

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC.,
Petitioner and Complainant,
v.
SPEEDISHUTTLE WASHINGTON,
LLC,
Respondent.

DOCKET NOS.
TC-143691 & TC-160516
SPEEDISHUTTLE'S REPLY TO SHUTTLE
EXPRESS' PARTIAL CHALLENGE OF
ORDER 06
Pursuant to WAC 480-07-825(5)(a)

I. INTRODUCTION

1 Speedishuttle Washington, LLC (“Speedishuttle”) here replies to the challenges Shuttle
Express asserts against Order 06, including the bases for Shuttle Express’ interpretation of
RCW 81.04.200 and ¶7 of the Initial Order which found Shuttle Express lacked a statutory
right to rehearing.

A. Speedishuttle May Reply As a Matter of Right.

2 Any party to an adjudicative proceeding may file an answer to a petition for administrative
review. WAC 480-07-825(4)(a). Further, a party who did not file the initial petition may
challenge the subject initial order in its answer. WAC 480-07-825(4)(c). In that instance,
any party has the right to reply to the new challenges raised by another party’s answer. WAC
480-07-825(5)(a).

3 Here, Shuttle Express filed its “Answer of Shuttle Express, Inc. in Opposition to Petition for
Review and Partial Challenge of Order 06.” Speedishuttle may therefore reply as a matter of
right to Shuttle Express’ partial challenge of the Initial Order by Shuttle Express on the
interpretation of RCW 81.04.200 and the Commission’s exercise of discretion as well the
characterization of Shuttle Express’ combined Petition for Rehearing and Complaint, filed

May 16, 2016 (“Shuttle Express’ Petition for Rehearing”), as an “initial pleading” to the extent it seeks rehearing.

II. REPLY

A. Shuttle Express Is Not Entitled To Automatic, Unfettered Re-litigation, Rehearing or Reopening.

- 4 Shuttle Express construes RCW 81.04.200 to claim the Commission must grant rehearing without any exercise of discretion. Since Final Order 04 of March 30, 2015 was not judicially appealed, it argues it may seek such rehearing within six months. Shuttle Express, tellingly, cites no Commission decision or court case interpreting RCW 81.04.200 in this manner. In contrast, Speedishuttle provides numerous authorities in which the Commission declined to allow rehearing because of the Petitioner’s failure to satisfy the requirements under the statute. Shuttle Express makes no attempt to distinguish this authority.¹
- 5 Critically, however, even accepting Shuttle Express’ argument as to the time for rehearing as true, the statute still states such petition “may be filed within six months... and the proceedings thereon *shall be as in this section provided.*” The plain words of the statute dictate Shuttle Express must meet the standards and criteria listed in RCW 81.04.200 in its petition for rehearing. Necessarily then, the Commission must evaluate whether those standards have been met. A review of decisions under Title 81 RCW reveals that is exactly what the Commission does.²

¹ See e.g., Order M.V.G. No. 1533, *In re Sure-Way Incineration, Inc.*, Application GA-868 (Feb. 1992), at 7-8; Order M.V. No. 128561, *In re App. P-66910 of Frank E. Nonnemacher d/b/a Nonnemacher Farms*, (1983) (citing Order M.V. No. 125248, *In re App. P-65613 of Washington Air Taxi Express, d/b/a WATE, INC.*, (1982); Order SBC No. 398; *In re App. B-277 of Island Ferry*, (1982).

² Order M.V. No. 141979, *WUTC v. K-Lines, Inc.*, Hearing No. H-4990 (Sept., 1990) (petition denied because petitioner did not demonstrate the Commission’s decision had an unintended result); Order M.V. No. 129068, *In re John F. Mitchell*, App. No. P-67157 (Jan., 1984)(Affidavits submitted after a hearing, alleging protestant’s misconduct and impeaching protestant’s testimony, generally do not affect disposition of an application. Such allegations of misconduct are relevant only when they impact the continuing ability of the protestant to serve the public.)

