BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application No. D-78932 of	)	
	)	**DOCKET NO. TC-001566**
VALENTINETTI, STEVE & BRIAN HARTLEY, D/B/A SEATTLE SUPER SHUTTLE,	)	**COMMISSION DECISION AND ORDER REVERSING INITIAL ORDER; DENYING APPLICATION**
for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles in Furnishing Passenger and Express Service as an Auto Transportation Company	)	
. . . . .	)	

1 **Synopsis:** This order denies an application for authority to provide shuttle bus service between the Seattle-Tacoma International Airport and points within the city of Seattle, finding that the evidence of record is insufficient to support a grant of authority.

2 **Nature of Proceeding:** This is an application by Steven Valentinetti and Brian Hartley[1] for authority to serve as an auto transportation company in providing passenger and express service between the Seattle-Tacoma International Airport and points in the city of Seattle. Two existing carriers filed protests to the application. Evergreen Trails, Inc. operating as Gray Lines of Seattle, opposes a grant of authority for service between the airport and hotels that it now serves. Shuttle Express, Inc., d/b/a/ Super Shuttle opposes the entire application.

3 **Initial Order:** Administrative Law Judge Marjorie R. Schaer on September 14, 2001, entered an initial order proposing that the application be granted.

4 **Petitions for Administrative Review:** The protestants jointly petitioned for administrative review, contending that the evidence fails to support the initial order and that the order was in error. The applicant answered the petition, supporting the initial order.

5 **Commission:** The Commission determines that the evidence fails to support a grant of authority, reverses the initial order, and denies the application.

---

[1] After filing the application, the applicants incorporated the business. For simplicity and consistency, we will refer to the applicants as two individuals. The distinction is for convenience and has no bearing on the result.

6 **Appearances:** The applicant is represented by Steven Valentinetti, a principal of the applicant. Protestants Evergreen Trails and Shuttle Express are represented by Brooks Harlow and David Rice, attorneys, Seattle.

DISCUSSION

A. Background.

7 This is an application for authority to provide a shuttle-style bus service for passengers and express between Seattle-Tacoma International Airport and points in the city of Seattle. The applicants, Steven Valentinetti and Brian Hartley, operate a shuttle service partially in the territory sought, in interstate commerce, serving airline crew members under contract with airlines. The application as now amended seeks authority to provide passenger and express service between the airport and points within the city of Seattle.

8 The matter was heard at Burien, Washington on May 3, 2001. The applicants presented four witnesses. In addition to Mr. Valentinetti, the applicants presented Mathias Eichelberger, a travel agent; Ernest Rosengren, a driver for a transportation company owned by Mr. Valentinetti; and David M. Estes, owner of Vashon Shuttle and VIP Shuttle, which are airporter companies serving the Sea-Tac to Vashon Island route. Witnesses speaking to need for service in general described experiences and statements of others that occurred several years before the hearing.

9 The initial order found that the evidence was sufficient to support a grant of authority and that the applicants are fit, willing, and able to provide the requested service in a portion of the territory sought in the original application.

B. Procedural Issues.

10 The applicants challenge the timing and sufficiency of service of the petition for administrative review. Petitioners served the order on the applicants via commercial delivery service on October 4, 2001. Applicants received it on October 5, 2001. They contend that it is untimely served upon them.

11 First, they argue that under WAC 480-09-780(2)(a), the twentieth and last day for service of the petition for administrative review should have been October 3, 2001, because the initial order was signed and effective on September 13. However, because the initial order was served on the parties on September 14, that date becomes determinative for the timing of post-order process. RCW 34.05.473(1)(c).

The twentieth day following September 14 (September 15 would be day "one") is October 4.

12 Second, applicants argue that the law requires that the document be received within the stated time for service, rather than tendered for service. They argue that their receipt on October 5, 2001 was untimely and, in effect, that the pleading should be stricken. The petition was tendered to and accepted by a delivery service on October 4, 2001 which meets the service requirements of rule and law. WAC 480-09-780(2(a); RCW 34.05.473(1)(c).

C. Sufficiency of the Evidence.

13 The protestants challenge many aspects of the initial order, principally its conclusion that the evidence of record supports a grant of authority. They pose several grounds for their challenge.

14 **1. Competence of the witnesses to testify.** First, protestants contend that none of the witnesses is competent to testify, in that none is "independent" of the applicants. They note that witnesses considered in support of the application include an employee of the applicants; friends of the applicants; and appear to include one of the applicants, Mr. Valentinetti.

