

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC.,

Petitioner and Complainant,

v.

SPEEDISHUTTLE WASHINGTON, LLC

Respondent.

DOCKET NOS.

TC-143691

TC-160516

TC-161527

PETITIONER'S ANSWER IN
OPPOSITION TO
RESPONDENT'S MOTION FOR
SUMMARY DETERMINATION

INTRODUCTION

- 1 Shuttle Express, Inc. (“Shuttle Express”) files this answer in opposition to the Speedishuttle of Washington, LLC (“Speedishuttle”) Motion for Summary Determination (“Motion”). To call the Motion “puzzling” would be a gross understatement. The Motion is essentially a tiny, narrow, subset of Speedishuttle’s already failed motion to dismiss filed last June. The Commission properly denied that Motion in Order 01 in the Complaint docket, TC-160516 (hereafter “Order 01”¹).
- 2 Respondent did not timely file any form of petition for review or other relief from—or modification to—Order 01. And at no time has the Commission modified or narrowed the scope of the order or its conclusions about the legal sufficiency of the Complaint. Thus the denial of dismissal and the grounds therefore are all still the law of the case at

¹ Not to be confused with Order 01 in Docket TC-143691, which is not relevant to the instant motion.

this time. Now, completely ignoring Order 01 and the Commission’s unchallenged prior holdings, the Respondent tries to take another bite at the apple. Its attempt is both misplaced and untimely. The Motion should be summarily rejected.

3 Also most puzzling is that the Respondent filed its Motion on the same day as Petitioner filed its pre-filed testimony. In so doing, it completely ignored all the testimony, which provides rich factual support and detail for the allegations of the Complaint, which the Commission has already held were legally sufficient and properly before the Commission.

4 For example, the proffered testimony shows that Speedishuttle—rather than merely serving in the “unserved” tech-savvy non-English speaking tourist as promised—has ripped the heart out of Shuttle Express’s business and profitability. It has diverted almost 60% of the previous Shuttle Express passengers to downtown Seattle hotels and cruise terminals.² And despite taking well over half of the highest-volume, lowest-cost traffic, from Shuttle Express, Speedishuttle itself is still losing money with no realistic prospects of ever making money unless (maybe) it drives Shuttle Express out of the market entirely.³

5 In support of this answer, Shuttle Express submits the declarations of Paul Kajanoff, Wesley Marks, and Don Wood, who verify their entire pre-filed testimonies under oath, and Jason DeLeo and Brooks Harlow, all filed herewith.⁴ It is also based on the records

² Opening Testimony of Petitioner/Complainant By Paul Kajanoff at 13-14 (Dec. 21, 2016).

³ *Id.* (Testimony of Paul Kajanoff) at 6-11; and Opening Testimony of Petitioner/Complainant By Don Wood (Dec. 21, 2016).

⁴ In the interests of efficiency and some measure of brevity, the separate exhibits to the testimonies of Messrs. Kajanoff, Marks, and Wood are omitted from their declarations in this filing. Their exhibits, while rich in background and support, are cumulative and unnecessary for purposes of the Motion. The testimonies alone provide ample factual grounds to deny the Motion. The exhibits are, of course, on file as of Dec. 21, 2016, and will be

and files in Docket No. TC-143691.

DISCUSSION

I. **The Commission Has Never Narrowed the Complaint in This Case, but has Instead Held the Complaint is Legally Cognizable in an Order that Was Never Timely Challenged.**

6 In its attempt to justify its belated renewed effort to dismiss the Complaint, Respondent first creates a “straw-man” narrowing of the Complaint, supposedly to the single issue of what it terms “predatory pricing” under Federal antitrust laws. It does so in reliance on Order 08 in Docket TC-143691. While that order may not be entirely clear in all respects, one thing is very clear. That is, Order 08 never mentions Order 01 at all. And certainly does not overrule or modify Order 01. Nor does it say the Complaint is somehow limited to “predatory pricing.”⁵ Nor does Order 08 apply Federal antitrust law standards relating to below-cost pricing to a complaint under RCW 81.04.110.

