

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC.,

Petitioner and Complainant,

v.

SPEEDISHUTTLE WASHINGTON, LLC,

Respondent.

DOCKET TC-143691

SPEEDISHUTTLE WASHINGTON, LLC'S
PETITION FOR RECONSIDERATION OF
ORDER 08

I. PRELIMINARY STATEMENT

1 Speedishuttle Washington, LLC ("Speedishuttle" or "Petitioner"), 1237 S. Director St., Seattle,
WA 98108, files the below Petition for Reconsideration of Order 08 served September 27, 2016.
This proceeding involves the consolidated Petition for Rehearing of Application TC-143691 and
the Complaint TC-160516 of Shuttle Express, Inc. ("Shuttle Express" or "Complainant"). This
Petition asks the Commission to reconsider Order 08 and particularly sections 23 and 26 of that
Order.

II. APPLICABLE LAW

2 RCW 34.05.470, WAC 480-07-850, WAC 480-07-860, RCW 81.68.040, WAC 480-30, et seq.,
particularly WAC 480-30-140, and Washington appellate and Commission case law cited herein.

III. ARGUMENT AND ANALYSIS IN SUPPORT OF PETITION FOR
RECONSIDERATION

A. **Reconsideration Should be Granted Here.**

3 This voluminous record already contains various discussions of the applicability of CR 59 by
analogy to Commission proceedings and the standards under which reopening is allowed. Order
08's ruling on reopening however is not here contested. What Petitioner now seeks is

reconsideration of portions of Order 08 based on errors of law which Petitioner respectfully asserts should change the view of the Commission in revisiting the portions of Order 08 which effectively retroactively restrict Certificate C-65854.

4 While admittedly granted only sparingly, reconsideration is not only expressly authorized by Commission regulation and the Administrative Procedure Act, but Commission case law which sets forth the conditions under which reconsideration may be granted, as classically outlined in Order M.V. No. 140273 *In re Thomas C. Kolean and James B. Stewart d/b/a Olympic Transport*, Application P-72389, (Sept. 1989). Reconsideration is proper when there are errors of fact or law in the final order. Order M.V. No. 136858, *In re United Couriers Northwest, Inc.*, App. P-70574 (Oct 1987). More specifically in the auto transportation arena, the Commission has previously reconsidered orders or portions thereof as it did in Docket No. TC-910789, *Everett Airporter Services Enterprises, Inc. v San Juan Airlines, Inc. d/b/a Shuttle Express*, (Mar 1993). There, the Commission granted reconsideration in suspending a penalty imposed by prior Order upon Shuttle Express for violating (ironically), restrictions in its then permit, instructing it to apply for authority to remove the restrictions it had violated, within a limited time period and without any further violation of the restriction. Here, of course, Speedishuttle is respectfully asking the Commission to reconsider the converse circumstance. It is requesting it reexamine whether Order 08's interpretation limiting current operations in the issued certificate to the service differentiation factors it identified in granting Speedishuttle's auto transportation certificate in spring, 2015 is in fact correct.

B. The Portions of Order 08 for which Petitioner Seeks Reconsideration Contrasted Against Final Order 04 Holdings.

5 Pursuant to WAC 480-07-850(2), Petitioner asks that the following sections of Order 08 be found erroneous as a matter of law when considered against the countervailing portions of Final, unappealed Order 04, as set forth in comparison below:

Order 08, September 27, 2016

23 Nor are we as sanguine as Speedishuttle about the development of competition in the wake of Order 04. The Commission expressly did not address whether Shuttle Express was providing service to the Commission’s satisfaction.¹³ Speedishuttle, therefore, may provide only the auto transportation service that the Commission found was different than Shuttle Express’ service. While some competition at the margins of the respective customer groups may be inevitable, the Commission did not contemplate that Speedishuttle would offer to serve any and all customers seeking door-to-door service to or from the airport. Shuttle Express’ allegations that Speedishuttle is engaging in such conduct, therefore, represent “a result injuriously affecting [Shuttle Express] which was not considered or anticipated at the former hearing” and an effect of Order 04 that “has been such as was not contemplated by the commission” within the meaning of the statute.¹⁴

¹³Order 04, ¶17.

¹⁴RCW 81.04.200.

26 Shuttle Express correctly observes that the Commission’s ultimate responsibility is to ensure compliance with RCW 81.68.040 and other applicable laws. Consistent with the legislature’s directive, we did not and cannot authorize Speedishuttle to depart from its business model and offer the same service Shuttle Express provides. If the evidence demonstrates that Speedishuttle is doing so or is otherwise violating its regulatory obligations, we will take appropriate enforcement action.

