

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC.,

Petitioner and Complainant,

v.

SPEEDI SHUTTLE WASHINGTON, LLC

Respondent.

DOCKET NOS.

TC-143691

TC-160516

RESPONSE OF SHUTTLE
EXPRESS, INC. IN OPPOSITION
TO MOTION TO DISMISS

INTRODUCTION

- 1 Shuttle Express, Inc. (“Shuttle Express” or “Petitioner”) hereby responds to the SpeediShuttle¹ motion to dismiss the Complaint in Docket No. TC-160561² without allowing any discovery, investigation, testimony, hearing or briefing on the merits. The Motion addresses, in part, the very high standard for a dismissal on the pleadings under Washington law. But then it fails to explain, in any cogent way, how that standard is met in this case.
- 2 As with its purported answer to the Complaint, the Motion is more in the nature of a post-hearing brief, arguing why Respondent *disagrees* with some (but not all) of the facts alleged in the Complaint. But the Motion never addresses most of the facts pleaded at all,³ let alone articulates in a comprehensible way why—even accepting all those facts and reasonable inferences as true—the Commission could not possibly grant some relief on the Complaint.

¹ SpeediShuttle Washington, LLC; to be referred to herein as “SpeediShuttle” or “Respondent.”

² SpeediShuttle Washington, LLC d/b/a/ SpeediShuttle Seattle’s Motion to Dismiss Complaint of Shuttle Express, Inc.; to be referred to hereafter as the “Motion.”

³ For example, in its point-by-point discussion of certain paragraphs it addresses Paragraph 38-41. But it fails to discuss Paragraphs 2-35 specifically at all, even though all of those paragraphs were incorporated into the Complaint by reference. Complaint, ¶ 37.

APPLICABLE STATUTES AND RULES

3 In addition to the statutes and rules cited in the Motion, Shuttle Express relies on relevant provisions of RCW Titles 34, 80, and 81, and WAC Title 480; including, but not limited to: RCW 34.05.413, 80.01.040, 81.04.110, 81.04.120, 81.04.200, 81.28.010, 81.28.230, 81.68.030, and 81.68.040; WAC 480-07-305, 480-07-395, 480-30-36, 480-30-096, 480-30-140, 480-30-241, 480-30-126, 480-30-140, 480-30-171, 480-30-281, and 480-30-356; and Superior Court Civil Rule 8.

STANDARDS APPLICABLE TO MOTION

4 The Motion cites the language of WAC 480-07-380(a) and Court Civil Rule (“CR”) 12(b)(6) and 12(c). Shuttle Express agrees that those Commission and court rules apply. But the CR 12 and case language quoted offer only a partial understanding of the high standards applicable to the Motion.

5 In addition to CR 12, the Commission should consider CR 8, which provides the standard for the level of detail that a “claim for relief,” such as a complaint, should contain. CR 8 merely requires “a short and plain statement of the claim showing that the pleader is entitled to relief.....” In other words a high-level summary suffices.

6 The Washington Supreme Court has described a CR 12(b)(6) review as follows: “At this stage, we accept as true the allegations in a plaintiff’s complaint and any reasonable inferences therein. CR 12(b)(6) motions should be granted sparingly and with care and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. Dismissal under CR 12(b)(6) is appropriate only if it appears beyond a reasonable doubt that no facts exist that would justify recovery.” *J.S. v. Vill. Voice Media*

Holdings, L.L.C., 184 Wash. 2d 95, 100 (2015) (all internal quotation marks and citations omitted).

7 Further, the bar for dismissing a complaint for failure to state a claim in Washington is much higher than in Federal court under its analogous rule. The Washington Supreme Court has expressly rejected recent U.S. Supreme Court cases that allowed Fed. R. Civ. P. 12 dismissal if the facts alleged in the complaint are not “plausible.” *E.g., McCurry v. Chevy Chase Bank FSB*, 165 Wash.2d 1020 (2009). Thus, even hypothetical and implausible facts alleged in the complaint must be considered as true at this stage of the adjudication. *E.g., Gorman v. Garlock, Inc.*, 155 Wash. 2d 198, 214 (2005).

8 Finally, in the unlikely event the Commission should find some defect or omission in the Complaint here, the appropriate remedy would be to allow re-pleading to correct the defect, not to dismiss. *E.g., WAC 480-07-495(3)-(5)*.

STATEMENT OF ISSUES

9 Should or can the Commission allow Respondent to avoid the consideration of a Complaint⁴ that is based on numerous well-pleaded alleged wrongs and violations of statutes and rules, and to avoid any scrutiny or investigation of those wrongs and violations, based on a motion to the effect that Respondent merely disagrees with them?