7 Order 01 properly acknowledged and accepted, in summary fashion, the broad scope of the allegations of the Complaint: “The Complaint alleges, among other things, that Speedishuttle is engaging in illegal and unfair practices by providing the same service Shuttle Express provides despite representations to the contrary, and that Speedishuttle is using predatory, unremunerative pricing to provide service at less than cost.” *Id.*, ¶ 7. As the Commission has already recognized, Speedishuttle’s below-cost pricing is but one element of the Complaint.

offered into evidence at the hearing.

⁵ Although the issue is not discussed in the Motion (it is merely assumed), it is questionable that the Commission would even have the authority to somehow bar a complainant from asserting and supporting well-pleaded allegations of a complaint under RCW 81.04.110. The statute seems to making a hearing on such complaint mandatory, even if the Complainant does not allege harm. *See* Order Dec. 5, 2002 (“The Commission ... is bound by its obligation to regulate in the public interest, which necessarily includes hearing complaints that allege unlawful acts by a regulated company.” (Emphasis added).

8 The Complaint itself alleged much more than pricing below cost, including, but not limited to:

38. Since May of 2015, Shuttle Express and Respondent have been engaged in competition in provision of passenger auto transportation service between SeaTac Airport and most of King County, Washington. Respondent obtained its authority to provide this competitive service by inducing the Commission to find its service would not be the “same service” as that already offered by Shuttle Express. It did so using false, misleading, and overstated testimony, arguments, and exhibits in the Application case. Its actions in the Application Case were accordingly deceptive, unreasonable, illegal, unfair, and tending to oppress the complainant, as well as contrary to the public interest.

39. Respondent has admitted it is operating in direct competition with Shuttle Express and that a substantial portion of its passengers are being offered and provided the same services that Shuttle Express offers and provides. As a consequence, the number of passengers carried by Shuttle Express since May 2015 has declined precipitously, as the number of passengers carried by Respondent has increased. This is not in the overall or long term public interest.

40. The extent to which Respondent is truly providing a different service to a previously unserved demographic is not known with certainty. However, on information and belief, the services being provided to passengers who speak and write only Chinese, Japanese, or Korean, and not English is a small fraction of the passengers Respondent is serving and may even be *de minimus*. Respondent’s direct competition with Shuttle Express for the same service—after seeking and obtaining a certificate based on promises and representations that it would instead offer a different service—is unreasonable, illegal, and unfair, and in violation of RCW 81.04.110, 81.28.010, and other laws and regulations. Such actions are also contrary to the public interest.

41. On information and belief Respondent is providing its services in competition with Shuttle Express at fares that are below cost. Respondent’s competition with Shuttle Express using such predatory pricing is unreasonable, insufficient, unremunerative, discriminatory, illegal, unfair, insufficient, and tending to oppress the complainant, and in violation of RCW 81.04.110, RCW 81.28.010, and other laws and regulations. Such predatory pricing is also contrary to the public interest, especially in the long run.

9 Not a single one of the foregoing allegations was dismissed or held to be beyond the scope of proper issues for this case. In Order 08, despite the language cited by Respondent, the Commission also stated: “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.” (Emphasis added).

10 All of the allegations of the Complaint are well-supported by the Shuttle Express pre-
filed testimony—also filed herewith in declaration form—consistent with Order 01 in
TC-160516 and Order 08 in TC-143691. But Respondent explicably ignored the
testimony—including the testimony on the below-cost pricing. Since the Motion ignores
all of the issues and supporting evidence other than predatory pricing, the Motion should
be denied on that basis alone.⁶

II. The Below Cost Pricing by Speedishuttle is Governed by Washington’s Public Service Laws—and Ultimately the Public Interest—Not Federal Antitrust Law.

11 Even if the Complaint case could be limited to the single issues of below-cost pricing
(despite the existence of an order which accepts the broader issues and the lack of an
order explicitly eliminating the other issues) the Motion still missed the mark badly.
Respondent’s focus on Federal antitrust law is nothing but yet another straw man seized
upon to give it something assailable to attack. But the basis of Shuttle Express’s claim is

⁶ Although it is not incumbent upon Shuttle Express to do so, since the motion fails to address other matters complained of, a few will be noted here, briefly. Contrary to sworn testimony, “walk up” passengers are being served. Wesley Marks Testimony at 16. Half or fewer of passengers are being greeted in baggage claim and escorted to their van. Jason DeLeo Decl., ¶ 9. The 20 minute departure “guarantee” has not been honored. Wesley Marks Testimony at 24. Few or no non-English speaking passengers are being served. Wesley Marks Testimony at 9-13. Unserved tech-savvy tourists are not being served. Don Wood testimony at 32. The overall number of door-to-door airport shuttle passengers has continued to decrease, not increase, as posited. Paul Kajanoff Testimony at 2 -5.

not Federal antitrust law—it is RCW Title 81, particularly RCW 81.04.110 and RCW 81.28.010.