6 Shuttle Express did not present even a scintilla of evidence to support its shotgun accusations, and therefore cannot meet the standard. Instead it repeatedly argues in conclusory, cursory argument-of-counsel fashion that it has met these requirements. But on this point, the Commission’s reasoning in *Sure-Way*, is again instructive. The Commission there specifically looked at the issue of whether the petition for rehearing was sufficient assuming it were timely filed. It found that “...the grounds stated in the petition do not meet standards for rehearing set out in the statute, *even after the required period has elapsed.*”³ (emphasis added). It reasoned:

There is no allegation that the effect of the order was not as contemplated by the Commission. There is no demonstration of good and sufficient cause which for any reason was not considered and determined by the Commission in the former hearing.⁴

B. The Low-Bar, Notice Pleading Standard to Automatically Invoke Rehearing Should be Rejected

7 The Commission should conclude the same here. And despite Shuttle Express’ new bootstrapping rationale, in *Sure-way*, the Commission clarified that under the statute “such” petition” meant a “qualifying petition” not simply any pleading.⁵ It also pointed out that the statute provides the Commission the basis “to allow [the Commission] to make a preliminary decision on whether the petition qualifies as one which it may grant.”⁶ Critically, and completely unaddressed by Shuttle Express, “a petition for rehearing is an application for adjudication under RCW 34.05.413, *and the Commission may deny the application under RCW 34.05.416.*”⁷

³ Order M.V.G. No. 1533, *Sure-Way Incineration, Inc.*, ¶10, 11, p. 8.

⁴ *Id.*

⁵ *Id.*, ¶7, p.7.

⁶ *Id.*, ¶8, p.7.

⁷ *Id.*

8 The Commission retains discretion to deny a request for adjudication, as provided by RCW 34.05.416:

If an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant.

9 That right has been recognized and affirmed by Washington Courts.⁸ It appears Shuttle Express believes that bare allegations of counsel amounting to conclusory regurgitations of the statutory standards are sufficient to obtain rehearing of an order every two years if the order is appealed and *every six months* if the order is not appealed to court. Speedishuttle is unaware of any decision so holding.

10 The *US West* case relied on by Shuttle Express in its Answer was a telephone general rate case, not a transportation application case, and contrary to Shuttle Express' extrapolation, the case does not hold anything "implicitly."⁹ The Court there confronted the reality before it, which then had included a petition for rehearing prior to the expiration of two years and the Commission's exercise of its discretion. It found the conclusions of the Commission justified, and provided sufficient reason to deny the application, then affirmed the denial of the petition for rehearing by the Commission. In fact, Speedishuttle cited a recent Commission decision that adopted the reasoning in *US West* in analyzing the nearly identical RCW 80.04.200 in its prior Petition for Administrative Review of Initial Order 06. The

⁸ *Lawrence v. Dep't of Health*, 133 Wash. App. 665, 678, 138 P.3d 124, 131 (2006) (citing RCW 34.05.416, "On the contrary, the [Medical Quality Assurance] Commission had legislatively delegated discretion to decide not to hold a public hearing.")

⁹ *US West. Commc'ns, Inc. v. Washington Utilities & Transp. Comm'n*, 134 Wash. 2d 74, 949 P.2d 1337 (1997), as corrected (Mar. 3, 1998)

Commission there denied rehearing and stated “[t]his statute establishes a two-year period during which an issue decided by the Commission need not be reheard.”¹⁰

11 Shuttle Express tries to deflect the requirements set forth in case law by citing to a 1927 case which it claims held that a finding of “changed conditions” was not necessary.¹¹ However, even an overview reading of the cited case reveals it did not hold that the Commission’s discretion was proscribed or that it must order the petition to move forward to rehearing without evaluation. Rather, it demonstrates that the predecessor statute to RCW 81.04.200 was substantially similar to the current statute and lists multiple bases under which, if met, rehearing is authorized.¹² The court there went on to state:

The order does not set out whether it was made because of changed conditions...*It may well be that the commission thought the effect of its former order was such as was not contemplated at the time of the original hearing...*¹³

12 Plainly, the correct conclusion is not that the Commission is ever bound to rehear a petition, but rather the petition for rehearing qualifies under the statutory bases in which the commission “may review” such an order, in its discretion. Again, the Commission should not elect to do so here.

13 Indeed, the Staff on this issue appears to now share Speedishuttle’s concerns regarding Shuttle Express’ tactics and intent on this focal rehearing issue:

...Staff fears that Shuttle Express will exploit the ambiguity in Initial Order 06 to justify complete relitigation of the BAP, as though the original proceedings never occurred. Staff is particularly concerned that Shuttle Express will relitigate its dispute regarding Speedishuttle’s “walk-up” kiosk at SeaTac Airport, even though the Commission already decided that its rules “do not prohibit Speedishuttle from offering ‘walk-up’ service,” and that, in any event, “once a certificate has been

¹⁰ *WUTC v. Pacific Power and Light Company*, 2015 Wash. UTC LEXIS 734, *69-70, 320 P.U.R.4th 178 (Wash. U.T.C. 2015).

