

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC.,

Petitioner and Complainant,

v.

SPEEDI SHUTTLE WASHINGTON, LLC

Respondent.

DOCKET NOS.

TC-143691

TC-160516

PETITIONER'S ANSWER TO
RESPONDENT'S MOTION TO
COMPEL

INTRODUCTION

- 1 Shuttle Express, Inc. (“Shuttle Express” or “Petitioner”) hereby answers the SpeediShuttle¹ Motion to Compel filed in these dockets on Friday, December 9, 2016. At the outset, Petitioner notes that Respondent takes an extremely narrow view of the discoverable issues and facts to be considered at the hearing in dealing with Petitioner’s discovery of the Respondent.² *See, e.g.*, Letter from Dave Wiley (filed Dec. 13, 2016). But when pursuing its own discovery against Shuttle Express, the bounds are inexplicably and considerably broadened in Respondent’s advocacy.
- 2 Petitioner does not agree that the issues regarding its case against Respondent are nearly so narrow as Respondent’s characterizations. For this reason, Petitioner has responded to

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

² Respondent repeatedly attempts to re-define the issues in this case unilaterally in its advocacy. The Commission should be very wary of succumbing to Respondent’s oft-repeated assertions about what the Commission may find to be relevant. The opening testimony has not even been filed yet. An overbroad exclusion of issues before the facts are even known to the Commission would be fraught with danger, as it could exclude important and damning evidence of Respondent’s actions, inactions, and intentions. Of course, this is the Respondent’s goal, because it is fully aware of its prevarications, errors, and omissions and knows full well that Petitioner is quite capable of uncovering many of them.

discovery that, were the shoe on the other foot, Respondent would likely contend is irrelevant. Nevertheless, given the nature of the claims of the Petitioner, discovery on the actions and motivations of the Respondent are relevant, particularly as to the true intentions of Speedishuttle, regarding the nature and scope of services it planned to offer when it filed its application for a certificate. The Commission could find such intentions to be material to its determination of what remedy would be in the public interest.

3 In contrast, given the nature of Respondent’s cognizable defenses and the Commission’s orders narrowing the issues and discovery somewhat, the permissible scope of its discovery against Shuttle Express is inherently much narrower. As discussed in more detail below, each of the requests in the motion has been reasonably answered, considering their tenuous or non-existent relevance.

DISCUSSION

4 Shuttle Express addresses each data request that is covered by the motion as follows:

5 Data Request No. 4: This request is extremely broad and vague, as Petitioner pointed out to Respondent for some time. *See, e.g.,* Harlow Declaration re Summary of Issues, Exhibit C (Nov. 30, 2016). Worse still, nearly all of the documents and communications that might be responsive are either communications between Shuttle Express and its counsel—thus privileged—or communications and work undertaken to prepare for filings in these dockets—thus work product. Despite these issues, Respondent made no effort to clarify or narrow the scope. And Respondent’s motion to compel offers no justification for requiring the production of documents and information protected by the attorney client privilege or the work product doctrine.

- 6 In seeking to compel production of documents protected by the work product doctrine in Superior Court, a party cannot simply argue relevance. A showing of hardship must be made:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including a party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

CR 26(b)(4). The Commission will generally follow the discovery limitations of Superior Court as a guide and should do so here, particularly given the breadth and vagueness of Data Request No. 4.

- 7 Data Request No. 5: Shuttle Express made a reasonably diligent search for its financial statement from over 25 years ago pursuant to this request. No one can remember the answer to the question, without reviewing the financials. As reflected in the response, it could not find them. It did find a large number of boxes in storage with unknown contents. Going through all those boxes in case financial documents may be in them would be unduly burdensome, especially given the lack of any real probative value of such old documents.

- 8 Whether or not Shuttle Express lost money 25 years ago is immaterial to this case. There was no other carrier providing door-to-door share ride service at the time who could have been harmed. And Shuttle Express was trying to invent a new service model that did not

exist at the time, not trying to take business away from an existing carrier—by providing the exact same service as a new entrant and pricing it below cost—as is at issue here.

9 Data Request No. 6: Again, unlike Petitioner’s communications, Respondent’s communications with the Port of Seattle are relevant to the case, because they establish that: 1) Speedishuttle actively and immediately sought to compete directly with Shuttle Express for passengers arriving at the airport who had not made prior reservations by booking online in Chinese, Japanese, or Korean; and 2) then immediately began offering the exact same service to the exact same demographic as Shuttle Express had been serving.

10 Respondent explains the reason for its “fishing expedition” request for similar information about the Port from Petitioner, but then fails to show that that reason is somehow relevant to its defenses or its counterclaim. Indeed its unfounded suspicions of some wrongful action by Shuttle Express in working with the Port—on what are essentially real estate issues—is outside of the Commission’s jurisdiction. If Shuttle Express has somehow improperly attempted to influence Port action, then Respondent should take that up with the Port. The Commission does not interfere in such far flung activities involving other government entities any more than it interferes in carriers’ obligations and rights vis-à-vis taxing authorities.