12 The Washington Supreme Court has long recognized that this Commission is given broad powers to fashion remedies when one carrier complains against another based on changed conditions. The powers and remedies clearly emanate from the state’s public service laws, not state or Federal antitrust laws. For example, *State v. Dep’t of Pub. Works*, 161 Wash. 622, 632, 297 P. 795, 798 (1931) the Court upheld the action of the Commission’s predecessor under the predecessor to RCW 81.04.110, noting that: “This is but a matter of adjustment of the competition differences between these transportation companies in view of changed conditions from those existing at the time of the original granting of the good-faith certificates to them.”

13 Contrary to Respondent’s speculative and self-serving antitrust construct, the issue is not whether *after Speedishuttle drives Shuttle Express out of the market it will be able to raise prices.*⁷ The issue is whether it would be in the public interest and consistent with RCW 81.68.040 and other statutes *to permit Speedishuttle to try to drive Shuttle Express out of the market*—and to do so using below-cost pricing to capture 44-59% the passengers that Shuttle Express used to carry,⁸ despite having asserted that it would offer a “different” service that would grow the overall market by serving the un-served.⁹

⁷ The construct is self-serving because the specter of future prices that are higher than a competitive market would support is difficult if not impossible in an industry whose prices and profits are subject to intensive regulation by a regulatory authority. Meeting the test of the Federal antitrust laws for actionable predatory pricing is likely impossible in a rate-regulated scenario.

⁸ Testimony of Paul Kajanoff at 13.

⁹ See, e.g. Order 04, ¶ 20 (“an entire demographic of travelers whose needs cannot be met by Shuttle Express’s existing service” that applicant could meet because its “proposed service is not the same service”); see also, Transcript at 140-44.

Respondent's legal arguments, founded solely on irrelevant antitrust laws and cases,¹⁰ cannot succeed unless the Commission ignores the public service laws it is bound to enforce.

14 Respondent not only misstates the real issue of the below-cost pricing, it completely ignored the extensive pre-filed testimony of Shuttle Express on the nature and implications of the entire financial failure of Speedishuttle that goes well beyond mere pricing. In particular, the testimony shows that Speedishuttle will likely never make a profit in the SeaTac share ride market unless it takes much more of what were previously Shuttle Express passengers.¹¹ But Speedishuttle's unlawful competition and entry by misleading or deceptive means have already put Shuttle Express into a loss situation. *Id.*

15 Respondent also tries to spin itself as "a much smaller service provider than Shuttle Express." *E.g.*, Motion at 18. But even by its own numbers, Speedishuttle has a quarter of the market. *See id.* at 8.¹² And reviewing the pre-filed testimony it can be seen the real world impact of Speedishuttle has been huge and lopsided, taking up to almost 60% of the Shuttle Express passengers to downtown Seattle. But the relative sizes don't really matter. Speedishuttle has clearly siphoned more than enough passengers from Shuttle Express to make it start losing money on its share ride operations.

16 Worse still, because in the current market both carriers are losing money this means that one or maybe both carriers must ultimately fail if the status quo is maintained.¹³ As Mr.

¹⁰ For example, *Seattle Rendering V. Darling-Delaware Co.*, 104 Wn.2d 15, 701 P.2d 502 (1985)(mis-cited by Respondent as 10 Wn.2d 15), was a case based on RCW Chs. 19.90 and 19.86, laws which the Commission has no jurisdiction to enforce.

¹¹ Testimony of Paul Kajanoff at 6-11. Even in that scenario, it may not be able to make a profit. *Id.* at 10-11.

¹² Its numbers are misleading, because the Shuttle Express numbers cited also include Pierce and Snohomish County passengers, which Speedishuttle does not serve.

¹³ Testimony of Don Wood at 28-29.