Final Order 04, March 30, 2015 Holdings

25 We also decline to attach the conditions proposed by Shuttle Express to Speedishuttle’s permit.¹⁶ The Commission requires only that an applicant demonstrate that it has the ability to start up the business, not that it is able to operate over the long term.¹⁷ Staff must still ensure that Speedishuttle satisfies the other requirements for obtaining a permit, and we will rely on Staff’s review of the tariff Speedishuttle files – as well as the company’s track record for providing the same type of service in Hawaii – to ensure that the service in Washington is consistent with the authority the Commission grants.

¹⁶ As Speedishuttle correctly notes in its response to Shuttle Express’s Petition, restrictive language in a permit will not be imposed without a strong showing of the need for the restriction. Order M.V. No. 147067, *In re Barry Swanson Trucking, Inc.*, Application E-76555 (Oct. 1993).

C. If Order 08 Stands on the Now Implicit Certificate Restrictions, Speedishuttle Should be Given Time, at a Minimum, to Reassess Whether it Wishes to Remain in the Washington Regulated Marketplace.

6 The Commission should understand Order 08’s unmodified holdings are a material surprise, rightly or wrongly, to Speedishuttle. To it, they represent an interpretation of the 2013 auto transportation rulemaking’s goals of encouraging increased competition in the marketplace in a considerably more limited context and in an unexpected retrenchment of Order 04. If it is now the Commission’s position that new market entrants will be limited to the totality of differentiation factors upon which an applicant seeks to distinguish its service from current providers under its revised rules, it respectfully has never said that so clearly before, and Speedishuttle ought to be afforded a reasonable interval in which to evaluate whether it wishes to remain in this more circumscribed market or effectuate an orderly exit.

7 If the Commission refuses reconsideration then, Speedishuttle, if authorized, would ask the Commission, additionally, on its own initiative under WAC 480-07-860, to stay the Petition for Rehearing and Complaint consolidated in this proceeding to allow a necessary reevaluation in light of its present substantial investment in personnel, resources, equipment and other infrastructure including facilities leases, marketing efforts and ticketing arrangements. Indeed, the reference in ¶23 of Order 08 to “...competition at the margins of the respective customer groups [as] inevitable,” alone causes pause, as a rather subjective and imprecise standard to comprehend. That, coupled with the stark threat of enforcement actions in ¶26 of Order 08, clearly seem to implicate the necessity of further careful internal and external assessments of the

market and consultations with the Commission’s enforcement staff, at a minimum, as to what now is, and is not, “compliance with regulatory obligations.”¹

D. Order 08’s Finding on the Failure of Order 04 to Previously Address Service to the Satisfaction of the Commission and the Requisite Elements of an Applicant’s Showing

8 The Commission announces in Order 08 that WAC 480-30-116 provisions are conjunctive, or rather that, because it, in Order 04, intentionally omitted a separate finding that Shuttle Express did not serve to the satisfaction of the Commission, “Speedishuttle therefore, may provide only the auto transportation service that the Commission found was different than Shuttle Express’ service.”² But what Order 04 actually said, in analyzing WAC 480-30-116 (the new rule on auto transportation applications) is: “[a]ll three elements must be present for the Commission to deny an application to serve a given route. We agree that Speedishuttle does not propose to offer the same service Shuttle Express provides and thus need not address whether Shuttle Express is providing service to the Commission’s satisfaction.”³ In other words, once the applicant was found not to be proposing the same service, the Commission need not find the objecting carrier was offering service to “the satisfaction of the Commission under” under RCW 81.68.040.

9 The effect of Order 08 is inapposite. It appears now to conclude that because the Commission *only* made a finding in Final Order 04 that Speedishuttle’s proposed service was “not the same service” as Shuttle Express’, it is authorized by Order 08 to *only provide those services*, notwithstanding what its facially unrestricted certificate may say. This would appear to

¹ Order 08, ¶26, p. 8.

² Order 08, ¶23, p. 7.

³ Order 04, ¶17, p. 6.

constitute a retroactive condition or restriction of an extant certificate, which the Commission has already acknowledged in this docket its own rules “do not permit.”⁴

E. Speedishuttle Believed in Good Faith the Certificate Issued by the Commission Embodied the Full Scope of its Authority after it Expressly Rejected Shuttle Express’ Service Differentiation Limitation Request and therefore is “Surprised” by Order 08.

10 The authority the Commission granted is contained in Certificate C-65854, attached hereto as “Exhibit A.” “[O]nce they have been issued...a permit, once acquired and exercised, becomes a vested right, subject to being divested for cause. *Lee & Eastes, Inc. v. Public Service Comm.*, 52 Wn.2d 701, 704, 328 P.2d 700 (1958).

