

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

ANSWER OF SHUTTLE
EXPRESS, INC. TO MOTION
TO STRIKE ANSWER RE
PETITION FOR REVIEW

- 1 The SpeediShuttle¹ Motion to Strike² continues to try to eliminate this case by essentially trying it backwards, not to mention inconsistently. In the now almost 60 pages of its numerous procedural filings since the Petition and Complaint herein, the only consistency is an ongoing and unprecedented effort to prevent Shuttle Express³ from having its case heard or restricting it to something of no consequence. Most disturbingly, Respondent repeatedly tries to bootstrap a Commission “notice” into an order and give it precedential value. That would be error.
- 2 In its Review Petition, the Respondent repeatedly faults Shuttle Express for, “fail[ing] to present any sufficient evidence” to support rehearing.⁴ But then, just three weeks later it repeatedly faults Shuttle Express for supposedly, “insert[ing] evidence into a closed record without approval....”⁵ Which is it? The answer is neither.
- 3 As the Shuttle Express Answer to the Review Petition made clear, the Rehearing Petition was a *pleading*. It did not need to provide every single fact that would support the Petition,

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

² SpeediShuttle’s Motion to Strike Answer to Petition for Administrative Review filed September 12, 2016.

³ Shuttle Express, Inc. (“Shuttle Express” or “Petitioner”).

⁴ SpeediShuttle’s Petition for Administrative Review of Initial Order 06, ¶ 7 (August 24, 2016); *see also, id.*, ¶¶ [LIST ALL]

⁵ *E.g.*, SpeediShuttle’s Motion to Strike Answer to Petition, etc., ¶ 19 (August 24, 2016).

only a high-level summary of sufficient detail to meet the statutory requirements to trigger a rehearing, either as of right or pursuant to Commission discretion.

- 4 As it twisted the Shuttle Express pleading in its Review Petition, the Respondent's motion has twisted the Answer to that Review Petition. The thrust of the Review Petition is that the Commission "should not exercise its discretion" to allow rehearing,⁶ based on numerous asserted policy reasons and purported technicalities. In responding to such lengthy and broad arguments founded upon public policy and discretion, the Shuttle Express Answer necessarily addressed a number of facts that the Commission might find relevant in deciding whether to uphold the administrative law judge's ("ALJ") Order 06.
- 5 Respondent has not questioned the truth of any of the facts alleged in the Answer it seeks to strike. Instead, despite arguing in its Review Petition that more facts were needed, it now asserts in its Motion to Strike that facts should be disregarded. It does so based on a discovery rule⁷ which is irrelevant to the use of discovery here and based on the "reopening" rule,⁸ which is also completely irrelevant to a rehearing proceeding. It also improperly raises new arguments in opposition to the Rehearing Petition, which have no place in a motion to strike.⁹
- 6 The Commission should consider the Answer and its facts to be an extension of the original pleadings or, since Respondent seeks to exclude them, an "Offer of Proof" akin to Superior Court Evidence Rule 103. It should be obvious they were not included in the argument as evidentiary proof on the ultimate merits of the case, only to provide additional factual context to support the exercise of discretion in Order 06 as being appropriate. The

⁶ *E.g.*, Review Petition, ¶ 5.

⁷ WAC 480-07-405(2)(c).

⁸ WAC 480-07-830.

⁹ Most disturbing is its characterization of the Commission's December 2015 "Notice" as having the force and effect of an "order." It plainly was not an order. This mischaracterization will be addressed in more detail below.

Commission may or may not find them probative, but they are facts and there is no reason to strike them. The Commission’s broad discretion permits it to consider facts it knows, suspects, or are reasonably alleged in deciding to commence a more thorough investigation. To hold otherwise could cripple the Commission’s ability to protect the public interest here and in future matters.

7 Finally, and probably most importantly to the overall case, Respondent asserts that the “walk-up service” issue should be rejected from the case, because it was “resolved in the Notice of Determination not to Amend Order 04 (Dec. 14, 2015).”¹⁰ This is not the first time this fallacious argument has been made. SpeediShuttle made this assertion early on and at some length in both its Answer to the Petition and its Reply of Right.¹¹ But Shuttle Express had no right to respond to either of those pleadings.¹² In the two pleadings to which Shuttle Express could have responded, the Motion to Dismiss and the now pending Petition for Administrative Review, Respondent avoided any discussion of the alleged preclusive effect of the “Notice.”