⁴ It is important the Commission not to lose sight of the fact that the Motion only seeks dismissal of the Complaint, not the Petition for rehearing. The Petition is relevant however, because the Complaint incorporates by reference all of the factual allegations of the petition. Complaint, ¶ 37. Accordingly, facts alleged in both the Complaint and Petition support granting relief on the Complaint. Of course, dismissal of the Complaint would not dispose of the Petition to Reopen in any event.

DISCUSSION

10 The Commission has broad powers to regulate public service companies. The Legislature has authorized and directed the Commission to: a) enforce the Public Service laws and, b) protect and promote the public interest consistent with those laws. *E.g.*, RCW 80.01.040. As our Supreme Court has noted, “The Legislature ... conferred [on the Commission] by necessary implication every power proper and necessary to the exercise of the powers and duties expressly given and imposed. ... Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law.” *State ex rel. Puget Sound Nav. Co. v. Dep't of Transp. of Wash.*, 33 Wash. 2d 448, 481, 486 (1949) (internal quotation marks and citations omitted).

I. The Complaint is Replete With Facts Supporting Commission Relief.

11 To accept the arguments of the Motion, the Commission would have to find that it has *no power whatsoever* to order any remedy or relief based on a complaint alleging the following facts,⁵ among others:

- a. Respondent obtained its certificate based on several representations that can now be proved were either never true, or are not now true, including:
 - Service would be by reservation only (not “walk up”),
 - All arriving airline passengers would be met by a greeter,
 - 20 minute departures from the airport would be guaranteed,
 - Non-English speaking passengers who previously were not being served would now be served,

⁵ These facts are alleged or implied by the Complaint. Under the applicable standard, they must be taken as true at this stage. See “Standards” section, above.

- Unserved tech-savvy tourists would now be served, and
 - By serving a previously unserved demographic the overall number of door-to-door airport shuttle passengers would increase and not continue to decrease.
- b. Rather than serving previously unserved passengers and growing the market—as represented—experience shows Respondent has vigorously endeavored to and succeeded in capturing a big share of a still shrinking market, with adverse consequences and risks to the public interest, such as:
- Reduced efficiency due to lower volumes plus double overhead,
 - Fewer passengers carried per trip,
 - Higher fares,
 - Longer wait times to fill a van, and
 - Reduced geographic service areas.
- c. Respondent has captured a significant portion of the market by predatorily pricing below cost, causing or risking:
- Higher fares in the long run, and
 - Harm to Shuttle Express due to loss of passengers and reduced economies of scale.

12 The foregoing summarized facts—and all other facts, inferences, and hypotheticals that may be drawn from the 40 paragraphs of facts alleged in the complaint—must be considered and taken as true. Accordingly, the only way the Motion could succeed is if the Commission completely lacked any authority or jurisdiction whatsoever to review and act on a single one of those facts. But nothing could be further from the truth.

II. The Commission Has Jurisdiction and Ample Authority to Grant Relief.

13 The Commission has numerous tools at its disposal to deal with such deceptive, unfair, and unlawful acts and omission under its broad grant of power, and has to a great extent spelled out many of those tools in its own rules. Authority and options include:

- a. Commence an adjudicative proceeding regarding any matter within its jurisdiction, RCW 34.05.413;
- b. Regulate in the public interest all persons engaging in the transportation of persons for compensation, RCW 80.01.040;
- c. Hear a complaint by a public service company⁶ regarding:
 - Rates, charges, rules, regulations, or practices alleged to be “unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition,”

And then:

- “[S]hall have power, ... [to] correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of,”

And further:

- “No complaint shall be dismissed because of the absence of direct damage to the complainant,” RCW 81.04.110;
- d. “[A]fter a hearing had upon its own motion or upon complaint ... fix by order the just, reasonable, or sufficient rates, fares, or charges, or the regulations or

⁶ Although the issue is not yet before the Commission, a hearing on a complaint is mandatory. See RCW 81.04.120 (“the complainant and the person or corporation complained of shall be entitled to be heard and introduce such evidence as he or she or it may desire”).

practices” of “any common carrier subject to regulation by the commission,”
RCW 81.28.230;

- e. “[S]upervise and regulate [Respondent as an] auto transportation company” and “suspend, revoke, alter, or amend [Respondent’s] certificate issued under the provisions of this chapter,” RCW 81.68.030;
- f. Cancel [Respondent’s] certificate for cause, including, its “[s]ubmission of false, misleading or inaccurate information,” WAC 480-30-171; and
- g. Suspend or cancel a certificate “For serious actions including, but not limited to, misrepresentation,” WAC 480-30-241.