¹¹ See Answer of Shuttle Express, fn. 9, p. 18 (citing *Dryden Commercial Club v. Dep't of Pub. Works of Washington*, 142 Wash. 317, 320, 252 P. 911, 912 (1927)).

¹² *Id.*, at 319.

¹³ *Dryden Commercial Club v. Dep't of Pub. Works of Washington*, 142 Wash. 317, 320, 252 P. 911, 912 (1927).

issued, the rules do not permit [the Commission] to attach conditions to it retroactively.”¹⁴ It is unclear why Shuttle Express thinks this issue is still alive.¹⁵

14 The Commission should now step in, evaluate Initial Order 06 and prevent the full-blown relitigation of the very same issues decided by this Commission previously. The weight of authority above demonstrates it has the discretion to do so which concomitantly involves its inherent right to control the scope of any rehearing under its procedural rules.

C. Shuttle Express Presented No Admissible Evidence to Support Its Bald Accusations; It Should Not Have the Opportunity for Rehearing

15 Nowhere does Shuttle Express address the authority cited by Speedishuttle regarding the appropriate standard by which to analyze Shuttle Express’ petition for rehearing. Shuttle Express makes no apologies for its failure to supply evidentiary facts to support its petition, instead arguing the Commission should simply apply a notice pleading standard to that petition. Again, Shuttle Express cites no Commission decision or statute in support of that broad claim.¹⁶ While such basic notice pleading might suffice in some fashion for a complaint, it cannot for a petition which seeks to reopen previous closed proceedings and rehear new evidence by making outlandish accusations and characterizations and simply claim its unfettered discovery right will subsequently support those bare assertions in “the public interest.”

16 This is precisely why the Commission looks to CR 59 for guidance, as it sets forth the standard for a “New Trial, Reconsideration and Amendment of Judgments.” It is therefore wholly inaccurate to characterize Speedishuttle’s Petition for Administrative Review as a

¹⁴ Notice of Determination not to Amend Order 04, p. 3 (Dec. 14, 2015).

¹⁵ Commission Staff’s Answer to Speedishuttle’s Petition for Administrative Review of Initial Order 06 (“Staff Answer”), ¶4.

¹⁶ Answer of Shuttle Express, ¶9, p. 4. Shuttle Express simply avers “[i]n addition to CR 12 the Commission should consider CR 8...” It cites no authority for this proposition.

dispositive motion.¹⁷ Instead, it is simply a request for reexamination of the sufficiency of Shuttle Express' Petition for Rehearing under RCW 81.04.200 in Initial Order 06 on which Shuttle Express carries the burden to demonstrate such extraordinary relief is warranted.

And just because Shuttle Express hopelessly entangled its Complaint and Petition allegations does not mean standards for review of both cannot be bifurcated, separated or distinguished.

17 While it is true, WAC 480-07-370 generally characterizes a petition for rehearing as a “pleading” and makes no specific mention of a specific standard applicable to such a document, as noted, the Commission has enunciated additional standards for interpreting the sufficiency of petitions for rehearing in previous decisions. The Commission looks to CR 59 by analogy, which requires competent evidence be presented. Shuttle Express provides none, only increasingly escalating intemperate allegations and the impugning of Speedishuttle's veracity and motives.

D. Shuttle Express' Rendition of the Rehearing Statute Essentially Guts the Viability of Judicial Review Petitions Under the State Administrative Procedure Act.