15 The Commission has repeatedly stated its aversion to conclusory testimony by an applicant that additional carriers are needed. *Order M.V.C. No. 2139, In re Apple Blossom Lines, Inc., App. No. GA-78198 (Jan., 1996); Order M.V.C. No. 1969, In re Fale, App. No. D-75758 (1992).* The Commission advises applicants, consistent with decisions in prior cases, that applicants must have independent witnesses to testify to the issue of need.

16 The initial order summarized Mr. Valentinetti's testimony in the findings of fact, but did not state in its analysis that it relied upon the testimony. To resolve this issue, we note that the testimony offers little that actually supports the need for another carrier, and we will not consider it.

17 The protestants seek to exclude evidence from an employee[2] of the applicants and from a friend of the applicants, as well. The employee's testimony is not supportive of the application for other reasons, as noted below; we need not rule on the exclusion other than to say that circumstances may arise when relevant testimony of an applicant or its employee as to factual occurrences that may bear on need may properly be considered.

[2] While the services were described of record as constituting an independent contract, the nature of the services appears to be employment. The distinction is not material to this decision.

18 We are unaware of any rule, however, that renders an individual incompetent to testify because of acquaintance or friendship with one of the litigants. Friendship is one factor that may be considered, among others, in determining credibility.

19 **2. Remoteness of asserted service failures**. Second, protestants contend that the supporting witnesses' testimony relates to events far too remote from the time of the application to be considered evidence of current need for an additional carrier. Mr. Rosengren and Mr. Estes both offered testimony about circumstances that occurred several years prior to the application. We have ruled that evidence of need must relate to a period within a year of the application to have at least prima facie relevance to the application. This testimony has not demonstrated relevance to current circumstances, and must be disregarded.

20 **3. Travel agent commission; hearsay.** Mr. Eichelberger, a representative of Northwest Airlines, testified about travel agents' preferences for commissionable ticketing and stated the opinion that passengers could be better served if agents had a commissionable option available to them.

21 We do not find this testimony to be evidence of need for an additional carrier. It gives no indication of service deficiencies or of passengers unable to find the reasonable service they need, when they reasonably need it. Moreover, it is not within the witness's sphere of responsibility. The Commission has accepted supporting testimony from travel agents, whose business is to serve clients with transportation needs. The agents' businesses require available service for their clients, and the agents can testify as to their own business experiences and to their clients' experiences. It is the sort of information on which a reasonable person would rely in the conduct of her business affairs.

22 Mr. Eichelberger is two steps removed. He is not speaking of his needs, nor of needs of his clients that he is responsible for filling. There is no indication that his business depends on the availability of commissionable airporter service. There is no indication that his information is of the sort that a reasonable person would rely on in the course of one's business. Applicants presented no travel agent to stand cross examination upon the degree of need for that mechanism or the consequences to the traveling public of its absence.

23 **4. Isolated instances.** Fourth, protestants contend that the evidence of need should be rejected insofar as it relates to two isolated instances: an ice storm that disrupted ground traffic, and peak travel days such as Thanksgiving and Christmas.

24 We believe that the ice storm constituted a *vis majeur*, and that it is not the sort of event that carriers must reasonably be expected to meet with full service. Passengers were delayed during the ice storm because nearly all road traffic was interrupted. Failures of service under those circumstances are not indications of need for an

additional carrier. There is no indication that the applicants, if authorized to provide service, could have performed any better or that failure to provide service during potentially treacherous conditions is unreasonable.

25 Ability to handle traffic on days whose peak loads far exceed normal levels – the Thanksgiving and Christmas holidays, for example, pose a closer question. The Commission has ruled that needs at peak times can support applications for transportation authority, although no prior order appears to have granted authority for failure of service at holiday peaks.

26 Mr. Rosengren testified about alleged service failures of Shuttle Express during the Thanksgiving holiday period of peak demand. He reported that Shuttle Express passengers reported having to wait longer than they anticipated for service.

27 The evidence of holiday need presented by the applicants' witnesses is outside the period relevant to this application, and does not offer protestants the opportunity to examine the circumstances faced by the travelers. It is not sufficient to support the application.

28 Mr. Rowley, Shuttle Express's operating witness, responded to the testimony. He stated that Shuttle Express has difficulty providing service on the peak service days. He described efforts to see that all passengers needing service were accommodated, including arranging service in his own business's limousines and arranging service through independent taxis, at Shuttle Express's posted rates to passengers. The question addressed in this initial order is posed not by the credible testimony of witnesses who experienced problems, but by the protestant's own witness, Mr. Rowley, who described difficulties in meeting the need. The initial order found, based on his testimony, that a need existed for additional service providers, and that the carrier failed to provide service to the Commission's satisfaction.

