

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC.,

Petitioner and Complainant,

v.

SPEEDISHUTTLE WASHINGTON,  
LLC,

Respondent.

DOCKET TC-160516

SPEEDISHUTTLE WASHINGTON, LLC  
d/b/a SPEEDISHUTTLE SEATTLE'S  
MOTION TO DISMISS COMPLAINT OF  
SHUTTLE EXPRESS, INC.

**I. PRELIMINARY STATEMENT**

1 COMES NOW Speedishuttle Washington, LLC d/b/a Speedishuttle Seattle (“Speedishuttle” or “Respondent”), by and through its counsel, David W. Wiley of Williams Kastner & Gibbs, PLLC, Two Union Square, 601 Union St., Suite 4100, Seattle, WA 98101, and pursuant to WAC 480-07-380(1), and WAC 480-07-375(2), and files this motion, as separately mandated by rule, here, seeking dismissal of the Complaint. It also files an answer to the Complaint by separate pleading, today.<sup>1</sup>

**II. RELIEF REQUESTED**

2 Speedishuttle here seeks dismissal of the Complaint filed against it by Complainant Shuttle Express (“Complainant” or “Shuttle Express”). Applicable statutes at issue include, but are not limited to, the following: RCW 81.04.110, 81.28.010, 81.28.180, 81.04.110 and 81.68.040. Applicable rules at issue include, but are not limited to, the following: WAC 480-07-380, 480-30-140, 480-30-420, 480-30-421, 480-30-426, and 480-07-320.

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<sup>1</sup> The original joinder of the Petition for Rehearing with the Complaint has unnecessarily complicated and rendered procedurally awkward, responsive pleadings and this Motion. The Respondent apologizes to the Commission for any lack of clarity in the “intertwined” nature of the contentions in this Motion as a result, but it believes the format was dictated by the joinder and inter-dependency of those pleadings and their allegations by the Petitioner/Complainant.

### III. STATEMENT OF FACTS

3 On February 9 and 10, 2015, Shuttle Express filed both a Petition for Administrative Review of Initial Order 02 Rejecting Objections and Granting Application and a Motion to Reopen the Hearing Record. In support of the latter, Shuttle Express claimed a failure to accommodate a temporary hearing loss of one of its key management representatives at the brief adjudication proceeding and its failure to have counsel at the hearing both merited reopening to allow it to “introduce new evidence” of market decline.

4 On March 30, 2015, Speedishuttle was granted a certificate of public convenience and necessity No. C-65854 from the Washington Utilities and Transportation Commission (“Commission”). At the hearing, Speedishuttle managers provided testimony on number of subjects, including how the proposed services would be different from those provided by Shuttle Express.

5 In its Final Order, the Commission found that Speedishuttle’s business model creates a significant distinction from Shuttle Express under WAC 480-30-140(2). In Final Order 04, the Commission also denied Shuttle Express’s Motion to Reopen, finding “Shuttle Express received the accommodation requested, declined to request a continuance, and fully participated in the hearing.”<sup>2</sup>

6 Speedishuttle began providing services in accordance with the Final Order and its April 13, 2015 issued certificate in May, 2015. Shuttle Express did not seek judicial review of the Final Order, or other orders resulting in the issuance or affirmation of Certificate No. C-65854.

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<sup>2</sup> Order 04, *In re the Application of Speedishuttle Washington, LLC d/b/a Speedishuttle Seattle*, (Mar. 2015), ¶¶15-16, at 5.

7 On May 16, 2016, Shuttle Express filed a Complaint subjoined to a Petition for Rehearing in  
this matter. The Complaint now seeks cancellation or restriction of Certificate No. C-65854.

#### IV. STATEMENT OF ISSUES

8 Should the Shuttle Express Complaint be dismissed for failure to state a claim upon which  
relief can be granted?

#### V. EVIDENCE RELIED UPON

9 The files, testimony and record in Application TC-143691.

#### VI. APPLICABLE STANDARDS FOR MOTION TO DISMISS

10 Pursuant to WAC 480-07-380(1), a party may move to dismiss another party's case on the  
basis that the opposing party's pleading fails to state a claim upon which the Commission  
may grant relief. In reviewing a Motion to Dismiss, the Commission considers the standards  
applicable to a motion made under Court Rule (CR) 12(b)(6) and 12(c) of the Washington  
Superior Court's Civil Rules.<sup>3</sup> Washington courts treat CR 12(c) motions for judgment on  
the pleadings identically to CR 12(b)(6) motions to dismiss for failure to state a claim.<sup>4</sup> The  
purpose of both rules probably is seemingly to determine if a plaintiff can prove any set of  
facts that would justify relief.<sup>5</sup> A CR 12(b)(6) motion should be granted when "it appears  
beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which  
would entitle the plaintiff to relief."<sup>6</sup> Additionally, "[w]hile a court may consider any  
hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the  
gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient."<sup>7</sup>

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<sup>3</sup> WAC 480-07-380(1).