18 The self-announced automatic right to rehearing as now portrayed by Shuttle Express in its September 1 Answer effectively nullifies judicial appeals under RCW 34.05.570 of the Administrative Procedure Act. Under its astonishing premise, a disappointed application litigant merely waits six months after a Final Order and petition for rehearing, citing “new evidence,” result “otherwise not anticipated” or other such statutory incantations and triggers complete rehearing. And here, Shuttle Express receives not just a new brief adjudicative proceeding rehearing mandated by WAC 480-30 et seq., but a full-blown conventional adjudicative proceeding with predistributed testimony, unfettered discovery and attendant

¹⁷ Answer of Shuttle Express, ¶¶8-10, pp. 3-4, citing WAC 480-07-380(a) and CR 12. SPEEDISHUTTLE'S REPLY TO SHUTTLE EXPRESS' PARTIAL CHALLENGE OF ORDER 06 -7

protracted process. This approach, of course, also facilitates a permanent “cat and mouse” game in the interplay between RCW 34.05.570(3) and RCW 81.04.200, and renders hollow any final order granting certificate authority since an automatic “redo” of that proceeding potentially lies ahead for any successful applicant. In short, Shuttle Express advances yet another collateral attack, here, this time on a statute, and in so doing, renders superfluous the entire petition for judicial review mechanism.

III. CONCLUSION

19 Shuttle Express seeks to proscribe the Commission’s jurisdiction and discretion under RCW 81.04.200 in an unprecedented fashion without any authority by arguing that, on the basis of “shotgun” allegations, it apparently has an automatic right to rehearing once six months have passed if it did not file a Petition for Judicial Review. According to it, the Commission must then order a full-blown “do-over” of the original application case. Not only is this a deeply flawed argument constraining the Commission’s broad discretion over proceedings under Title 81 RCW, but it is paralyzing to the orderly decision-making of this administrative body.

20 In Shuttle Express’ now transparently self-serving view in its Answer to the Petition for Review in critiquing Order 06, any party who objects to an application result who does not file a judicial appeal of that decision, has, six months after that Order, essentially an automatic, unfettered right to a complete “redo” of that application. Clearly, under this analysis, no new entrant granted operating authority is ever safe or secure in making the necessary investments to launch regulated service, but instead, remains in an indefinite suspended animation period in which it is apparently forever subject to the spontaneous whims of an incumbent provider who disagrees with the outcome of an application proceeding. That new entrant is then completely vulnerable to an incumbent who can throw

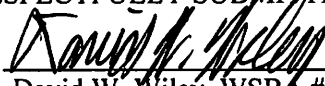
any bare assertions against the wall claiming “changed conditions,” “results not considered or anticipated,” or some other rote or specious contention and force a complete rehearing. This is indeed chilling. What new applicant would ever consider entering the Washington regulated marketplace facing that uncertain atmospheric condition?

21 The Commission should reject such a unilateral and prejudicial construction of the rehearing statute. The Commission is not and should not be constrained in exercising its jurisdiction by inflammatory accusations and pejorative labels sought to be affixed to a respondent/new entrant, as here invoking some automatic procedural remedy. The Commission has the discretion to accept, reject or limit the scope of a petition for rehearing consistent with the latitude given it by the appellate courts to interpret RCW 81.68.040.¹⁸ Shuttle Express’ rather audacious statutory argument yet again evokes the Commission’s admonition in 2014 to it about Shuttle Express fundamentally misconceiving that it knew better how to regulate itself than the Commission.¹⁹ Its latest construction of the rehearing statute is yet another manifestation of that inherent belief.

DATED this 12 day of September, 2016.

RESPECTFULLY SUBMITTED,

By


David W. Wiley, WSBA #08614

Daniel J. Velloth, WSBA #44379

dwiley@williamskastner.com

dvelloth@williamskastner.com

Attorneys for Speedishuttle Washington, LLC

¹⁸ *Pacific Northwest Transportation Service, Inc., v. Utilities and Transportation Commission*, 91 Wn. App. 589, 596-597, 959 P.2d 160 (1998).

¹⁹ Order 04, Docket TC-120323, *In re WUTC v. Shuttle Express, Inc.* (Mar. 2014), ¶31, p. 12.

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2016, I caused to be served the original and three (3) copies of the foregoing document 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
Attn: Greg Kopta

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 the WUTC's web portal; and

served a copy via email and/or 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	Greg Kopta Director/Administrative Law Division 1300 S. Evergreen Park Drive SW P.O. Box 47250 Olympia, WA 98504-7250 (360)-664-1355 gkopta@utc.wa.gov
Brooks Harlow Lukas, Nace, Gutierrez & Sachs, LLP 8300 Greensboro Dr. Suite 1200 McLean, VA 22102 (703) 584-8680 Email: bharlow@fcclaw.com	

Dated at Seattle, Washington this 12th day of September, 2016.


Maggi Gruber
Legal Assistant

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