29 Mr. Rowley's testimony makes clear his view that no person requesting service from Shuttle Express goes unserved, and that he has provided needed service through contracts with an unregulated subsidiary and with taxicab companies. We cannot say, from the evidence we are entitle to consider, that travelers on the holidays found an unreasonable failure of service under the circumstances.

30 Mr. Eichelberger also testified that on one occasion he arranged transportation for a houseguest and that Shuttle Express changed the pickup point by a block at the last minute, requiring the witness to walk to the previously arranged point and direct the traveler to the correct location. This appears to be credible and competent evidence of the witness's experience. It is, however, an isolated instance of inconvenience and it will not alone support a grant of authority.

D. Request for Official Notice.

31 Petitioners ask that the Commission take official notice of an asserted drop in air travel following a terrorist attack in New York on September 11, 2001. They reason that if air travel has dropped, the demand for airporter service has also dropped within their service territories and any need for additional carriers has been reduced.

32 We reject this proposal. The events of September 11, 2001, have caused myriad effects and did disrupt air travel. That is a matter of public knowledge. However, the nature of the reduction in air travel, its timing, the extent of its effect on airporter traffic, and its consequence for this proceeding, are not matters that are susceptible of acceptance through official notice. RCW 34.05.452(5), WAC 480-09-750. To present new evidence, the Commission requires a motion to reopen, which protestants did not file.

E. Service to the Commission's Satisfaction.

33 Petitioners challenge the initial order's use of the same asserted service failures to support both a finding of need for an additional carrier and a finding that the existing carriers will not serve to the Commission's satisfaction.

34 We reject this argument. While in this proceeding we do not conclude that there is need for an additional carrier or that there is a failure to serve to the Commission's satisfaction, the same evidence may support both findings. While the questions are different, the same facts may answer them.

35 Making both findings on the basis of the same, similar, or related evidence is not inappropriate as a matter of principle. Whether doing so is appropriate in a given case is a question of mixed fact and law (or the application of RCW 80.68.040 to the facts of the case. See, *Franklin County v. Sellers, 97 Wn.2d 317;646 P.2d 113 (1982)).*

F. Lack of a Concession Agreement.

36 Petitioners challenge the initial order for failing to deny the application because the applicants did not demonstrate that they possessed a valid concession agreement with the Port of Seattle that would enable the applicants actually to perform service.

37 While this matter is rendered academic by the result of our analysis of the evidence, it remains a matter of some concern to the Commission. It is best dealt with by saying that it is the Commission's responsibility to apply Title 81 and pertinent rules, based

on the evidence before it, and it is the Port's responsibility to act within its statutory authority.

38 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.

G. Effect of evidence as to Evergreen Trails, Inc.

39 Petitioners ask that any grant of authority be limited against service to points served by Evergreen Trails, Inc. They argue that no instance of failure of service is related to Evergreen Trails, Inc. and that no evidence of need is related to points served by Evergreen Trails, Inc.

40 We think that the point is well-taken. While the Commission in the past has noted the differences between the service such as Evergreen Trails provides and that is provided by a shuttle carrier, and has excluded locations presently receiving service from grants of authority for on-call service, it does not follow that the mere existence of that distinction will support a grant of authority in the absence of evidence that would support a grant of authority. See, *Order M.V. No. 1909, In re San Juan Airlines, App. No. D-2589 (1991).*

H. Applicants' fitness and ability to provide service.

41 Protestants challenge the grant of authority, contending that the applicants have not demonstrated themselves fit, willing and able to perform the service in question. Protestants cite an asserted lack of a demonstration of adequate financing and asserted lack of experience in running a business of the sort sought.

42 The Commission does not consider an applicant's financial condition to be a critical element in a grant of authority, so long as there is credible evidence that the applicant has sufficient financing to begin operations and continue them for a reasonable period while its business is building. The fact of the applicants' operations in interstate traffic might constitute prima facie evidence of their financial ability. They are not required to begin business with a fleet of hundreds of vehicles.

43 Neither are they required to demonstrate extensive experience in running a large business of the sort they seek to enter. Such a demand would operate to stifle, rather

than expand, the adequacy of service to the public. The applicants do have experience in providing a limited shuttle service in interstate traffic, have demonstrated enthusiasm for the business, and could start small and work to grow their business as many other entrepreneurs have done upon receiving authority.

