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 BY LEAVE TO SHUTTLE EXPRESS, INC.'S ANSWER TO PETITION FOR ADMINISTRATIVE REVIEW OF ORDER 06

I. INTRODUCTION

1 Speedishuttle Washington, LLC ("Speedishuttle") here replies by leave to the allegations contained in the Answer of Shuttle Express, Inc. in Opposition to Petition for Review and Partial Challenge of Order 06 ("Shuttle Express Answer").

II. ARGUMENT IN REPLY

A. The Rehearing Petition as Laid Bare in Shuttle Express' Latest Answer Suggests Shuttle Express wants to Use the Rehearing Process to Further its Market Dominance Position.

2 It is time to strip away the pretense of the "formalities of the pleading" on the omnibus and procedurally convoluted, conjoined Petition for Rehearing and Complaint.[1] What Shuttle Express seeks by its latest Answer here is the administrative demise of a competitor, or alternatively, the radical diminution of its operating permit for its operations so that it will voluntarily withdraw from the marketplace. And, on what overarching articulated basis? A single point raised in a brief adjudicative proceeding on January 12, 2015 that was directed to the Port of Seattle concession agreement which the applicant erroneously believed would preclude it from offering walkup/on-call service at the airport under its applied-for certificate. This was testimony, albeit erroneous, directed to the second prong of what the

[1] A pleading which the Staff aptly characterized: "Staff wishes to express that it disapproves of Shuttle Express's decision to combine and *enmesh* these pleadings. In preparing this Response, Staff was confused as to which allegations and requests for relief applied to the former and which applied to the latter." Staff's Response to Shuttle Express's Petition for Rehearing, fn. 4, p. 2.

Commission itself has acknowledged by Final Order is the process by which a Commission-authorized auto transportation provider gains access to SeaTac Airport.

B. Shuttle Express Intentionally Conflates Certificate Authority from the Commission with Concession Authority from the Port of Seattle.

3 There is in fact no extrinsic evidence that, by this testimony, the applicant was seeking to restrict or otherwise limit the certificate authority it was then seeking from the Commission, in effect, the initial prerequisite to operate as an auto transportation company between SeaTac Airport and other named territory. In fact, the applicant well knew how to seek restrictions in applied-for operating authority from the Commission and affirmatively acted to do just that when it sought to remove any authorization in its pending application on December 3, 2014 to perform scheduled service and noted that letter request on the brief adjudicative hearing record. (Tr. 34).

4 Indeed, as the Commission has previously recognized:

> ...a grant of authority by the Commission does not direct the Port to take any action; whether it acts within its statutory discretion. Neither does a grant by the Commission preempt the Port, nor does it give an applicant the authority to enter the airport grounds without whatever permission is required of the Port any more than a Commission grant of authority would obviate the need for vehicle or drivers' licenses. Concession authority rests with the Port and obtaining it is a matter for a successful applicant to pursue independently with the Port. [2]

5 Shuttle Express has acted concertedly throughout these Post-Order proceedings to blur these separate certificate and concession/dual jurisdiction lines and starkly magnified that erroneous commingling by its latest Answer. After failing to reopen the hearing record on testimonial evidence it already had before the final Order, (i.e. not newly-discovered evidence) and ostensibly trying to block the facilitation of Speedishuttle's subsequent uphill attempt to gain access to the airport with the Port of Seattle, it (to date) has engineered an

[2] Docket No. TC-001566, *In re Application D-78932 of Valentinetti, Steve & Brian Hartley, d/b/a Seattle Super Shuttle* (Feb. 2002) ¶38, p. 7.

effective unprecedented reopening of the previously closed and unappealed hearing record of TC-143691.