11 The present interpretative inconsistency in Order 08 cannot therefore be reconciled. While the Petitioner now understands, by Order 08, the mandated rehearing will adduce evidence on the current elements and offerings of the service differentiation factors comprising the business model the Commission addressed in its Final Order, Speedishuttle never understood, (however now mistakenly) on receiving certificate C-65854, that its prospective operations would be limited to those specified distinguishing factors. It is also not aware that a for-hire common carrier performing door-to-door auto transportation passenger service between Seattle International Airport and points within King County could lawfully fulfill its common carrier obligations by unilaterally limiting its service to service restrictions it understood to be

⁴ Notice of Determination Not to Amend Order 04, December 14, 2015, p. 4.

disfavored by policy and by actual previous decision in this record.⁵ Order 08 unfortunately contravenes that understanding.

12 Indeed, Shuttle Express previously sought, on Petition for Administrative Review of Order 02, and was expressly denied, service restrictions Order 08 now unequivocally imposes:

Should the Commission distinguish Speedishuttle's service as not the same service, Shuttle Express asks that Speedishuttle's certificate be conditioned upon Speedishuttle providing the features it now relies upon to distinguish its service.⁶

13 Speedishuttle directly responded to Shuttle Express' certificate restriction advocacy in its Petition for Administrative Review of Order 02 which pleading had argued for just the type of service differentiation factors in Speedishuttle's prospective certificate in February 2015, prior to entrance of Final Order 04 on March 30, 2015. Rather than re-characterize or synopsise the arguments, Speedishuttle simply here attaches the two relevant pages from its February 22, 2015 "Answer to Shuttle's Petition for Administrative Review" at pp. 17, 18 as "Exhibit B," incorporating those arguments opposing certificate restriction.

14 This also suggests again why ¶¶23 and 26 of Order 08 are so surprising and ostensibly, contradictory. Nor are the enforcement complication/concerns noted in Speedishuttle's Answer

⁵ Moreover, "[i]n the context of auto transportation services, 'public convenience and necessity' means that every member of the public should be reasonably afforded the opportunity to receive auto transportation service from a person or company certificated by the Commission." WAC 480-30-140(a). C-65854 is such a certificate setting forth the full scope of that authority. Order 08 appears to mandate, instead, that Speedishuttle vary its obligation to serve by discriminating amongst potential riders, limiting that service only to those who meet its differentiation model attributes. But how, for instance, is "tech-savviness, non-English speaking, tourist" to be measured objectively? What if a customer is, say, a foreign businessman at SeaTac Airport who speaks English and has an iPhone? Would he qualify? Should Speedishuttle now pre-screen its customers by providing, i.e., questionnaires, before acceptance of fares? These are not facetious or rhetorical examples but practical considerations in avoiding routine violations of certificate restrictions and worse yet, enforcement sanctions now threatened by Order 08. Speedishuttle will likely have difficulty enforcing such restrictions "around the competitive edges" while at the same time fulfilling its common carrier and regulatory obligations.

⁶ Shuttle Express Petition for Administrative Review, p. 13, February 10, 2015 (emphasis added).

in the cited Commission case law at all alleviated by ¶23's new reference to "competition at the margins of the respective customer groups." Shuttle Express has already well demonstrated the historical difficulties posed by auto transportation certificate restrictions and neither historic Commission policy on permit restrictions nor the goals codified in the 2013 rulemaking would seem to support those advocated restrictions, putting aside their prior outright rejection by Final Order 04.⁷

15 Order 04 succinctly held with respect to this request: "We decline to attach the conditions proposed by Shuttle Express to Speedishuttle's permit."⁸ Thus, rather than being "sanguine about the development of competition in the wake of Order 04,"⁹ Speedishuttle and its representative may have seriously misread the policy statement implementing the Commission's 2013 rule changes, specifically misperceiving the implication of the streamlining of the application process and the encouragement of competition in that rulemaking. And, while Order 08 reminds both parties that the Commission has a responsibility to ensure compliance with RCW 81.68.040 "and other laws," Speedishuttle understood, that by Washington Appellate case law¹⁰ and in pronouncements implementing the 2013 Rulemaking, the Commission was expressly finding a public policy benefit in encouraging broad competition in this industry in providing the prospect of new and expanded service to consumers within its interpretation of

⁷ The Commission has previously raised concerns with restrictions in auto transportation certificates, noting sound public policy weighs against restrictions that could be almost impossible to enforce and that would be "confusing and very possibly frustrating to the public." Order M.V.C. No. 1834, *In re San Juan Airlines, Inc. d/b/a Shuttle Express*, Hearing D-2566 (Aug. 1989). Speedishuttle submits the restrictions announced by Order 08 would be consistent with those concerns as just addressed in footnote 5, above.