14 Given all the foregoing explicit powers, plus the Commission’s inherent powers and duty to protect and promote the public interest, it is inconceivable the Commission could not possibly order some type of relief based on a complaint that alleges a certificate was obtained based on misrepresentations and/or the services actually being provided today that bear little or no relationship to the “different” services that were proposed. To find otherwise would effectively nullify RCW 81.68.040, which the Commission cannot do in either its orders or its rules.⁷

15 The Commission has a long history that establishes its power under either a complaint or petition for rehearing to add restrictions to a certificate as necessary to effectuate the intent of the order granting the certificate to allow and implement only a new and different service, not undermine the service already offered satisfactorily by another existing carrier. *See, e.g.,* Order M.V.C. No. 1979, *Evergreen Trails, Inc. v. San Juan Airlines, Inc.*, (Dkt. TC-900407, 1992).

⁷ This key issue is discussed further at Paragraph 18-23, below.

III. The History of TC-143691 Does Not Bar, but Supports Relief.

16 There is no question that Shuttle Express disagreed with the Commission’s decision to grant Respondent’s certificate last year. But while Shuttle Express harbored its doubts about the truth of the Respondent’s representations and entire theme of an allegedly “different service,” the detailed bases for those doubts could not be known or effectively proven in the application case, particularly on abbreviated hearing with no discovery. And the Commission, as it apparently was led to believe that the proposed service would be sufficiently different that it could grant a certificate for the same area consistent with RCW 81.68.040, could only have reached its conclusion based on the *representations* Respondent made about how the Respondent would operate and who it would serve.

17 Today, with a year of actual operating experience, Complainant and the Commission have access to new *facts*—as opposed to self-serving representations from Respondent. The facts available today show the true nature of Respondent’s service. It is—by design—functionally identical to Shuttle Express. The facts today also show the adverse impact on the public interest and Shuttle Express. The Complaint contains numerous allegations of new and newly discovered evidence that the Commission could not have considered in the application proceeding because that whole proceeding was prospective. Having been misled by the Respondent once before the Commission should have learned that Respondent’s assertions cannot be taken at face value. A more thorough investigation is warranted today, if not required.

IV. Understanding and Continuing to Follow RCW 81.68.040 is Key to Crafting Proper Relief on the Complaint.

18 While the Commission has a broad grant of powers, one limiting factor is the restrictions that exist in any statute. Chief among those is RCW 81.68.040. Although the Complaint in this case is not an application for new authority, the restrictions of RCW 81.68.040 cannot be ignored.

Only by understanding those restrictions can the scope and intent of the Commission’s grant of a certificate to the Respondent be interpreted properly and consistent with the Commission’s authority at the time of that grant. Even more important today, if it is assumed—as it must be—that the Respondent’s certificate was issued in accordance with RCW 81.68.040, then Respondent should be operating a truly “different service,” not the same service as Shuttle Express, as is alleged in the Complaint.

19 RCW 81.68.040 provides, in pertinent part:

The commission may, after notice and an opportunity for a hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the commission, or when the existing auto transportation company does not object, and in all other cases with or without hearing, issue the certificate as prayed for; or for good cause shown, may refuse to issue same, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate to such terms and conditions as, in its judgment, the public convenience and necessity may require.

20 Respondent’s application sought to “operate in a territory already served by a certificate holder,” *i.e.*, Shuttle Express. All other things being equal, the Commission could not have granted the application without finding that Shuttle Express “will not provide the same to the satisfaction of the commission....” The Commission made no such finding in any of its orders in Docket TC-143691. This was by design. Order No. 04, ¶ 17. Instead the Commission chose to grant service in the same territory served by Shuttle Express by finding that, “Speedishuttle does not propose to offer the same service Shuttle Express provides....” *Id.* (emphasis added).

21 It could be—and was—argued that the distinctions of the service “proposed” did not truly meet the requirements of the RCW 81.68.040 or the Commission’s rules under that statute. But that is ***not the issue raised by the Complaint***. The issue today—based newly discovered evidence of

Respondent’s true intent, including its actual operations—is whether or not *the service that was proposed is the service that is actually being provided*. If there is no consequence for proposing a *different* service, but then providing the *same* service as the existing certificate holder, then the Commission will have failed to enforce the protections from new entrants that the legislature mandated for existing certificate holders when it adopted RCW 81.68.040. The Complaint goes to the heart of this issue.

22 The Commission need not find error in its prior rulings to grant relief on the Complaint. It can, and should, order appropriate relief based on the new evidence in the context of the prior case.⁸ Well-crafted relief can ensure that going forward the requirements of RCW 81.68.040 are met to implement the intent of the Commission—based on representations made by the Respondent—to provide a different service to an “entire demographic” that Shuttle Express was not serving.