<sup>4</sup> *P.E. Systems, LLC v. CPI, Corp.*, 176 Wash. 2d 198, 203, 289 P.3d 638 (2012) (citing *Suleiman v. Lasher*, 48 Wash. App. 373, 376, 739 P.2d 712 (1989)).

<sup>5</sup> *P.E. Systems*, 176 Wash. 2d at 203.

<sup>6</sup> *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

<sup>7</sup> *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005).

## VII. ARGUMENT IN SUPPORT OF MOTION TO DISMISS

11 In addition to the general and specific denials set forth in its separate Answer with respect to the specific allegations in the Complaint which it now incorporates by reference, Speedishuttle, in support of its Motion to Dismiss, further responds to the specific Complaint allegations here as follows:

A) In ¶38 of its Complaint, Shuttle Express alleges that, by offering testimony under WAC 480-30-140 that its service was not the “same service” as Shuttle Express, Respondent used “false, misleading, overstated testimony” in support of that position. In meeting its requisite showing to establish that it was not the “same service,” Speedishuttle adduced evidence on a number of non-exclusive factors. The Commission, in its discretion under the revised rules in 2013, can rely on one, some or all of those factors. As one example, the Commission found evidence in its Order 04 (of March 30, 2015), that by offering luxury vehicles in the marketplace, this in and of itself established dissimilar service and an unserved portion of the market by Shuttle Express.<sup>8</sup> Speedishuttle’s service is in fact not the “same service” under law and rule, and Shuttle Express’ allegations in the Complaint with respect thereto should be rejected.

B) Responding to the allegations in ¶39 of the Complaint, Speedishuttle has never denied it would be operating in competition with Shuttle Express. The legal issue is not whether it proposed to compete with Shuttle Express, but how its service would be differentiated from Shuttle Express and to what type of market it might provide augmented service. Speedishuttle specifically denies that “as a consequence” or otherwise “as a proximate cause,” Speedishuttle has caused the alleged “precipitous decline” in the alleged

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<sup>8</sup> See again, Order 04, ¶¶22, 23, and 24 at 7, 8.  
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number of passengers carried by Shuttle Express, and simply baldly asserting that Speedishuttle is responsible for a passenger or revenue decline does not begin to support a complaint under RCW 81.04.110.

C) In response to ¶40 of Shuttle Express' Complaint, Shuttle Express alleges that foreign speaking (primarily Asian) visitors Speedishuttle serves "may even be de minimus as compared to the totality of passengers served."<sup>9</sup> Whether a small portion of Speedishuttle's customer base is foreign-speaking does not mean, under WAC 480-30-140(2), that Speedishuttle's service is consequently the "same service" as Shuttle Express. Whether one, or 1,000, of its passengers are served by multilingual website, drivers, reservationists and/or greeters is not the point. The point is that the offering and providing of such services differentiates Speedishuttle from Shuttle Express. Once again, Shuttle Express has failed to state a claim under RCW 81.04.110 and 81.28.010 in that regard.

D) Finally, Shuttle Express separately complains that Speedishuttle is providing services in competition with Shuttle Express "at fares that are below cost." While that is necessarily a bare allegation in its current form, Shuttle Express' argument is legally and factually wholly unsupported, deficient and more importantly, fails to state a justiciable claim under WAC 480-30-420 and CR 12(b)(6). In specific, the gravamen of the Shuttle Express Complaint fails to acknowledge recent fare flexibility exceptions to auto transportation tariff filings under WAC 480-30-421 and WAC 480-30-426, effectively meaning the Complainant has failed again to state a claim upon which relief can be granted.

12 Without waiving any of the objections in its Answer to the Complaint, Speedishuttle also expressly denies for the purposes of this Motion as well that its approved rates in any way

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<sup>9</sup> Formal Complaint Against Speedishuttle Washington, LLC for its Rules, Regulations or Practices et.al, Docket TC-143691, ¶40, at 17.

constitute predatory pricing. It avers instead that in fact those fares are quite comparable to, and in some instances, higher, and some instances, lower, than the prevailing rates assessed by Shuttle Express in its tariffs in overlapping service territory, and because of this prevailing inherent variability of circumstance which is readily ascertainable upon review of published tariffs, Shuttle Express also contends the Complaint should be dismissed.