6 On the basis of bench request responses in a closed record directed to on-call and by-reservation operations at SeaTac in summer 2015, Shuttle Express previously argued for restrictions on Speedishuttle's certificate by linking the lack of definitive certificate restrictions in Speedishuttle's new certificate with its opponent's mistaken assumption and reference in brief testimony on January 12, 2015 directed to expectations of the airport concession. Again, Speedishuttle had initially assumed, in good faith, it would not be able to offer on-call service due to exclusivity in Shuttle Express' concession agreement, (which assumption again was incorrect).[3]

7 Thus, despite the broadside attacks made by Shuttle Express in its increasingly intemperate Answer to the Petition for Administrative Review, there was never any restriction in Speedishuttle's authorization from the Commission in serving "walk up" customers nor again was any legal or administrative restriction ever requested of the Commission by Speedishuttle. Again, "the restriction" was the misperception by it that the Port of Seattle at the time of the hearing would not allow Speedishuttle to offer on-call or walk up service under a prospective concession agreement. That misperception, despite a subsequent understanding that the legal question was officially resolved by the Commission in

[3] The overlapping jurisdictional lines and "two-step approach" to gaining access as a regulated auto transportation provider to SeaTac Airport has admittedly been the source of confusion, not only to prospective applicants, but some lingering disagreements between the two governments over the years. In *Port of Seattle v WUTC*, 92 Wn. 2d 789,597 P.2d 383 (1979), the Washington Supreme Court affirmed the right of the WUTC to regulate "the rates, services and practices" in relation to airport bus service companies, rejecting the Port's theory that its right to enter into concession agreements at the Port under RCW 14.08 repealed the auto transportation statute. This decision appears not to have eliminated all jurisdictional conflict between the two entities with respect to ground access by certificated carriers at the airport nor the need for a separate analysis of legal/definitional restrictions in WUTC certificates versus contractual "impediments" or limitations on service imposed by concession agreements with the Port of Seattle which the Speedishuttle case has unquestionably now highlighted.

December, 2015, is unquestionably the focus and trigger of this entire "Post/Post Order, Petition for Rehearing and Complaint" process.

C. The Implications of Unlimited Rehearing and the Misjoinder of that Proceeding with the Complaint.

8 If the Commission now wants to mandate "process" in the form of expansive discovery, depositions, prefiled testimony, rebuttal and live hearing for cross examination with Post-hearing briefing and multiple tens (if not hundreds of thousands) in additional legal expense for the aggregate parties on the seminal allegation of a false assertion which has been increasingly escalated by Shuttle Express recently to an unprecedented level, that is clearly within the Commission's discretion under law. But, that is obviously not what its 2013 Rulemaking envisioned for this evolving industry, nor was that the expectation of a willing new applicant in 2014, seeking to offer its experience and service style that it had previously developed in the Hawaiian marketplace.

9 Speedishuttle's business reputation, veracity, lawfulness, goodwill and ultimate integrity are now unquestionably under active assault by Shuttle Express and its counsel in the latest pleading. No administrative and due process defense is worth the sacrifice of those qualities, values and resources by allowing a competitor (particularly without a protective order or its equivalent) to potentially obtain customer lists, financial data, market plans, employee lists and other proprietary information to harm it in the marketplace, even if it should ultimately prevail in the prospective protracted, expensive administrative litigation with its certificate intact. That would amount to a classic "phyrric victory," and the Commission must realize the risks posed by an unbridled discovery process, that, as currently mandated by Initial

Order 06, does not operate in a commercial vacuum.[4]

10 In light of Shuttle Express' Answer of September 1, surely the Commission will now consider the commercially destructive path of no return this currently unconstrained redo of the original application is currently on, in which a misstatement based on an erroneous perception of another agency's concession agreement, serves as a springboard and indelible coloration for Rehearing and Complaint, ultimately seeking the operational exit of Speedishuttle.

11 If the rehearing and complaint statute, in the Commission's view, preordain that omnibus hearing process, then the 2013 Rulemaking and administrative finality and decision-making are unquestionably eroded.[5] Unrelenting and ostensibly unlimited-funded challenges by a self-styled "qualified exclusivist" prevail and future entrants beware.