44 Protestants' challenges to the applicants' fitness and experience are not well-taken.

I. Conclusion.

45 The Commission reverses the initial order and denies the application. In reviewing prior decisions involving airporter service, it is clear that the Commission views the provision of adequate service to passengers as a paramount factor in determining need for an additional carrier. The Commission has granted airporter authority on the testimony of few witnesses. But in each case, the Commission has had sufficient credible evidence to support the decision.

46 Here, the principal evidence of asserted service failures by an existing carrier consisted of witnesses' accounts of other persons' experiences that occurred several years before the hearing, outside the time frame that the Commission will consider. Removing that testimony, the only indications of need were (1) disputed evidence of service quality on days of extreme need; (2) assertions that travel agents prefer commissionable tickets, which existing carriers do not offer but the applicants propose to offer; and (3) a single instance in which the existing carrier moved the pickup point by a block shortly before the time for pickup.

47 We conclude that the evidence of need for additional service on needle peak days is not clear; that agents' commission practices are not an appropriate determinant in granting or denying authority; and that a single instance of asserted service failure will not support a grant of authority.

48 The ultimate question in each airporter service application is whether the existing carriers meet the public's need for service and whether those carriers will provide service to the Commission's satisfaction. These applicants failed to meet the burden of proof on those issues.

FINDINGS OF FACT

49 (1) On October 11, 2000, Steve Valentinetti and Brian Hartley, d/b/a Seattle Super Shuttle ("SSS") filed with the Commission an application for a certificate of public convenience and necessity to operate motor vehicles in furnishing passenger service door-to-door, by reservation only, between Seattle-Tacoma International Airport and points in the city of Seattle. Shuttle Express, Inc., d/b/a

Super Shuttle ("Shuttle Express") and Evergreen Trails, Inc., d/b/a Gray Lines of Seattle ("Gray Line") (collectively "the Protestants") protested the application.

50 (2) SSS possesses appropriate equipment to perform the services for which it requests authority in this proceeding. Its maintenance program is currently sufficient. The company has sufficient financial resources to allow it to provide the proposed service. Based on the evidence presented, if the application is granted, SSS will comply with the laws and rules governing auto transportation companies under Chapter 81.68 of the Revised Code of Washington.

51 (3) The testimony of Mathias Eichelberger, Ernest Rosengren, and David Estes relates to circumstances outside a reasonable time frame for consideration in this proceeding, does not permit an opportunity for opposing parties to inquire of persons who allegedly experienced service failures, and describes experiences for which the witnesses have no business responsibility. The testimony of these witnesses fails to demonstrate that there is need for an additional carrier to provide the requested service.

52 (4) No evidence of record tends to demonstrate that Gray Line of Seattle fails to provides service to the satisfaction of the Commission. Gray Line conducts operations within the scope and nature of its authority. It provides service between listed points within the city of Seattle and the Seattle-Tacoma International Airport.

53 (5) No evidence demonstrates that Shuttle Express fails to provide service to the satisfaction of the Commission. Lack of a program of compensation for travel agents is not shown to be a failure of satisfactory service. While Shuttle Express does not have sufficient capacity to meet the demand for door-to-door service between SeaTac and the city of Seattle on the two busiest days of the year, it meets need by providing service in limousines and by contracting with taxicab companies.

CONCLUSIONS OF LAW

54 (1) The Washington Utilities and Transportation Commission has jurisdiction over the parties to and subject matter of this application.

55 (2) The applicants are fit, willing and able to provide the services requested under chapter 81.68 RCW and chapter 480-30 WAC.

56 (3) The evidence of record is insufficient to demonstrate that there is a need for an additional carrier to provide the service that the applicants propose.

57 (4) The existing certificate holders serving the requested territory provide service to the satisfaction of the Commission in the territory in which SSS proposes to operate and it therefore is not proper to grant overlapping authority to the applicants under RCW 81.68.040.

58 (5) It is not in the public interest and is not required by the public convenience and necessity that the applicants be granted a certificate to authorize service as an auto transportation company.

59 Based on the above findings of fact and conclusions of law, the Commission makes and enters the following order.

ORDER

60 IT IS ORDERED That Application No. D-078932 of Seattle Super Shuttle, LLC for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles in Furnishing Passenger and Express Service as an Auto Transportation Company is denied.

DATED at Olympia, Washington, and effective this _____ day of February, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).