

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

ANSWER OF SHUTTLE
EXPRESS, INC. IN
OPPOSITION TO PETITION
FOR REVIEW AND PARTIAL
CHALLENGE OF ORDER 06

INTRODUCTION

- 1 Shuttle Express, Inc. (“Shuttle Express” or “Petitioner”) hereby answers the SpeediShuttle¹ petition for review of Order 06² in Docket No. TC-143691 (now consolidated with TC-160561), which seeks denial of a rehearing without allowing any discovery, investigation, testimony, hearing or briefing on the merits of the Shuttle Express Rehearing Petition. Further, pursuant to WAC 480-07-825(4)(c), Shuttle Express counter-challenges that portion of the Order stating that, “Shuttle Express does not have a statutory right to rehearing....” Order, ¶ 7. The Review Petition—and all of Respondent’s ongoing efforts to avoid shedding any light of day on its prevarications—must and should be denied.
- 2 First, the Review Petition suffers from a fatal *substantive flaw* throughout. That is, it largely ignores the law that the Commission was bound to (and presumably did) follow in the original hearing and final Order 04, and is equally bound to follow in both this Review Petition and the consolidated Complaint. Specifically, the Commission was barred by RCW 81.68.040 from granting SpeediShuttle’s certificate “in a territory already served by

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

² SpeediShuttle’s Petition for Administrative Review of Initial Order 06; to be referred to hereafter as the “Review Petition.” Order 06 will be referred to simply as the “Order.”

[Shuttle Express]” unless it found that Shuttle Express would not provide the same service “to the satisfaction of the commission.” No finding of dissatisfaction was ever made in any order in Docket No. TC-143691. Instead the Commission found that the operation SpeediShuttle proposed had such a “significant distinction” from Shuttle Express that it could be granted without violating Section 040. That distinction now appears to have been presented in false and misleading ways.

3 The Review Petition also suffers from two *procedural flaws* which are each independent grounds for denial. First, Order 01 in the Complaint docket denied SpeediShuttle’s motion to dismiss on June 28, 2016. SpeediShuttle failed to timely appeal that order, which is now law of the case and is contrary to many of the arguments in the Review Petition. Second, the Review Petition repeatedly miscomprehends the nature of the Rehearing Petition, which is that it is a “pleading.” The Commission’s rules on pleadings do not require the entire case and all supporting evidence to be presented in the Rehearing Petition. The rules provide for further proceedings, including discovery, testimony, exhibits, hearings, and briefing. If and when Respondent complies with these procedures, Shuttle Express is confident it will provide ample evidence of the nature and magnitude of SpeediShuttle’s changes or deceptions.

4 The foregoing concern about SpeediShuttle’s willingness to comply with Commission procedures is not just theoretical at this point. Yesterday, responses to Shuttle Express’s first data requests were due. SpeediShuttle objected to *every single* request. In objections and a letter from counsel Respondent characterized the requests as “premature” based on the Review Petition that is currently pending. In other words, Respondent is effectively treating discovery having been stayed both as to the Rehearing Petition and the Complaint merely by its filing of its petition, despite the lack of any stay order and the fact that the Complaint would be unaffected even if the Review Petition were granted. Worse,

SpeediShuttle has taken the position in response to discovery that “it will not release any pertinent financial data that could become a matter of public record....”

5 The game of “hide the ball” that served SpeediShuttle so well in its application for authority is not over. It is being taken to a new level, as all proper discovery is being delayed and some even refused. Discovery is likely to be the subject of a motion to compel shortly. But the Commission needs to understand now that the Respondent in this case is using all means, both proper and questionable, to keep any and all relevant facts hidden from the Commission.

APPLICABLE STATUTES AND RULES

6 In addition to the statutes and rules cited in the Review Petition, 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, 480-07-380, 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 Rules 8 and 12.

STANDARDS APPLICABLE TO REVIEW PETITION

7 The Review Petition fails to articulate any standard for its proposal to summarily deny the Shuttle Express Rehearing Petition. As with its failed attempt to dismiss the Complaint, the Review Petition 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 Rehearing Petition. But the Review Petition never addresses most of the facts pleaded in detail at all, 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 Rehearing Petition.