23 The history of Docket TC-143691 does not support dismissal of the Complaint. Rather, it cries out for relief. Otherwise, an applicant can easily vitiate the intent of the Legislature simply by claiming it will serve a new demographic (blind, deaf, Italian) and then actually target and carry the demographic that was already 99% served by the existing certificate holder. In the Complaint docket, it should be assumed that the intent of the Commission in issuing Order No. 4 (and in adopting WAC 480-30-140) was to enforce, not vitiate, RCW 81.68.040.

V. Both the Complaint and Petition Raise Important Public Interest Issues.

24 Finally, this proceeding raises important public interest issues, including whether county-wide door-to-door airport shuttle service is sustainable with two carriers splitting a shrinking market, as well as whether an applicant that appears to have prevaricated about its intention to serve currently unserved airline passengers can or should be rewarded indefinitely for its prevarication.

⁸ See *Evergreen v. San Juan Airlines*, *supra*.

25 Also, if Respondent is allowed to continue to operate at all, for how long should Respondent be allowed to lose money on its service to get started and capture market share? Should it be allowed to try to drive Shuttle Express out of business? Or just damage the efficiency and viability of Shuttle Express' operations sufficiently that Shuttle Express is forced to raise its fares significantly?

26 Another important public interest issue is what remedy should be accorded to an existing certificate holder that has lost a significant portion of its "walk-up" passengers to an applicant who swore under oath it would not even carry walk-ups at all? The facts pleaded in the Complaint paint a compelling picture of an applicant that used both guile and flat-out lies to obtain a grant of authority that might well not have been granted, or might have risked being overturned by a reviewing court. This kind of manipulation of the Commission's processes is unlawful and contrary to the public interest. The Respondent should not be permitted to retain the benefits of its ill-gotten gain.

27 Protecting and restoring the public interest need not consume a great deal of the Commission's resources. Shuttle Express is prepared to do the lion's share of the investigation. But to do so, the Commission needs to permit discovery of emails, correspondence, financial records, hiring manuals and questionnaires, and other reliable evidence that is hard to falsify. Subpoena and cross-examination are demonstrably inadequate, given this Respondent's history of misrepresentations.⁹

28 In *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), the Supreme Court described the public interest standard as a "supple instrument for the exercise of discretion by the expert

⁹ Also, the Petition and Complaint were filed together and should be considered in one proceeding, if necessary by a formal consolidation order. The factual underpinnings of both are closely intertwined and overlapping, even if the burden of proof and relief available in each proceeding may be somewhat different. It would be grossly inefficient for the Commission and all parties to have two separate proceedings under the circumstances.

body ... charged to carry out ... legislative policy.” The public interest has suffered and will further suffer if the Commission fails to use its public interest “instrument” to remediate the wrongs Respondent has committed.

CONCLUSION

29 Even at this early stage of the proceedings, Respondent has made it clear it will do anything to avoid the light of day being cast on the apparent misrepresentations it made to obtain its certificate, its immediate efforts to circumvent the entire purpose of the grant for a “different” service than Shuttle Express, and its evident secret true intent from the outset to be just another airport shuttle service—functionally indistinguishable from the existing certificate holders. To avoid any scrutiny whatsoever, it immediately filed a motion to dismiss the case on the pleadings. It also filed an answer that failed to specifically admit or deny any of the factual allegations in the Complaint.¹⁰ And it has made it clear that it will object to any discovery or a full adjudicative proceeding.

30 Respondent’s efforts to avoid the consequences of its “bait and switch” strategy to obtain its certificate must be rejected. The Public Service Laws provide ample opportunities for review

¹⁰ Further, the Shuttle Express Motion to Strike should be granted and Respondent directed to file a true and proper answer.

31 and relief under the facts alleged. The public interest requires review and an appropriate remedy.
The Motion must be denied.

Respectfully submitted this 21st day of June, 2016.

LUKAS, NACE, GUTIERREZ & SACHS, LLP



Brooks E. Harlow, WSBA 11843
Counsel for Shuttle Express, Inc.
8300 Greensboro Dr. Suite 1200
McLean, VA 22102
Phone: 703-584-8680
Fax: 703-584-8696
bharlow@fcclaw.com

CERTIFICATE OF SERVICE

I hereby certify that on June 21st, 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

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: jbeattie@utc.wa.gov | John Fricke Pacific Northwest Transportation Services, Inc. d/b/a Capital Aeroporter Airport Shuttle PO Box 2163 Olympia, WA 98507-2163 (360) 292-7680 Email: johnf@capair.com |
| David W. Wiley Williams Kastner Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 206-233-2895 Email: dwiley@williamskastner.com | |

Dated at McLean, Virginia this 21st day of June, 2016.



Elisheva Simon
Legal Assistant