8 The issue of Respondent’s inconsistent testimony and statements on walk-ups really should be an ultimate issue in the case, after full discovery, cross-examination, hearing, and briefing. It has no place in a motion to strike. Since it seems to be a centerpiece of Respondent’s defense to the most troubling issue in the case, it really should have been included in the Petition for Administrative Review. Nevertheless, Shuttle Express will

¹⁰ Hereafter, referred to as the “Notice.”

¹¹ SpeediShuttle’s Reply By Leave To Shuttle Express, Inc.’s Answer To Petition For Administrative Review Of Order 06 (Sept. 12, 2016) And SpeediShuttle’s Petition For Administrative Review Of Initial Order 06 (Aug. 24, 2016), respectively.

¹² SpeediShuttle took great advantage of the ability to get in the last word. The discussion about the Notice and most or all of paragraphs 12 through 21 raised new arguments that bear no relationship to the issue to which it is supposedly replying. As the Shuttle Express cross-challenge made clear, it went to the very narrow timing issue of six months versus two years. But the Reply improperly replies to the issues of exercise of the Commission’s discretion. The 10 paragraphs should more appropriately have been included in the proposed reply by leave of the Commission. A motion to strike 12 to 21 would be appropriate, but SpeediShuttle’s procedural maneuverings have already consumed more than enough time, effort, and expense.

address it here, because this is the first opportunity it has had to respond and it is important the Commission not be led to commit the error by treating its “notice” as an “order.”

9 Under the Administrative Procedure Act (“APA”), “[o]rder,” without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.”

RCW 34.05.010(11)(a). Nothing in the “Notice” suggests that it was a “final determination” of the legal interests of any person. The Notice is not found on the Commission website under the “orders” tab. And although the Notice was filed after the entry of Order 05, then next order in the number sequence was an actual order, Order 06—now being challenged. The Notice was not given an order number in the docket. In form and substance it was not an order.

10 The APA requires that “orders” be entered by the “members of the agency head” (commissioners here) or the “presiding officer.” RCW 34.05.461(1). The presiding officer in Docket TC-143691 has, from the outset (including the Notice of Intent to Amend Order 04), been the same ALJ. Neither the commissioners nor the ALJ issued the “Notice” in question. It was issued by the Commission Secretary, further evidence it was not intended to be an order.

11 The APA further requires that, “[t]he order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief.” RCW 34.05.461(3). No such statement was included. Nor were other formal content requirements of RCW 34.05.461(3) clearly set forth in the Notice, though it might be contended that some of them were implicit. Again, in form and substance it was not an order.

12 From what is in and what is not in the Notice, the obvious intent was not to issue an order, but simply let the parties know that no action was going to be taken at that time. Reasons were given, but because there was no order, they cannot be binding on the Commission nor on the parties.¹³ And it is disingenuous for SpeediShuttle to fault Shuttle Express—in a motion to strike—for not “challenging” the Notice. There was nothing to challenge and no identification of the procedures or rights to challenge, as would have existed in a real order. Had Shuttle Express sought judicial review of the “Notice” it would have been thrown out of court for trying to appeal a non-order.¹⁴

13 Respondent’s Motion to Strike seeks to further its persistent efforts—using half a dozen pleadings and other tactics—to prevent discovery, testimony, cross-examination and post-hearing briefing before all the relevant evidence can be admitted or even discovered. This is backwards. The Commission should deny the Motion, reject Respondent’s stonewalling efforts, and allow the case to proceed normally.

Respectfully submitted this 15th day of September, 2016.

LUKAS, NACE, GUTIERREZ & SACHS, LLP



Brooks E. Harlow, WSBA 11843
Counsel for Shuttle Express, Inc.
8300 Greensboro Dr. Suite 1200
McLean, VA 22102
Phone: 703-584-8680
Fax: 703-584-8696
bharlow@fcclaw.com

¹³ Moreover, the rationale was based on the narrow facts, laws, and regulations under consideration at that time. The Shuttle Express Petition and Complaint go far beyond those considerations, both factually and legally.

¹⁴ Probably with the encouragement of the Respondent’s and Commission’s attorneys.

CERTIFICATE OF SERVICE

I hereby certify that on September 15th, 2016, I served a copy the foregoing document via email, with a copy via first class mail, postage prepaid, to:

<p>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</p>	<p>David W. Wiley Williams Kastner Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 206-233-2895 Email: dwiley@williamskastner.com</p>
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Dated at McLean, Virginia this 15th day of September, 2016.



Elisheva Simon
Legal Assistant