’s procedural rule on reopening have here been demonstrated. Shuttle Express’s reference to the provisions WAC 480-07-350 and WAC 10-08-150 to attempt to establish “good cause” under WAC 480-07-830 fails to explain why the lack of a qualified interpreter prevented Shuttle Express from presenting the evidence it seeks to offer now. Moreover, Shuttle Express has not made even the barest of showings that the evidence it seeks to admit is “essential to the decision and...was unavailable and not reasonably discoverable with due diligence at the time of the hearing.” Implicitly, Shuttle Express singularly relies on the alternative “good and sufficient cause” rationale under WAC 480-07-830 to trigger its eligibility to reopen here. Yet in order to do so, Shuttle Express ignores the fact that two, not one, representatives were present at the hearing, that its request for accommodation was untimely and unserved on the applicant and that it might have sought a continuance at the hearing pursuant to WAC 480-07-385, but failed to do so.

7 While WAC 480-07-350 appears not to have been previously interpreted by the Commission in case law on this issue, it expressly incorporates WAC 10-08-150 as to the rules of procedure governing the provision and qualifications of interpreters, in WAC 480-07-350(1). However, other provisions of the Washington Administrative Code may provide some insight.

For example, WAC 371-08-490, “Provision of interpreters and of reasonable accommodations to individuals with special needs” which applies to environmental and land use hearings, indicates: “...[t]hat person [seeking accommodation] shall request an interpreter or other reasonable accommodation from the presiding officer not later than three weeks before the date of the hearing, conference or other situation for which the interpreter or accommodation is needed.” Clearly, asking an administrative agency to accommodate an auditory deficiency the last business day before the long-scheduled administrative proceeding is not reasonable. Again, if good cause for affording accommodation is demonstrated for an indispensable participant, the alternative would have been to move for a continuance and argue its appropriateness. Shuttle Express clearly does not have “good and sufficient cause” to reopen the hearing pursuant to the above Commission rule. In summary, Shuttle Express: 1) was aware of the evidence to be presented long in advance of the hearing but elected after the fact to seek its introduction attached to a Motion to Reopen, 2) had two, not one, qualified representatives at the hearing only one of whom suffered from a temporal hearing loss, and 3) failed to request and argue in support of a continuance in light of the alleged lack of accommodation. For all of these reasons, again, this effort should fail.

B. There is No Supportable Basis for Shuttle Express to Reopen the Record Here.

8 The Commission has previously dealt with and articulated bases for Motions to Reopen. A petition/motion to reopen should show circumstances not reasonably foreseeable during the presentation of evidence. Order M.V. No. 126785, *In re John A. Huffman/Rich’s Hauling Service*, App. P-65687 (April 1983), where the Commission also noted it looked by analogy at CR 59(a) to determine whether reopening is appropriate. Shuttle Express has not attempted to claim that the customer attrition evidence it seeks to present was unforeseeable, unavailable or

newly discovered so that it was not able to be produced at the time of hearing. Indeed, the data and the customer count figures it seeks to supply over two years were all likely available at the exhibit filing deadline. The month's end December, 2014 information could have been supplied by the date of the hearing or been the subject of a late-filed exhibit Motion.

9 A request for reopening to supplement the record with evidence which was reasonably available at the time of the hearing will be denied. *Thurston County v. Burlington Northern Railroad*, TR-1930 (Aug. 1988). Reopening to receive additional evidence will be denied when the additional evidence is not essential to a decision and the evidence was available or reasonably discoverable at the time of the hearing. Order M.V. No. 140608, *WUTC v. Rontra Freight*, H-4990 (Dec. 1989).⁴

10 Indeed, the Commission has been consistent in resisting litigants who want another bite of the apple once an application Order is entered from augmenting their presentation with evidence available at the time of the hearing. Such "do overs" unquestionably protract proceedings and should be particularly eschewed in streamlined brief adjudicative proceeding settings:

There is no reason shown for reopening except that the Commission found applicant's case sufficient for a...grant of authority and protestant wants to supplement its case with evidence that was available at the time of the hearing. That is not sufficient reason for reopening.⁵