8 The relief requested by SpeediShuttle is that, “The [Shuttle Express] Petition should be denied.”

Review Petition, ¶ 36. Because the denial would be based on Shuttle Express’s Rehearing Petition itself, and would be a dispositive order that would deny any opportunity for discovery, presentation of witnesses and exhibits, cross examination, and briefing on a full factual record, the Commission should treat the Review Petition as a “dispositive motion” on the pleadings under the standards of WAC 480-07-380(a).³

9 WAC 480-07-380(a) states that the Commission will consider the standards of Superior Court Civil Rules (“CR”) 12(b)(6) and 12(c). 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 petition, 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.

10 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)⁴ (all internal quotation marks and citations omitted).

³ Unfortunately, SpeediShuttle’s failed to file a proper “answer” to the petition for rehearing in June, and instead filed a brief of some unstated nature and unclear purpose. The amorphous nature of that “answer” exacerbates the unclear basis or standard for the relief it requests today in the Review Petition. The vitriolic June pleading also concluded that Shuttle Express’s petition for a rehearing should be denied—implicitly on a summary basis and again without any articulation of what standard could support such a summary denial. And that is how Order 06 dealt with the initial pleading. But fortunately the administrative law judge instead allowed the rehearing to go forward, instead of dismissing it summarily, as SpeediShuttle urged.

⁴ 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

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

STATEMENT OF ISSUES

12 Should or can the Commission allow Respondent to avoid the consideration of a Rehearing
Petition that is based on numerous well-pleaded alleged wrongs and violations of statutes and
rules based largely on new evidence not previously available or considered, and to avoid
scrutiny or investigation of those wrongs and violations, based on a petition to the effect that
Respondent merely disputes them?

DISCUSSION

13 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).

complaint must be considered as true at this stage of the adjudication. *E.g.*, *Gorman v. Garlock, Inc.*, 155 Wash. 2d 198, 214 (2005).

I. Understanding and Following RCW 81.68.040 is Key to Establishing Proper Case Procedures and Ultimately to Crafting Appropriate Relief on the Rehearing Petition.

A. Background.

- 14 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 Rehearing Petition in this case is not an application for new authority, the restrictions of RCW 81.68.040 cannot be ignored.
- 15 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 Rehearing Petition.
- 16 In one passing comment, SpeediShuttle acknowledges Shuttle Express’s “quasi-monopoly” (Review Petition, ¶ 7) but thereafter ignores how that statutory right undercuts its arguments in support of the Review Petition. The source of that “quasi-monopoly” is RCW 81.68.040, which 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.

- 17 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 an application to provide the *same* service 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).

18 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 Rehearing Petition*. The issue today—based on 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 Rehearing Petition goes to the heart of this issue.

19 SpeediShuttle’s Rehearing Petition does not go anywhere near the heart of the issue. Rather, it tries to ignore the new evidence and instead to retry the application case based on old evidence. SpeediShuttle even tries to shift the blame for the impact of its own transgressions onto unregulated new market entrants such as Uber. But applying the nuances of the 2013 auto transportation rulemaking, and revisiting procedural orders in TC-143691 that were long ago mooted based on old evidence that is now questionable, is but a veiled attempt to avoid the issue. Those arguments are irrelevant to the Rehearing Petition, as is the advent of competition from Uber and other TNCs. They are merely desperate attempts to avoid scrutiny of the real issues.

20 Even more blatant evidence of SpeediShuttle’s desperation can be found in their responses to Shuttle Express first data requests. It is ironic in the extreme that Respondent would express concern that reopening could encourage parties to present a “haphazard” case the first time around (Review Petition, ¶ 27), when it was Shuttle Express which sought a full adjudicative proceeding and SpeediShuttle that resisted it. And even now, SpeediShuttle has objected to every single data request of Shuttle Express. It proposes to partially answer just 5 of the 23 data requests—by September 30th, over four weeks late. And it purports to refuse to provide any financial data that might be introduced into evidence. SpeediShuttle is effectively treating the case as stayed by its pending petition, even though it has not sought nor been granted a stay.

21 The Commission need not find error in its prior rulings to grant relief on the Petition. It can, and should, order appropriate relief based on the new evidence in the context of the prior case as well as any consequences or even “an effect ... that was not contemplated by the Commission.” RCW 81.04.200. Well-crafted relief can ensure that going forward the requirements of RCW 81.68.040 will be met to implement the apparent intent of the Commission—based on representations made by the Respondent—to provide a different service to an “entire demographic” that Shuttle Express was purportedly not serving at all. Or, if the new facts show that no such unserved demographic ever existed, the Commission could restrict or even cancel Respondent’s certificate. In light of the broad powers granted to the Commission in RCW 81.04.200 and throughout Title 81, principles of res judicata and estoppel present no barrier to Commission enforcement of the public service laws and protection of the public interest.

