

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BREMERTON-KITSAP AIRPORTER, INC.

Complainant,

SHUTTLE EXPRESS, INC.

Respondent.

DOCKET NO. TC-110230

[PROPOSED] REPLY OF  
BREMERTON-KITSAP AIRPORTER,  
INC. TO RESPONDENT SHUTTLE  
EXPRESS, INC.'S ANSWER TO  
MOTION TO AMEND COMPLAINT

1 Shuttle Express, Inc. (“Shuttle Express” or “Respondent”) now seeks to deny due  
process to Bremerton-Kitsap Airporter, Inc. (“BKA” or “Complainant”) by opposing its  
liberally-construed right to amend its complaint under WAC 480-07-395, on the basis  
of a lack of standing in BKA as Complainant to pursue a claim under RCW 81.04.110  
and thus to dismiss the Complaint.<sup>1</sup>

2 The Respondent’s entire premise for its position is a perceived lack of standing in BKA  
to bring the complaint by failure to allege any harm “direct or indirect” in the actions of  
Shuttle Express.

3 Without arguing here the basis of allegations of direct and indirect harm caused by  
tariff publication and/or operations exceeding the scope of Certificate C-975, BKA  
respectfully suggests Shuttle Express misapprehends basic distinctions between

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<sup>1</sup> Albeit, Shuttle Express appears both somewhat uncertain of the central jurisdictional basis of the Complaint indicating “[it] is apparently brought pursuant to RCW 80.04.110 [sic], which provides that “[no] complaint shall be dismissed because of the absence of direct damage to the complainant” and unreconciled to the latter reference of lack of need for direct damage via a pleading. Answer at ¶ 4, p. 1.

standing as an intervenor in an adjudicative proceeding and that of a complainant in private complaint proceedings under RCW 81.04.110.

4 Indeed, one of the bases upon which BKA here complains is that the 2010 zip code tariff rate design intrudes into territories encompassing stops against which Shuttle Express is restricted to serve and does so explicitly in reference to “other operators’ service”<sup>2</sup> which obviously includes Complainant as a competing authorized auto transportation company providing service in overlapping geographic territory.

5 Shuttle Express’s featured contention in resisting amendment of the Complaint and seeking dismissal, is that allegation of violation of law and rules by one competitor against another does not in and of itself plead any direct or indirect harm to the Complainant and therefore fails.<sup>3</sup> While this rationale might, under specified circumstances, be sufficient to deflect a protest or deny an intervention in an adjudicative proceeding, it is wholly misplaced in an action to dismiss a private complaint.

6 In application, rate or permit amendment adjudicative proceedings, the Commission’s procedural rules and case law establish that an opponent, in order to participate, have a valid interest adverse to the application, rate or petition proceeding.<sup>4</sup>

7 This reasoning was also recently applied in the *Shuttle Express* Order ironically relied upon by the Respondent in its opposition, Order No. 5, TC-091931, *In re Application of Shuttle Express, Inc.* (Apr. 2011), when the Commission found that the putative

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<sup>2</sup> BKA Amended Complaint at ¶¶ 5, 6, pp. 2, 3.

<sup>3</sup> Again, a premise that BKA accepts here only to focus on the erroneous misapplication of standing rules by Respondent in its Answer.

<sup>4</sup> See, WAC 480-07-355(3), WAC 480-30-116(2)(a)(v), and also, Order M.V. No. 133753, *In re Sunshine Disposal, Inc. d/b/a Valley Transfer & Storage App. E-19104 (Apr. 1986)*, where the Commission famously distinguishes standard criteria for “protestants” and “intervenors,” and alternatively, finds a demonstration of a substantial interest in the outcome of the proceeding or a finding that the participation may be in the public interest as a basis for intervention.

intervenor, Seatac Shuttle, had failed to demonstrate a substantial interest in the docket since it did not hold comparable door-to-door authority that was the subject of the permit restriction application nor had it established that its participation was in the public interest.<sup>5</sup>

8 What Shuttle Express here though woefully fails to distinguish, in subsequently hallmarking a quotation from that Order in its concluding salvo at the bottom of page 2 of its Answer, is *that* ruling was in the context of an *intervention* in an application/petition proceeding and not in any type of enforcement proceeding.<sup>6</sup> This inappropriate blurring of the legal distinctions by Respondent between standing to intervene versus standing to complain is also featured in some recent Commission decisions.