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[4] Shuttle Express also now argues in its Answer that there were "two procedural flaws" in Speedishuttle's review approach. First, that it did not seek review of the Order Denying the Dismissal of the Complaint in June nor of the Prehearing Conference Order 02 and 07 in this matter. Speedishuttle did not appeal denial of its Motion to Dismiss the Complaint because the standard for filing of a complaint under RCW 81.04.110 is decidedly different than those in RCW 81.04.200. Much like the old euphemism about grand juries "indicting a ham sandwich," it understands that in complaints, because of the breadth of the complaint statute, one public service company can complain about another on almost any articulable basis. This does not vitiate whatsoever Speedishuttle's position about any pending discovery under the rehearing petition on which Shuttle Express now elaborates. Initial Order 06 was an order that by its express terms at page 5 notes: "[t]he action proposed in this Initial Order is not yet effective." That means the Petition for Rehearing and all allegations dependent upon the original application proceeding <u>including discovery related to the original application</u> are not effective until the Commission enters its Order in review of Initial Order 06. The Prehearing Conference Order, while simply acknowledging that discovery would be conducted pursuant to WAC 480-07-400 et seq., did not specifically address the issue of what types of discovery would be appropriate to which issue in the now-consolidated proceeding. Clearly, if the Commission subsequently denies or limits any rehearing that could automatically change the scope and propriety of the pending data requests. That is yet another reason why the awkward joinder of the Petition and Complaint is so problematic and why the Respondent raised the concern about the prematurity of much of the Petitioner's discovery requests that the Petitioner has now improperly injected into this record.

[5] A Rulemaking and its effect which up until now in this proceeding, Shuttle Express has been conspicuously silent in addressing.

D. Shuttle Express Now Unquestionably Uses its Interpretation of RCW 81.68.040 to Collaterally Attack the 2013 Auto Transportation Rule Changes.

12 Probably even more revealing in Shuttle Express' latest pleading is the new arguments it raises under RCW 81.68.040 and the rather subtle collateral attack it makes anew on the 2013 Rulemaking and the application of WAC 480-30-140 under the statute. Recall from the very start of this proceeding and the first procedural skirmish in December, 2014, when Shuttle Express filed its "Objection to and Motion to Strike Brief Adjudicative Proceeding," Speedishuttle has characterized Shuttle Express' persistent litigation position as constituting a collateral attack on that rulemaking.

13 In confirming that premise, Shuttle Express now here argues that both Speedishuttle and ostensibly the Commission failed to fully comprehend RCW 81.68.040 and that the restriction against entry in that statute means that WAC 480-30-140 mandates "Respondent should be operating a truly different service not the same service as Shuttle Express, as is alleged in the Rehearing Petition."[6]

14 In so arguing, of course, Shuttle Express not only posits the converse, e.g. that Speedishuttle is a "wolf in sheep's clothing" or rather, Shuttle Express in disguise, but omits any reference to the definition of "same service" under the Commission's rule, which interprets that statute:

> WAC 480-30-140 (2) Same service. When determining whether one or more existing certificate holders provide the same service in the territory at issue, the commission may, among other things, consider:
>
> (a) The certificate authority granted to the existing companies and whether or not they are providing service to the full extent of that authority;
>
> (b) The type, means, and methods of service provided;
>
> (c) Whether the type of service provided reasonably serves the market;
>
> (d) Whether the population density warrants additional facilities or transportation;
>
> (e) The topography, character, and condition of the territory in which the objecting company provides service and in which the proposed service would operate;

[6] Answer of Shuttle Express to Petition for Review, ¶15, p. 6.

> (f) For scheduled service, the proposed route's relation to the nearest route served by an existing certificate holder. The commission views routes narrowly for the purpose of determining whether service is the same. Alternative routes that may run parallel to an objecting company's route, but which have a convenience benefit to customers, may be considered a separate and different service; and
>
> (g) Door-to-door service and scheduled service in the same territory will not be considered the same service.