22 The history of Docket TC-143691 does not support denial of the Rehearing Petition. 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 Rehearing 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.

B. Unless the Dictates of RCW 81.66.040 are Ignored. The Rehearing Petition is Replete With Facts Supporting Commission Relief.

23 To accept the arguments of the Review Petition, the Commission would have to find both that Shuttle Express has no right to a rehearing *and* that it is not in the public interest to even allow investigation or hearing based on a rehearing petition alleging the following facts, among others:⁵

- 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,
 - 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.

⁵ These facts and all reasonable inferences must be taken as true at this states. *See* Standards Section, above.

- 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.

24 The foregoing summarized facts—and all other facts, inferences, and hypotheticals that may be drawn from the over 30 paragraphs of facts alleged in the Rehearing Petition—must be considered and taken as true at this stage of the case. Accordingly, the only way the Review Petition could succeed is if the Commission could find as a matter of law that those facts, if proved, cannot meet the prerequisites of RCW 81.04.200. But nothing could be further from the truth. And even assuming, *arguendo*, that the Commission could make such a finding it would also have to find that those facts do not warrant a discretionary rehearing, as is provided for in RCW 81.04.200.

C. On Rehearing the Commission Has and Ample Authority to Grant Relief Based on the Evidence Presented.

25 Only the Commission knows what its subjective intent was in granting the SpeediShuttle certificate. But objectively the record in the application case is replete with representations by SpeediShuttle’s testimony and exhibits and the arguments of counsel that it was seeking to offer a “different service.” And following those sworn statements and arguments, the Commission granted a certificate based on a finding that the proposed service would be “substantially different” from the existing Shuttle Express service. Thus, objectively and considering the requirements of RCW 81.66.040, the Commission had to have relied on SpeediShuttle’s claims to “target” a currently unserved “demographic of travelers.” It can now be shown through publicly available evidence, to be bolstered by discovery, that those claims by SpeediShuttle were false and may have been known to be false at the time they were made.

26 The Commission has numerous tools at its disposal to deal with such deceptive, unfair, and unlawful acts and omissions 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. Conduct a rehearing proceeding pursuant to RCW 81.04.200;
- d. Hear a complaint by a public service company under 81.04.110;
- 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.

27 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 Rehearing Petition 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.

28 The Commission has a long history that establishes its power under a 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).

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

29 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 an 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.

30 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 Rehearing Petition 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.

II. The Review Petition Should Also be Denied Due to Two Procedural Flaws.

A. SpeediShuttle Did Not Seek Review of the Orders Denying Dismissal of the Complaint nor the Prehearing Conference Order.

31 Because SpeediShuttle did not Seek Review of the Orders Denying Dismissal of the Complaint in TC-160516 nor the Prehearing Conference Order in the consolidate docket, the decisions in those interlocutory orders are now law of the case. Interlocutory review would have had to have been filed within 10 days, or August 14th. WAC 480-07-810(3). That was not done. This means that the hearing on the Complaint and discovery to support the Complaint will go forward regardless of the Commission’s ruling on the Review Petition.

32 The Complaint overlaps the Rehearing Petition substantially. Indeed, the Complaint adopts all of the allegations of the pleadings in the Rehearing Petition by reference. The simple reason for this overlap is that the factual bases of both pleadings are intertwined to a great extent. Accordingly, a denial of the Rehearing Petition at this early stage would likely result in no

efficiencies. All denial of the Rehearing Petition now would do is unduly and improperly tie the Commission's hands, perhaps in a small but important way, by limiting some of the legal grounds for taking whatever action the Commission may find necessary or prudent to protect the public interest based on the facts to be established at the hearing.

33 It makes no sense for the Commission to narrow its options at this early stage of the proceedings before the evidence is offered or even fully known. The Review Petition should be denied.

B. SpeediShuttle Improperly Implies that Shuttle Express Must Present All its Evidence in the Rehearing Petition, Rather Than After Discovery, Testimony, Cross Examination, and Hearing.