9 In Order No. 6, UT-061256 et al., *In re: Cost Management Services v. Cascade Natural Gas Corporation* (Oct. 2007), the Commission, in an interlocutory order, agreed with an Initial Order's finding that the complainant lacked standing to intervene in a utility affiliate's rate filing action, but went on to reverse the Initial Order's finding that the complainant also lacked standing to amend its complaint. The Commission there interpreted RCW 80.04.110(1) in finding the Initial Order's view of the utility complaint statute (which is essentially identical to the companion transportation complaint statute under Title 81) correct that only customers and public officials could complain against the reasonableness of rates, but incorrect on the request to amend the complaint on the basis of allegation of unlawful acts and on complainant's lack of standing by finding that RCW 80.04.110(1) contains "... a specific grant of subject

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<sup>5</sup> Order 05, Docket TC-001931 ¶¶ 12, 13 at 4.

<sup>6</sup> Indeed, at footnote 19 of Order 05, the Commission expressly acknowledges that distinction: "Whether Shuttle Express violated Commission rules or orders, therefore, is not an issue that is properly before us in this docket, and we reach no conclusions on that issue . . ." Order 05, footnote 19, p. 7.

matter jurisdiction over claims by ‘any person or corporation,’ of any act or omission that violates any law, order or Commission rule,” Order 06, Dockets UG-061256 et al. ¶ 41, p. 13.

10 The Commission, in the *CMS* case, thus construed the private complaint statute to broadly allow allegations against a regulated company of unduly discriminatory or unduly preferential practices or rates and/or other allegations of violation of Commission law or rule as capable of being brought by any person.

11 The Commission also has expressly extended this interpretation of the private complaint jurisdictional statute to Title 81 actions, in Order 05, Docket TG-071194, *Waste Connections of Washington, Inc. v. Enviro-Con Trucking, Inc. and Waste Management Disposal Services of Oregon, Inc.* (Oct. 2008), where it said:

As the name implies, an enforcement action seeks to enforce a state law or commission rule or order and thus by its nature involves the public interest. Under the complaint statute, RCW 81.04.110, the Commission, a municipal corporation or other “body politic” *or a private entity may file a complaint alleging that a public service company or a person or entity acting as a public service company has violated the law, commission order or rule.* (Citation omitted.) By giving equal standing to other persons or entities to enforce the law, the statute recognizes that in bringing such a complaint, a private entity is advocating in the public interest as well as its own. [Emphasis added.]

Order 05, Docket TG-071194 ¶ 17 at 5.<sup>7</sup>

12 Shuttle Express’ Answer and concomitant request that the original and amended complaint be dismissed entirely misreads the “apparent” basis of the amended complaint under RCW 81.04.110. It misconstrues the appropriate standards by which the authorized action is judged in advocating that criteria for protest and intervention

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<sup>7</sup> The Supreme Court of Washington itself has also expressly recognized RCW 81.04.110 as conferring upon the Commission jurisdiction to construe the scope and operational boundaries of an auto transportation certificate where one certificate holder challenged the operations of another as unlawful under a certificate issued by the Commission’s predecessor. *See State ex rel North Bend Stage Lines v. Department of Transportation*, 26 Wn.2d 485, 174 P.2d 516 (1946).

status be unilaterally applied regarding articulation of direct and indirect harm in obfuscation of the standards of RCW 81.04.110, the public interest and the inherent right of a private party, (here, a competitor with overlapping auto transportation authority), to foundationally allege violation of law and rule under RCW 81.04.110(1). In so doing, the Respondent also advocates a complete ellipsis of consideration of the Commission's own liberal construction pleading philosophy and ignores the express rule under WAC 480-07-395(5), which thus not only fails to promote "fair and just results" by seeking dismissal of the complaint action, but completely contravenes the right of private party complaint actions under RCW 81.04.110.

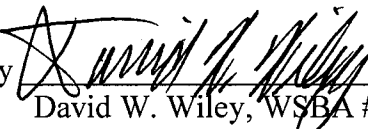
CONCLUSION

13 Complainant BKA therefore asks that its Motion for Leave to Reply to the Answer of BKA be granted, that Shuttle Express' request be denied and that Complainant be allowed to amend its Complaint and that this matter proceed to hearing at the discretion of the Commission.

DATED at Seattle, Washington this 13<sup>th</sup> day of July, 2011.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

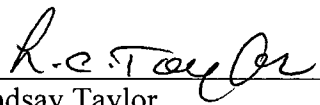
I hereby certify that on July 13th, 2011, I caused to be served the original and three (3) copies of the foregoing document to the following address via first class mail, postage prepaid to:

David Danner, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
Attn.: Records Center  
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Olympia, WA 98504-7250

I certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to: [records@utc.wa.gov](mailto:records@utc.wa.gov);

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Lyndsay Taylor