⁸ Order 04, ¶25, p. 8, and fn. 16.

⁹ Order 08, ¶23, p. 7.

¹⁰ *Pacific NW Transportation Services v. Washington Utilities and Transportation Commission*, 91 Wash.App. 589 (1998).

statutory goals. While it is possibly now true that Speedishuttle may have adopted an overbroad reading of the Commission’s policy articulations in light of the 2013 Rulemaking, it harkens back to the following passage from General Order R-572 to which it has referred repeatedly in these post-Order proceedings:

...The Commission has worked extensively with stakeholders over the last several years to review regulation of the auto transportation industry, and has determined that auto transportation companies operate within a competitive market for passenger service in the state. Many alternatives to auto transportation company service exist, including taxis, limousines, public transit, rail, or intrastate airline service. Individuals may drive to SeaTac International Airport and park at the Port of Seattle or in one of the many private lots. They may also obtain rides from family or friends. The Commission must review current rules and processes to ensure that they recognize current competitive conditions. It must also ensure that its processes are streamlined and efficient. ¹¹

16 Petitioner believes in good faith that Order 08 may signal a contraction of that policy statement, and in that evolved interpretative context, Speedishuttle would not have sought to become a new entrant in the Washington regulated marketplace in 2014. ¹²

¹¹ General Order 572, ¶25, p. 9.

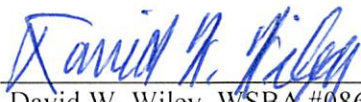
¹² Indeed, as recently as this past week, the Commission has acknowledged the significantly broader scope of present competition in the provision of airport transportation services at SeaTac Airport. There, it again effectively reaffirmed the above passage and quoted, in an Order, the importance of reviewing its rules and processes “to recognize current competitive conditions.” These latter conditions have greatly intensified since the 2013 rule changes with the advent of Uber, Lyft and transportation network companies (“TNC’s”), and particularly, permission by the Port this past spring to allow them to pick up shared ride customers at SeaTac Airport. Thus the Commission, in granting Shuttle Express exemptions from various auto transportation rules for a specified trial period, noted that it viewed its Order of Exemption as another “opportunity” to recognize those current competitive conditions. Order 01, Docket TC-160819, ¶11, *In re Shuttle Express, Inc.* (Sept. 30, 2016). Just as the unrestricted scope of CC-65854 is not presently reconcilable with the Portions of Order 08 sought to be reconsidered here, neither is the renewed recognition of the expansive competitive forces in the Commission’s September 30 Order consistent with what are effectively latent restrictions on Speedishuttle’s certificate property right announced by Order 08.

IV. SUMMARY/PRAYER FOR RELIEF

17 Speedishuttle asks the Commission to reconsider Order 08, particularly as to Sections 23 and 26 and to conform and confirm its ruling there with unappealed Final Order 04 and issued certificate C-65854 in its previous rejection of certificate restrictions advocated by Shuttle Express. In the alternative, should the Commission refuse reconsideration and thereby reaffirm Order 08, it asks that the Commission suspend/stay this proceeding on its own motion under these unusual circumstances and allow Speedishuttle sufficient time to reevaluate its multi-million dollar commitment to this marketplace over the last 20 months to determine whether it wishes to continue to provide regulated service now expressly limited only to the differentiation factors and business model based thereon or effect an orderly exit from the regulated Washington auto transportation marketplace.

DATED this 4 day of October, 2016.

RESPECTFULLY SUBMITTED,

By 
David W. Wiley, WSBA #08614
dwiley@williamskastner.com
Attorney for Speedishuttle Washington, LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2016, I caused to be served the original and three (3) copies of the foregoing documents to the following address via first class mail:

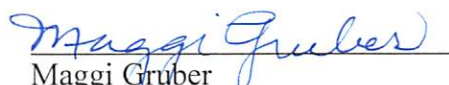
Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
Attn.: Records Center
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

I further certify that I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via the WUTC web portal;

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

Julian Beattie Assistant Attorney General 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 Judge 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	Rayne Pearson 1300 S. Evergreen Park Dr. SW, PO Box 47250, Olympia, WA 98504-7250 Olympia, WA 98504-7250 rpearson@utc.wa.gov

Dated at Seattle, Washington this 4th day of October, 2016.