34 Making the same procedurally defective arguments as its motion to dismiss, SpeediShuttle repeatedly argues to the effect that the Shuttle Express Rehearing Petition lacks sufficient evidence to support granting relief under RCW 81.04.200. But those arguments put the cart before the horse, procedurally. The full evidence is to be presented under oath at the hearing, together with exhibits. Witnesses are subject to cross examination. Only after the conclusion of the hearing is the record expected to be complete.

35 A petition for rehearing is a "pleading." WAC 480-07-370(1)(b). At the pleading stage, the record is just beginning. The petition needs only, "clearly and concisely set forth the ground(s) for the petition and the relief requested." *Id.* Nowhere does the rule on pleadings require "all facts. To the contrary, WAC 480-07-380 makes clear that only a summary is required. *See* Standard of Review section, above.

36 Were pleadings required to set forth each and every fact in full detail, the Commission would have no need of a discovery rule. But the Commission has recognized that often discovery may be needed, either to fully protect the rights of parties or to better serve the public interest by ensuring that all relevant facts can be placed in the record. *See, e.g.,* WAC 480-07-400, *et*

seq. Here, the discovery rule has been invoked and no doubt will elicit more relevant evidence.

37 The Rehearing Petition in this case has numerous facts that should raise concerns about the veracity of much of the evidence, argument, and entire tenor of the Respondent’s application for a certificate. But that limited publicly available evidence is likely just the tip of the iceberg. For example Exhibits A and B to the Rehearing Petition were emails between SpeediShuttle and the Port of Seattle. They were obtained from the Port via a Public Records Act (“PRA”) request prior to the filing of the Rehearing Petition. But the Port is still responding to the PRA and more damning evidence is still coming out. For example, on or about July 19, 2016, the Port produced an email and memo from SpeediShuttle’s counsel dated May 25, 2015. A copy is attached hereto as Exhibit A.⁶ It states, in part, “Because WUTC regulations at WAC 480-30-036 do not preclude door-to-door service providers from offering walkup service, there was **never** an understanding that service would be in any way deterred....” (Emphasis added).

38 How can the representations to the Port in Exhibit A hereto be reconciled with the testimony of SpeediShuttle’s President and CEO just a few months earlier at the application hearing that, “We will not have [walk up] service. We would only have prearranged, so that’s why we would have greeters in the baggage claim greeting, at the baggage claim, prearranged guests....”⁷? How can Exhibit A be reconciled with SpeediShuttle’s counsel’s statement in closing arguments at the application hearing, that, “This company is also going to operate, again, in different territory, with different character, focused exclusively on reservation-only, door-to-door service, so I urge you to find that neither of the providers are providing or could

⁶ Exhibit A is provided for illustrative purposes only at this stage.

⁷ Transcript at 48, Dkt. TC-143691 (emphasis added).

provide the same service as that proposed by the applicant....”⁸ Either conditions changed radically in just a few months or the statements at the hearing were false at the time. Either constitutes grounds for rehearing.

39 If the Port of Seattle is in possession of emails that show SpeediShuttle always intended to serve walk up passengers and compete head-to-head with Shuttle Express, what emails must exist internally within SpeediShuttle on what their real business model was in entering the King County ground transportation market? Based on the tip of the iceberg, it is reasonable to assume that much more could be hiding beneath the surface.

40 Attached as Exhibit B are Shuttle Express’s first data requests to SpeediShuttle. Each is targeted to evidence that would tend to prove or disprove the assertions Respondent made in its application for operating authority. And each could also, in turn yield evidence that is either new or was not available to the Commission and the parties during the application case, but “may have impacted the Commission’s ultimate decision” had it been available, as noted in Order 06.

41 Discovery is an essential tool that can and should reveal what service was really contemplated at the time of the hearing and what has really happened in the market since then.

Unfortunately, Respondent objected to every single data request and provided no useful information in response—only objections and argument. A motion to compel will likely be necessary if the facts are ever to be learned.

III. Because Order 04 Was Not Appealed, an Aggrieved Party May Seek Rehearing as a Matter of Right After Just Six Months.

42 Order 06 several times refers to the Commission’s “discretion” to grant a petition for rehearing under RCW 81.04.200 before two years have elapsed. Since the Order ruled that the Shuttle Express Rehearing Petition should go forward, Shuttle Express did not have any reason to

⁸ Transcript at 142, Dkt. TC-143691 (emphasis added).

question the rationale of the apparently discretionary decision. But since SpeediShuttle now challenges whether that exercise of discretion was appropriate, Shuttle Express is compelled to challenge the Order in a small way that should not affect the ultimate outcome, pursuant to WAC 480-07-825(4)(c).