15 The Commission has previously interpreted the content and application of this rule in this case's Order 04 and, in related aspects, the earlier *Sani Marou* application case in October, 2014.[7] Shuttle Express implacably maintains its rejection of that interpretation here, a selective perception that has already been considered and repeatedly rejected in this record. Simply pleading in the alternative that there is "new evidence" and that the Commission's interpretation of the prior evidence was inconsistent with Shuttle Express' rendition of "same service," is hardly an indicia that this matter justifies rehearing under either RCW 81.68.040 or RCW 81.04.200 as the Petitioner now argues.

16 The 2013 Rulemaking as well as Order 04 addressed the permutations of the statutory reference to "same service" that the Petitioner challenges with in its latest rendition in this Answer.

> The Commission developed the standards and the proposed rules for reviewing applications with the intent to inform existing companies and applicants how the Commission would evaluate applications. The standards are based in part on the Commission's interpretation of the statutory requirements in RCW 81.68 and applications adjudicated over the past three decades, as well as an effort to increase opportunities to provide new or improved service to consumers within the limits allowed by the statute. The proposed rules are not intended to express a policy service between types of service...rather, the intent is to provide a clear framework for companies to make choices regarding how best to serve consumers and the Commission to evaluate those choices.

General Order 05, R-572, ¶35, p. 12 (2013). (Emphasis added).

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[7] Order 04, Docket No. TC-140399, *In re Sani Mahama Marou d/b/a SeaTac Airport 24* (Oct. 2014).

17 In that General Order, (the 2013 Rulemaking), the Commission also directly addressed critiques by incumbent carriers that the Commission's interpretation of the statutory phrase "same service" in the rule was too broad and advocated the Commission modify the term to read "essentially the same" or "similar." Shuttle Express' latest Answer to the Petition for Administrative Review echoes precisely those same service differentiation factors which were considered and rejected in the rulemaking and also in Shuttle Express' previous Petition for Administrative Review of Initial Order 02. The criteria the Commission uses to evaluate same service under the rule is not a finite test nor is it limited to specific factors identified in the rule which, to the contrary, clearly says ..."the commission may, among other things, consider..." which definitional distinction the Commission highlighted yet again in Final Order 04.[8]

18 The 2013 Rulemaking also rejected the kind of subtle restriction and shift in the comparative factors for "same service" advocated under RCW 81.68.040 in the latest Answer by Shuttle Express by saying:

> [a]s discussed above, the Commission interprets the statute to reflect clearly the State's interest that it should draw a bright line between service offerings. The proposed rule describes adequately the factors the Commission will consider in determining, on the facts, whether the service proposed is the same as the service currently provided. As it has in prior cases, the Commission can and must draw distinctions between what is the 'same' service in a particular market...***[9]

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[8] Final Order 04, ¶18, p. 6; ¶20, pp. 6-7. Interestingly, the Commission also found (and Shuttle Express never heretofore addresses) in Order 04 that Shuttle Express did not reasonably serve the entire market. As the Commission notes "[a]ll three elements must be present for the Commission to deny an application on a given route." Order 04, ¶17, p. 6. Lest the parties get too bogged down on the "same service" analysis, this seeming separate finding tied as it is to luxury vehicles and Shuttle Express' decade-long rescue service in violation of WAC 480-30-213, is and was apparently a wholly independent basis of Final Order 04's grant of authority to Speedishuttle.

[9] Footnote omitted, General Order R-572, ¶40, pp. 14-15.

E. The Service Differentiation Factors Forming the Basis of the Finding in Order 04 are the Law of the Case and Hardly Demonstrate Speedishuttle is a Clone of Shuttle Express as its Latest Theory Propagates.