Maggi Gruber
Legal Assistant

SPEEDISHUTTLE WASHINGTON, LLC'S PETITION FOR
RECONSIDERATION OF ORDER 08 - 11

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

EXHIBIT A

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION
1300 S EVERGREEN PARK DRIVE SW, PO BOX 47250
OLYMPIA, WA 98504-7250
(360) 664-1222

This certificate authorizes the following operations under the provisions of RCW Title 81:

Speedishuttle Washington, LLC
d/b/a Speedishuttle Seattle
1237 S. Director St.
Seattle, WA 98108

Cert No.
C-65854

DOOR TO DOOR PASSENGER SERVICE BETWEEN Seattle International Airport and points within King County.

Charter and Excursion Carrier Services in the state of Washington.

TC-143691

04-09-15

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION



By _____

EXHIBIT B

believes or is shown that the argument will add substantially to its understanding of the issues and the positions of the parties.***²⁶

The request for oral argument should be rejected.

B. The Certificate Restriction Closing Salvo is Inappropriate, Disfavored and a Transparent Last Ditch Effort to Limit Competition by the Objector.

32 Shuttle Express concludes its Petition with a final “Hail Mary” premise that asks that all the unspecified service differentiator factors/features be “codified” or apparently translated into certificate restrictions, citing to the Commission’s jurisdiction to impose “terms and conditions” on certificates under RCW 81.68.040 in justification. While the Objector never precisely says so, the more salient of these restrictions it apparently would see imposed are based on the start-up size of Applicant’s fleet, the service guarantees described in the proposed service Speedishuttle wants to transplant from its current operations to this marketplace, and apparently service in all 80 zip codes in King County it already intends to serve.

33 Shuttle Express clearly wants finite constraints imposed on this prospective new market entrant as a fallback to blocking the application entirely should all of the previous arguments and remedies it throws up prove unsuccessful. Yet once again, neither the application hearing record nor Shuttle Express’s legal arguments support such a proposition nor does Shuttle Express make even a colorable claim that they do.²⁷

34 Indeed, in the recent commercial ferry case, *In re Application of Sean McNamara d/b/a/ Bellingham Water Taxi, et al.* Dockets TS-121253 and TS-121395, cited approvingly by Shuttle Express at page 7 of its Petition, the Commission rejected similar permit restriction conditions finding them neither necessary nor appropriate. There, the Protestant sought restrictions on the

²⁶ Order M.V. No. 138750, *In re Randy and Denise Cooper and John and Kelly Port d/b/a/ Central Washington Mobile Homes Transport Services*, App. E-19540 (Dec. 1988) at p. 1.

²⁷ Additionally, restrictive amendments or permit restrictions which involve vague descriptions and/or timing requirements which are not readily susceptible to or capable of enforcement should be rejected. Order M.V. No. 141737, *In re Application of Bullet, Inc.*, Application E-19967 (Jul. 1990).

Applicant's routing, speed and passenger capacity by superimposing such restrictions on the proposed certificate. Analyzing the three proposed restrictions separately, the Commission rejected them all, observing:

[a]lthough we require ferry companies to file and adhere to a time schedule, the Commission will not attempt to manage the day-to-day business decisions of a regulated company....²⁸

35 Moreover, the Commission's historic inclination is to disfavor permit restrictions.

Restrictive language in a permit will not be imposed without a strong showing of the need for the restriction. Order M.V. No. 147067, *In re Barry Swanson Trucking, Inc.*, Application E-76555 (Oct. 1993).

36 The only showing Shuttle Express has made for permit restrictions here is as a default if its other arguments to deny the application fail, cobbling together two or three service differentiation factors mentioned in passing to sustain a permanent limitation on the service offering of the applicant. This is not any "strong showing." Finally, this suggestion would also once again contravene the express intent of the agency in the 2013 Auto Transportation Rulemaking to streamline, expedite and make more efficient current rules and processes and would indisputably restrict, not broaden competitive forces. Shuttle Express seeks regulation of the auto transportation industry as both a foil and a shield and the Commission should deflect this alternative concluding salvo to accomplish Shuttle Express's classic "have it both ways" approach to the revised operating environment for regulated auto transportation providers.

V. PRAYER FOR RELIEF

37 Having fully answered Objector Shuttle Express's Petition for Administrative Review, for all of the above reasons, Applicant Speedishuttle Washington, LLC asks that Order 02 be

²⁸ *In re Application of Sean McNamara d/b/a/ Bellingham Water Taxi, et al.* Dockets TS-121253 and TS-121395 (July 2013), ¶21, p. 7.