43 The Shuttle Express challenge is limited strictly to the issue of whether the rehearing it sought is truly discretionary, or rather as of right. On this point, RCW 81.04.200 is clear and states, simply: “In case any order of the commission shall not be reviewed, ... such petition for rehearing may be filed within six months....” Further, “[u]pon the filing of such petition, such proceedings shall be had thereon as are provided for hearings upon complaint....”

44 There is no dispute that there was no court review of the final order granting Respondent operating authority in the territory already served by Shuttle Express. Neither the applicant nor the protestants sought further review of the final order. Shuttle Express filed its Rehearing Petition more than a year, but less than two years, after the final order it seeks to be reheard. Based on the plain language of RCW 81.04.200, the rehearing should not be a matter of discretion, because the six month provision applies in this case, not the two year period.

45 There are no court interpretations of RCW 81.04.200, but there is a telling case arising from RCW 80.04.200, which is the almost identical provision in RCW Title 80, governing utilities. *US West Comm’s, Inc. v. Washington Utilities & Transp. Comm’n*, 134 Wash. 2d 74 (1997), as corrected (Mar. 3, 1998). Implicit in the court’s decision is the understanding that if US West had sought rehearing of the issue at hand after two years, rather than in just months (and with a court appeal pending, to boot), the Commission would have been required to consider the new evidence that was proffered by US West. *See id.*, 134 Wash. 2d at 104–05.

46 The Commission should uphold the outcome of Order 06 and, moreover, make it clear that Shuttle Express has a right to a rehearing after six months, because there was no review of the final order to be reheard.⁹

IV. Both the Complaint and Rehearing Petition Raise Important Public Interest Issues That Should be Heard.

47 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. The proceeding should not be abbreviated or artificially constrained in any way. Doing so will only serve the interests of the alleged wrongdoer, SpeediShuttle. It will not serve the public interest and may well harm the broader public interest.

48 Another other 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 Rehearing Petition paint a compelling picture of an applicant that used both sharp practice and possibly 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.

⁹ Shuttle Express does not concede that the Commission necessarily has discretion on the non-temporal requirements of RCW 81.04.200, as argued by SpeediShuttle. In *Dryden Commercial Club v. Dep’t of Pub. Works of Washington*, 142 Wash. 317, 319, 252 P. 911, 912 (1927), a case under the predecessor to RCW 81.04.200, the Court stated, “It is not necessary that there be changed conditions to justify the order.” Regardless, the Shuttle Express Rehearing Petition pleads all the required elements of the rehearing statute, as discussed above and in Order 06 itself.

49 The Commission itself expressed how “troubled” it was about the obvious discrepancy between SpeediShuttle’s testimony and its subsequent operations. Notice of Determination Not to Amend Order 04 (Dec. 14, 2015). But, lacking the broad scope of the investigative tools and powers provided by a petition for rehearing, the Commission took no action at that time. *Id.* The Rehearing Petition now provides the procedural vehicle that was lacking last December, for the Commission to fully develop the facts and take such action as it may find is necessary or in the public interest.

50 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. To facilitate that investigation the ALJ has wisely permitted 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.

51 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 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

52 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. Even viewed in a charitable light, the business model it has implemented is intended to circumvent the entire purpose of the grant for a “different” service than Shuttle Express. To avoid any scrutiny whatsoever, it immediately filed a motion to dismiss the Complaint, which was properly denied, and now seeks to prevent a rehearing. And, most

recently, it has completely thwarted all efforts at timely discovery of facts Shuttle Express and the Commission need to determine the most appropriate relief to be implemented by interposing improper objections and outright refusals to provide financial information.

53 Respondent's efforts to avoid the consequences of its "bait and switch" strategy to obtain its certificate as well as its current "hide the ball" efforts must be rejected. The Public Service Laws provide ample opportunities for review and relief under the facts alleged. The public interest requires review and an appropriate remedy. As was the motion to dismiss the Complaint, the Review Petition must also be denied.

Respectfully submitted this 1st day of September, 2016.