19 Whether Shuttle Express likes it or not, the five criteria listed in ¶21 of Order 04 are the service differentiation factors the Commission found on this application record.[10] One of those alone, the provision of luxury vehicles i.e., the Mercedes Benz Sprinters, is not controverted by Shuttle Express, and could, alone, be a basis of a grant of authority here. Moreover, the provision of Wi-Fi and Speedi TV could also be indicia in and of themselves allowing Speedishuttle to be granted the certificate it was in 2015. Tellingly, nowhere in Shuttle Express' amorphous conjoined Petition and Complaint of May 17, 2016 and new Answer to the Petition for Administrative Review, is there any dispute of the provision of luxury vehicles. As to Wi-Fi and TV service, all Shuttle Express says is "it is not presently known if Respondent provides working TV and Wi-Fi in all its vans, [sic] which it had started to install by the time of the hearing in the application case." [11]

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[10] Speedishuttle had been operating in Hawaii since 1999 (see, Application of Speedishuttle to WUTC ("Application") p.4) and presented numerous exhibits in the BAP record from supporters who had used their services in Hawaii, like Go Network, Adventure Travel West, Inc., City-Discovery, Destination America, Expedia, Inc., among others. See, Attachment A to Application; and CW-2, Exhibits A-R. The provision of luxury vehicles, Wi-Fi, multilingual websites and Speedi TV were all aspects of Speedishuttle's services focused on in testimony at the hearing. When an applicant has never performed regulated services in Washington before and has no basis of operations to draw from here, there is no actual operations basis in the proposed service area to present. Does this then necessarily mean that those elements of differentiation are false? Shuttle Express' evolving theory on Petition now apparently is, that Speedishuttle's whole application was a ruse that it always intended to be a "mirror image" of Shuttle Express, apparently owing to the fact that it competes now with Shuttle Express. This argument once again belies Shuttle Express' true motives of eliminating competition here. It is seemingly arrogant to the extent that it believes Shuttle Express entire service model and record would seek to be mimicked and replicated. It also minimizes and overlooks the service qualities that Speedishuttle intended to offer in entering and broadening the market. By its own admissions at the hearing and in these recent pleadings, Shuttle Express does not offer luxury vehicles (except possibly in its unlawful "rescue service"). It did not have any free Wi-Fi to speak of in its vehicles until after the application was granted. See Section 23(c) of Petition/Complaint page 10 (in classic post-application improvement indicia to attack the need for a service), offers no multilingual websites and no TV. All of these factors according to Order 04 were service differentiation factors and demonstrate that Shuttle Express did not reasonably serve the market. There is nothing misleading about these representations, all of which are provable should the Commission so require.

[11] Petition and Complaint of Shuttle Express, ¶23 at page 10.

20 All of the above is to underscore the fact that the Commission, in Order 04 in interpreting "same service" and in applying its discretionary definitional factors recently set forth in WAC 480-30-140, did not err in applying that rule fully consistently with RCW 81.68.040 as the Commission is broadly authorized to do.[12] Moreover, despite Shuttle Express' obfuscations of the differentiation factors in its latest Answer, these are again unequivocally set forth at ¶21, page 7 of Order 04: luxury vehicles, significantly increased accessibility for non-English speaking customers; individually tailored customer service, tourism information and Wi-Fi service, (any and all of which serve as a basis for the finding that Speedishuttle did not proffer the "same service" under rule). This finding contravenes Shuttle Express' entire position in the Petition for Rehearing and Shuttle Express knows it. In other words, Shuttle Express constantly couches its challenge on the basis of alleged misrepresentation of "on-call service," and on an alleged "targeted demographic." Neither of these accusations encapsulates nor otherwise captures the gravamen of the Commission's decision in Order 04 on "same service," and should therefore be rejected on their face.

III. CONCLUSION/PRAYER FOR RELIEF

21 For all of the above reasons in Reply to Shuttle Express' Answer to Petition for Administrative Review, Speedishuttle again asks that, its accompanying Motion, Petition for Leave, Reply to Shuttle Express' Cross Answer and its Petition for Administrative Review of Initial Order 06 Granting Rehearing, be granted.

[12] *Pacific NW Transportation v. Utilities & Transportation Commission,* 91 Wash. App. 589, 959 P.2d 160 (1998).

DATED this 12 day of September, 2016.

RESPECTFULLY SUBMITTED,

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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:

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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

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

Maggi Gruber
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