#### **VIII. RESPONSE TO SHUTTLE EXPRESS' PRAYER FOR RELIEF IN SUPPORT OF MOTION TO DISMISS**

13 Shuttle Express' broad Request for Relief in its Complaint poses a number of procedural complications for the Commission also meriting dismissal of the Complaint by this or its own Motion. First, while in ¶45, it asks for prompt commencement of an adjudicative proceeding, it further asks that the Petition and the Complaint be combined in the same proceeding. While any issue of common law and fact are subject to potential consolidation under WAC 480-07-320 by the Commission, here, of course, we have differing procedural remedies sought and a separate burden of proof requirement on a private party complainant, pursuant to RCW 81.04.110. Additionally, Speedishuttle believes strongly that the Petition to Rehear the original application case should and must be resolved prior to any determination on the Complaint pleading. At this juncture, differing standards of review, which are clearly more specific and narrow under RCW 81.04.200, must be separately applied. Moreover, consolidation "for joint consideration" of both the Petition and the Complaint in the same proceeding would improperly allow the Complainant to piggyback on insufficient, unproven, hearsay-based allegations in the Petition to support ongoing allegations in the Complaint case. Joint consideration or consolidation at this juncture would be premature and prejudicial.

14 Shuttle Express' Request for Relief also generally contains various requests for extraordinary relief that are unwarranted, wasteful and unnecessary in this case. Speedishuttle asks that the Commission deny Shuttle Express' request that yet another adjudicative proceeding be initiated under WAC 480-07-305, and deny consideration of the Petition for Rehearing and the Complaint in the same proceeding. Additionally, as it has extensively argued in its separate Answers to Petition to Reopen and to Complaint today, Speedishuttle asks that the Commission deny Shuttle Express' request that Certificate No. C-65854 be cancelled or restricted in any way, and here, that its subjoined Complaint be dismissed.

15 Moreover, Speedishuttle asks that the Commission deny Shuttle Express' request that Speedishuttle be ordered to cease providing on-going regulated services in which it has invested hundreds of thousands if not millions of dollars in accordance with Commission rules and regulations and/or provide a profit and loss statement. Finally, Speedishuttle asks that the Commission deny Shuttle Express' request to require submission of ongoing monthly reports. Such an extraordinary request is infrequently sought by staff in complaint/show cause proceedings under RCW 81.04.510, but to Speedishuttle's knowledge, has not been employed in favor of a competitor complainant in a private party action under RCW 81.04.110.

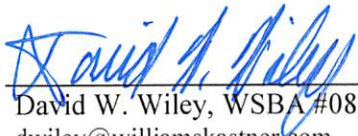
16 Based on all the facts and law outlined above, and more extensively in its Answer to Petition to Rehear and in Answer to Shuttle Express' Complaint which Speedishuttle incorporates by reference here, Speedishuttle asks that the Commission grant its Motion to Dismiss, and enter any other such orders as may be warranted under the laws and facts of this matter.

## IX. CONCLUSION/PRAYER FOR RELIEF

17 Shuttle Express' Complaint fails to meet the standards under CR 12(b)(6) and 12(c) and Commission rule for viability. The intertwined Complaint fails to assert any set of facts that, if true, entitle Shuttle Express to a judgment in its favor. Moreover, the matter has already been exhaustively addressed by the Commission and, as the Complaint fails to acknowledge and consider significant changes in law for entry and for rates in application of the 2013 rulemaking, the Complaint should be dismissed with prejudice.

DATED this 7<sup>th</sup> day of June, 2016.

RESPECTFULLY SUBMITTED,

By   
David W. Wiley, WSBA #08614  
[dwiley@williamskastner.com](mailto:dwiley@williamskastner.com)  
Attorney for Speedishuttle Washington, LLC



**CERTIFICATE OF SERVICE**

I hereby certify that on June 7, 2016, I caused to be served the original and three (3) copies of the foregoing documents to the following address via Fed Ex:

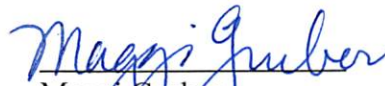
Steven V. King, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
Attn.: Records Center  
P.O. Box 47250  
1300 S. Evergreen Park Dr. SW  
Olympia, WA 98504-7250

I further certify that I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via web portal to: [records@utc.wa.gov](mailto:records@utc.wa.gov)

and served a copy via email and first class mail, postage prepaid, to:

Julian Beattie 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: <a href="mailto:jbeattie@utc.wa.gov">jbeattie@utc.wa.gov</a>	Bruce Winchell Mills, Meyer, Swartling 1000 Second Avenue Seattle, WA 98104-1064 (206) 382-1000 <a href="mailto:bwinchell@millsmeyers.com">bwinchell@millsmeyers.com</a>
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Dated at Seattle, Washington this 7<sup>th</sup> day of June, 2016.

  
Maggi Gruber  
Legal Assistant