LUKAS, NACE, GUTIERREZ & SACHS, LLP



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EXHIBIT A

MEMORANDUM

TO: Paul Bintinger
FROM: Dave Wiley
DATE: May 26, 2015
RE: Your Email of May 23, 2015

Paul:

Thank you for your email from Friday evening. There are a couple of points that I wanted to offer in response for clarification. First of all, our client has been indicating it wanted to provide door-to-door service to your folks since their initial telephone conversations in the spring which contacts accelerated after the Commission granted final operating authority on March 30, 2015 to Speedishuttle. Because WUTC regulations at WAC 480-30-036 do not preclude door-to-door service providers from offering walkup service, there was never an understanding that service would be in any way deterred just as it is not with the other auto transportation companies operating at the airport. Thus, we don't know where the source of any inference of limitation on door-to-door service would have originated from.

As for "tailoring" ground transportation agreements for door-to-door service, I don't believe there are any impediments under a one-on-one negotiation to adapting to any landlord expectation nor would I think the operations of Speedishuttle's model would in any way impact the Port's evolving expansion plans for Sea-Tac Airport infrastructure for ground transportation.

I guess what we are now seeking is a more precise idea and timetable for when the tailored operating agreement for door-to-door airport service can be accomplished since, as indicated, definitiveness of term and ground arrangements are a requirement for amortizing requisite investments in order to maximize service to the traveling public by Speedishuttle at Sea-Tac.

As indicated, we have made contacts with Jolene Culler with whom Speedishuttle hopes to meet before Friday of this week when Cecil Morton returns to Hawaii for a graduation event. The goal is to identify and obtain permanent space in the ground transportation area and accelerate resolution of the most pressing issue, culminating in a formal operating agreement which provides Speedishuttle security and access parity with the other regulated providers as it continues to invest to maximize its service to the traveling public particularly with the arrival of peak summer season.

EXHIBIT B

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

FIRST DATA REQUESTS OF
SHUTTLE EXPRESS, INC. TO
SPEEDI SHUTTLE WASHINGTON,
LLC

TO: Respondent SpeediShuttle Washington, LLC

INTRODUCTION

Please respond to the following data requests in accordance with WAC 480-07-400, *et seq.*

Unless otherwise stated, the time period covered by the following requests is January 1, 2013 to the date of your response. If any response changes, including updated or additional responsive documents or information, please update the response to the date of the hearing.

“Market” means transportation and related services and facilities in or between the SeaTac airport and points in King County, Washington.

“Document” or “record” includes both paper and electronic records and files in their native format, including all metadata. For any file formats that are not readable with mass market software (such as Excel, Word, Outlook, Acrobat), please also provide or offer to provide in a file format commonly readable (such as Adobe Acrobat portable document format).

DATA REQUESTS

1. Provide a list of each current or past employee of SS who works in or serves the market, whether full time or part time. For each employee, provide the following information, if known: name, age, place or places worked, job title, employer, job description, nationality, and languages spoken, read or written.
2. Provide copies of all emails between or among SS personnel and/or third parties that address or relate to the availability or provision of services to passengers or potential in the market who do not speak or do not read and write English or who are tech-savvy.
3. Provide copies of all documents that reflect, show, or related to hiring or engagement of employees or contractors to serve the market, including advertisements, qualifications, hiring manuals, employment manuals, questionnaires, interview questions, evaluation forms, and decision records or notices.
4. Provide all records that show online inquiries or bookings in the market and what language was used by the passenger or prospective passenger to make the inquiry or booking.
5. Provide all records that reflect, show, or relate to airport greeters at SeaTac, including duty rosters, schedules, time records, passenger meet/greet lists, locations, languages spoken and numbers of passengers served—by language or nationality, if known.

6. Please provide statistical data for each reservation or trip to or from Sea Tac Airport including, but not limited to, Hudson date/time stamps for reservation time of day, ready to go time of day, on board time of day, location and drop off time of day served in the market to or from SeaTac Airport, how they reserved the transportation (*e.g.*, phone, computer, smartphone, in person, language used), the fare(s) paid, whether or not they spoke English, whether they used Wi-Fi or watched TV, the number of passengers carried in each vehicle on the same trip, the number of stops per trip, the time for each trip, and Hudson system fields for TripID and ShiftID.
7. Please provide all documents that show or relate to the time elapsed that passengers departing SeaTac Airport waited from their check in or presentment with SS until the departure of the vehicle from the loading area, including statistical data, emails, memoranda, “guarantees” or other representations to passengers, or complaints.
8. Provide documents that show the vehicles used to transport passengers in the market, including, for each vehicle, the make, model, year, and any amenities, such as TVs and Wi-Fi facilities. Provide records that show when such amenities were installed, operated (on/off/disabled, etc.) and used (*e.g.* Wi-Fi data usage records).
9. Provide documents that reflect, show, or relate to a decision or practice to carry “walk-up” or not “pre-arranged” passengers or the like (by whatever terminology or nomenclature), in the market.
10. Describe in detail every aspect of Speedishuttle’s service in the market that you would contend is in a material way different from the door-to-door share-ride van service offered by Shuttle Express.