11 Data Request No. 7: As with number 6, Respondent fails to offer any explanation of the relevance, other than the broad brush assertion that 25 year-old third party complaints “are very likely directly relevant to Speedishuttle’s defenses....” What defenses? Why are they relevant? The motion is silent. They are not relevant. Respondent lacks

standing to complain on behalf of third parties. It cannot bring an enforcement action for the Commission. The satisfactory nature of Shuttle Express's service was not timely questioned in the application case and was therefore effectively waived. *See* Order 09, ¶ 12. And, as the Commission has already ruled more than once, the issue of satisfactory service by Shuttle Express is not an issue in the case and was not part of the basis of its grant of authority to Respondent. *See* Order Nos. 4, 8, and 9.

12 Data Request Nos. 12 and 13: These requests suffer from the same infirmities as Data Request No. 7; *i.e.*, there are vague allegations of rule violations by Shuttle Express that could lead to Commission enforcement action (if true), but bear no cognizable relationship to the issues in this case as framed by the pleadings and by the Commission. At least here Respondent *attempts* to tie the alleged acts to the case, but it does so by claiming they are related to whether Shuttle Express is “providing service to the satisfaction of the Commission.” Motion to Compel, ¶ 20. But, again, the Orders in this case effectively exclude “satisfaction” of Petitioner’s services, repeatedly. *See* Order Nos. 4, 8, and 9.

13 The request for Shuttle Express’s cost data also asserts relevance to its defense of the claims that the fares of Speedishuttle are below cost and therefore predatory (among other things). But the gravamen of a predatory pricing claim is that Respondent’s fares are subsidized in order to divert passengers that would have and could have taken Shuttle Express, but for the entry and below cost pricing of Speedishuttle. A single element of Shuttle Express’s costs are irrelevant to whether this is occurring.³ Moreover,

³ Full current financial statements for Shuttle Express might conceivably be more relevant, but Speedishuttle asked for current financial statements in its Data Request No. 2 and then withdrew that request over a month ago. *See*,

Respondent oversimplifies that nature and breadth of Petitioner’s claim regarding Respondent’s financials. Petitioner’s analysis and testimony are expected to show that *Speedishuttle will never make a profit unless it takes half or more of passengers that Shuttle Express used to serve.*⁴ As the evidence will show, the market simply cannot support two competitors providing what is functionally and fundamentally the same transportation service.⁵

14 Not only are Request Nos. 12 and 13 improper fishing expeditions, they appear to be pursued to support an unrelated complaint recently filed by Speedishuttle against Shuttle Express. *See* Docket No. TC-161257. Even a cursory review of that complaint reveals a dearth of factual support—it is based on “information and belief.” It appears that Respondent is attempting to obtain facts in this case to support otherwise unsupported allegations in an unrelated case.⁶ And of course standing and other legal defenses will come into play in that other case as well, even if Respondent can provide factual support.

15 Data Request No. 14: First, Respondent’s discussion in support of compelling a full response to this request omits the detail and minutia that it requests. But it is important to see the entire request to appreciate just how onerous this request is. In full, it reads:

Please provide statistical data for each reservation or trip from January 1, 2013 to date

e.g., Harlow Declaration re Summary of Issues, Exhibit C (Nov. 30, 2016). Data Request No. 2 is also not included in the present motion.

⁴ This fact is something that the Commission clearly did not intend when it granted Respondent’s application. It intended complementary services that would grow the **market**. *See* Order Nos. 2 and 4.

⁵ This points up the final irony of Respondent’s motion, which is that if Speedishuttle weren’t competing for exactly the same passengers as Shuttle Express, then the pricing of Shuttle Express’s service would not matter.

⁶ Just one business day before this answer was due, Respondent filed a motion to consolidate its new complaint with this docket. Perhaps this is a tacit admission that the new complaint lacks real factual support. Given that the answer to the complaint is not due for almost two weeks and the answer to the motion to consolidate is not due until the end of this week, the possibility of consolidation should not influence the motion to compel. Discovery that was irrelevant when served, when answered, and when moved on cannot be made retroactively relevant for purposes of this motion.

between Sea Tac Airport and:

- Bellevue/Eastgate: Hyatt Regency, Coast Hotel, Sheraton, Silver Cloud, Courtyard – Marriott, Residence Inn, Hotel Bellevue, Day’s Inn, Larkspur Landing, Embassy Suites, Courtyard Marriott, Hampton Inn;
- Issaquah Area: Motel 6, Holiday Inn, Hilton Garden Inn; University District: McMahan Hall, Terry Hall, Lander Hall, University Inn, Hotel Deca, Silver Cloud, Watertown, Travelodge;
- Kirkland Area: Baymont Inn, Carlton Inn, Motel 6, Comfort Inn, Woodmark, LaQuinta;
- Overlake/Redmond Area: Redmond Inn, Silver Cloud, Courtyard – Marriott, Residence Inn, Fairfield Inn;
- Renton Area: Econolodge, Quality Inn & Suites;
- Seattle Area: Renaissance, Crowne Plaza, Fairmont Olympic, Sheraton, Grand Hyatt, Westin, Warwick, Hyatt at Olive 8, Quality Inn & Suites, Courtyard – Marriott, Springhill Suites, Four Points, Best Western Executive Inn, Silver Cloud, Edgewater, Marriott Waterfront, Motif, Hotel 5, Paramount, Maxwell Hotel, Pier 91, Pier 66, Holiday Inn, Holiday Inn & Suites, W Hotel; Northgate Area: Hotel Nexus;

including, but not limited to, Hudson date/time stamps for:

- reservation time of day,
- ready to go time of day,
- on board time of day,
- location and drop off time of day,
- service type, number of passengers,
- how they reserved the transportation (*e.g.*, phone, computer, smartphone, in person),
- the fare(s) paid,
- the number of passengers carried in each vehicle on the same trip,
- the number and location of stops per trip,
- the time for each trip, and
- Hudson system fields for TripID and ShiftID.

In other words, it seeks data on tens of thousands of trips, hundreds of thousands of passengers, and millions of data points on those trips and passengers. It justifies this giant fishing expedition based on an unsupported assertion that Shuttle Express “does not actually provide ... door-to-door service to the locations identified....” Motion to Compel, ¶ 23. But Respondent ignores that fact that it directly raised the question and

Shuttle Express directly answered it, with a clear denial. Exh. A hereto (Data Request No. 10 and answer).

16 Shuttle Express did offer to try to provide more summary, high-level data or the locations of the parties' trips, if either the Commission changed its ruling on the discoverability of such data or the Respondent would voluntarily disclose such data. Petitioner had requested similar, but much less detailed, data in its Request No. 6, but Respondent objected that it was unduly burdensome and overbroad. Shuttle Express Motion to Compel, Exh. A, Data Request No. 6 and answer (Sept. 13, 2016). The Commission upheld that objection. Oral Ruling, Tr. At 188 (Sept. 27, 2016). But since that ruling, financial and other data provided by Respondent to the Petitioner indicates that Speedishuttle may not be equitably serving all of King County as it offered to do.

17 The recently obtained financial data suggest that Respondent is focused almost exclusively on serving Seattle hotels and cruise terminals. In other words, Respondent appears to be cream-skimming in the extreme. And of course Shuttle Express has for many years served all the hotels and cruise terminals with both door-to-door and scheduled service. Thus the cream-skimming has cut deeply into the highest-volume, lowest-cost service areas of Shuttle Express, dramatically cutting its gross profit per passenger and its overall profitability. Meanwhile, Speedishuttle appears to largely avoid thin and costly routes and areas, like North Bend, Duval, Pine Lake Plateau, etc.

18 The breadth of Request No. 14 is staggering. But Petitioner would welcome revisiting both 14 and its own request No. 6. Properly framed, some data that shows where the two parties are actually serving could be relevant.

CONCLUSION

19 Based on the foregoing, Shuttle Express urges the Commission to deny the Motion to Compel, except for a mutual exchange of data regarding areas served, the scope of which should be discussed collaboratively at the hearing on the motion.

Respectfully submitted this 19th day of December, 2016.

LUKAS, NACE, GUTIERREZ & SACHS,
LLP



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EXHIBIT A

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
DOCKET NOS. TC-143691 AND TC-160516
FIRST DATA REQUESTS OF RESPONDENT SPEEDISHUTTLE
ANSWERS AND OBJECTIONS OF PETITIONER SHUTTLE EXPRESS, INC.

Date Request No. 10. Provide any and all documents or data that reflect the background timing, notice to customers and/or the Commission that reflect Shuttle Express' decision to cease door-to-door shared ride, reservation service between SeaTac Airport and any downtown Seattle or Bellevue hotels and the Seattle piers.

RESPONSE: Shuttle Express objects that this request is not reasonably calculated to lead to the discovery of admissible evidence because the facts sought are not material in any way to the Petition for Rehearing, the Complaint, defenses, nor the Counterclaim. Without waiving the foregoing objection, Shuttle Express states that no such documents exist. Shuttle Express currently continues to provide door-to-door shared ride service between all Seattle and Bellevue hotels and SeaTac airport as well as between hotels in King County and Seattle piers. Shuttle Express has made no such "decision to cease" providing such services as implied by the request.

Responding Person: Wesley Marks

Date of Response: September 20, 2016

Witness: Wesley Marks

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, I served a copy the foregoing document via email, with a copy via 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	David W. Wiley Williams Kastner Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 206-233-2895 Email: dwiley@williamskastner.com
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Dated at McLean, Virginia this 19th day of December, 2016.



Elisheva Simon
Legal Assistant