⁴ Ironically, this is also not the only time Shuttle Express has been reminded by the Commission about the requisite standards for reopening. In Order M.V.C. No. 1899, *In re San Juan Airlines, Inc. d/b/a Shuttle Express* (Mar. 1991), the Commission rejected its prior efforts (this time as an applicant) to reopen the hearing record to show improved financial circumstances. The Commission there found, as Speedishuttle here contends, that the information Shuttle Express sought to introduce "was entirely within the control of the carrier. Information about the rate increase was not reasonably undiscoverable by the Applicant." Order M.V.C. No. 1899 at 5.

⁵ Order M.V. No. 137347, *In re Redondo Heights Wrecker Service, Ltd.* (Feb. 1988) at p. 4 citing, Order M.V. No. 129635, *In re Susan Schlosser and Peggy Blake d/b/a The Paper Jogger*, App. P-67065 (May, 1984).

C. Even Should the Commission Here Consider the Proffered Evidence, it has no Probative Value.

11 In the unlikely event the Commission somehow allows reopening here, the Applicant would note that Shuttle Express's new evidence does nothing more than suggest its passenger volume in the requested territory purports to show declines in the past two calendar years. As verified on the Commission's website, Shuttle Express has revised its tariffs in that same interval and has elected fare flexibility in 2013 as provided by the auto transportation rule revisions. The reasons for that diminution in customer count could be legion: service quality degradation, rate changes, Shuttle Express's sizeable regulatory fines and possible notoriety through the proceeding in Docket No. TC-120323 and the proliferation of unregulated competition that it cites to at page 2 of its Motion to Reopen, amongst others.

12 Shuttle Express also appears to suggest in its Motion that the latter unregulated competition growth factor should trigger renewed regulatory controls on entry. Once again, the Commission has addressed this concern in General Order R-572 that revised the intrastate auto transportation rules and found, *inter alia*, that

it has determined auto transportation companies operate within a competitive market for passenger service in the state. Many alternatives to auto transportation company service exist, including taxis, limousines, public transit, rail or intrastate airline service. Individuals may drive to SeaTac International Airport and park at the Port of Seattle or in one of the many private lots. They may also obtain rides from family or friends.⁶

13 Shuttle Express's apparent answer to this evolving competitive reality is simultaneously to seek to gain the advantage of a new rate regulatory flexibility mechanism but argue here that the Applicants proposed service model should be thwarted by return to an entry analysis attuned to a primary focus on the impact of additional authorized service on incumbent regulated providers. Unfortunately for Shuttle Express, that regulatory focus has shifted and the

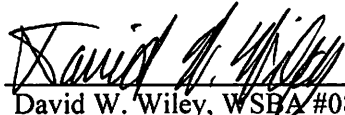
⁶ The 2013 "Auto Transportation Rulemaking" at ¶25, p. 9.
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Commission has implemented a policy “to promote competition in the auto transportation industry.”⁷ Even if Shuttle Express could somehow put the traditional entry model genie back in the proverbial regulatory bottle and connect its purported regulated customer declines to the prospect of additional competition in the regulated marketplace, this could not overcome the findings on the focal legal issues featured in Order 02 under WAC 480-30-136 and WAC 480-30-140 and which will be addressed in detail in the Applicant’s Answer to Petition for Administrative Review.

14 For all of the above reasons, Applicant asks that Shuttle Express’s Motion to Reopen the Record be denied.

DATED this 17th day of February, 2015.

RESPECTFULLY SUBMITTED,

By 
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⁷ *Id.*
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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2015, I caused to be served the original and three (3) copies of the foregoing documents to the following address via first class mail, to:

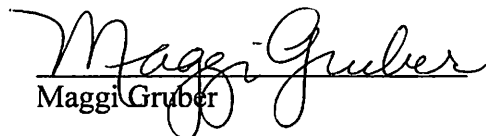
Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
Attn.: Records Center
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

I further certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to:

records@utc.wa.gov

and an electronic copy via email and first class mail, postage prepaid, to:

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