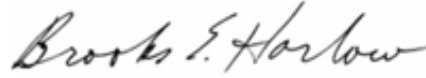
11. Describe in detail every aspect of Speedishuttle's service in the market that you would contend is in a material way the same as or similar to the door-to-door share-ride van service offered by Shuttle Express.
12. Provide all documents that reflect, show, or relate to an attempt by Speedishuttle to compete with Shuttle Express or to carry passengers that could instead take Shuttle Express, including advertising, communications with the Port of Seattle, or communications with trade associations or travel groups.
13. Provide all documents that reflect, show, or relate to efforts by Speedishuttle to attract non-English speaking passengers in the market, or in Hawaii, including websites, advertising, or outreach to trade associations or travel groups.
14. Provide documents that reflect, show, or relate to loans or capital investments to Respondent by shareholders, financial institutions, corporate affiliates, or third parties, including the amounts, dates, terms, and any related documents, such as applications, agreements, bank statements, demands, repayments, reports, extensions, renewals, guarantees, or security interests.
15. Provide financial statements of the Respondent, by month, on the following bases: consolidated with corporate affiliates, separate, or both, if available. Provide any audit documents, if available.
16. Provide all business plans, projections, cash flow analyses, profitability analyses, and other documents that reflect, show, or relate to the Respondent's profitability, lack of profitability, or plans or expectations to become profitable.
17. Describe efforts to attract or target tech-savvy or non-English speaking passengers in the market and provide any documents that reflect, show, or relate to such efforts.

18. Please describe all efforts to serve passengers in the market that were not being served or could not be served by Shuttle Express prior to your UTC application and provide documents that reflect, show, or relate to any such efforts.
19. Provide copies of all agreements with airlines, Go Group, and Hudson Group for or relating to ground transportation in the market.
20. Provide copies of all reports provided to or prepared for the UTC, the Port of Seattle, Go Group, and Hudson Group.
21. Provide analyses of air and/or ground transportation in, to, or from the market, including demand, needs, existing providers, and any drafts or plans to enter the market or obtain operating authority. The scope of this request is January 1, 2012 to the date of hearing in this matter.
22. Provide copies of all correspondence to or from the Go Group. The scope of this request is January 1, 2012 to the date of hearing in this matter. This request encompasses all forms of correspondence, including paper, emails, or text messages. It is intended to include aggregate reservation or transportation data, but is not intended to include all specific or individual reservations, bookings, or requests for ground transportation.
23. Provide copies of all correspondence to or from the Hudson Group. The scope of this request is January 1, 2012 to the date of hearing in this matter. This request encompasses all forms of correspondence, including paper, emails, or text messages. It is intended to

include aggregate reservation or transportation data, but is not intended to include all specific or individual reservations, bookings, or requests for ground transportation.

Submitted this 17th day of August, 2016.

LUKAS, NACE, GUTIERREZ & SACHS, LLP



Brooks E. Harlow, WSBA 11843

Counsel for Shuttle Express, Inc.

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Phone: 703-584-8680

Fax: 703-584-8696

bharlow@fcclaw.com

CERTIFICATE OF SERVICE

I hereby certify that on August 17th, 2016 and August 24th, 2016, I served a copy the foregoing document via email, with a copy via first class mail (August 24, 2016 only), 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	David W. Wiley Williams Kastner Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 206-233-2895 Email: dwiley@williamskastner.com
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Dated at McLean, Virginia this August 24th, 2016.



Brooks E. Harlow

CERTIFICATE OF SERVICE

I hereby certify that on September 1st, 2016, I served a copy the foregoing document via email, with a copy via first class mail, postage prepaid, to:

<p>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</p>	<p>David W. Wiley Williams Kastner Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 206-233-2895 Email: dwiley@williamskastner.com</p>
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Dated at McLean, Virginia this September 1st, 2016.



Elisheva Simon