Wood testifies, even before one or both carriers exit the market the public is already being harmed, by increased wait times, reduced efficiency, and higher operating costs per passenger.¹⁴ All of these problems are contrary to the short-term, and especially the longer-term, public interest. A large segment of the public still uses and values the van-provided share ride service and would be forever harmed if the service must be reduced in geographic scope, time of day, or even altogether.

17 Nearly everything that Respondent has done fits the grounds set forth in the Complaint statute for maintaining a complaint. In its application case, Respondent claimed it would offer a “different” service that would grow the market by attracting a new demographic that Shuttle Express was not serving.¹⁵ The Commission accepted this proposition. *See, e.g.,* Order 08. But instead, Speedishuttle has taken close to 60% of the core of the pre-existing Shuttle Express business to downtown Seattle.¹⁶ And it has done so by intentionally targeting wholesale ticketing agents, like GO Group, which used to ticket all their passengers with Shuttle Express.¹⁷

18 The fact that the siphoning from Shuttle Express to Speedishuttle was not incidental (rather it was blatant intention) is and will be well-established. Even the pre-filed testimony, as extensive and detailed as it is, still does not tell the full story. Due to over four months of discovery delays by Speedishuttle,¹⁸ certain key documents were not available in time for the pre-filed testimony.¹⁹ Documents produced in mid- to late-

¹⁴ *Id.* (“Over time, increasing financial stress as both providers continue to incur losses will result in additional pressure to reduce costs, usually by further lowering service quality. The final result could be the financial weakening of both providers to the point that neither can sustain its operations and must exit the market.”).

¹⁵ *See e.g.,* Transcript at 140-44.

¹⁶ Testimony of Paul Kajanoff at 12, 14-15.

¹⁷ *Id.*

¹⁸ Indeed, as of this writing Speedishuttle’s discovery responses are still incomplete.

¹⁹ These documents will be introduced as hearing exhibits, in rebuttal, or on cross examination.

December include dozens upon dozens of solicitation of share-ride transfers to and from SeaTac, aimed at travel agents and wholesale ticket sellers, most of which had used Shuttle Express previously. In other words, GO Group is just the tip of the iceberg.

19 Perhaps the best example of documentation establishing a concerted effort to build its business on former Shuttle Express passengers is the email string attached to the Harlow Declaration, between Speedishuttle and GTA Travel as Exhibit A (Bates Nos. 884-890).

In a solicitation that is typical of the dozens of others, Speedishuttle writes:

“SpeediShuttle Seattle is on schedule to begin offering services in King County Seattle Washington May 1, 2015. ... This is your first opportunity in decades to choose another company's services since only one company [Shuttle Express] has been permitted to operate in the entire King county service area for thirty years.” *Id.* at 889 (emphasis added). This email was sent on February 19, 2015, well before the final order in the application case was even issued!

20 And just in case the implicit reference to Shuttle Express in the Speedishuttle solicitation leaves any doubt, subsequent emails in the string make it abundantly clear where the passengers were coming from. For example: “The existing bookings I will leave with Shuttle Express. I am sure once I send the advert announcing New Low Rates for Shared Transfer available now in Seattle, clients will cancel and rebook with Speedishuttle.” *Id.* at 884 (emphasis added). The email also reflects how Speedishuttle charges less than Shuttle Express to downtown Seattle (though it charges more to rural parts of the county).

21 What is notably missing from the dozens of solicitations to the former Shuttle Express wholesale ticket agents is any mention of foreign language capability or needs. A word search of an over 200-page document production of December 27, 2016, for the words

“foreign,” “English,” “Chinese,” “Japanese,” and Korean” does not result in a single “hit.” Those words *do not exist* in any of the dozens of solicitations. Harlow Dec. ¶ 3.

Like the GTA emails in Exhibit A, Speedishuttle’s focus was not on seeking or finding an unserved demographic. It was purely about getting the ticketing agents to switch from Shuttle Express (after 30 years) to Speedishuttle, all the while using below cost pricing to lure that business.

22 Rates of regulated carriers must be must be just, fair, reasonable, and sufficient.” RCW 81.28.010. The Commission is well within its powers to find some or all of the rates of Speedishuttle are not “sufficient” based on the evidence submitted to date and Respondent’s admissions it is priced below cost.²⁰ Further, RCW 81.04.110 allows the Commission to take action upon complaint if, “the rates, charges, rules, regulations, or practices of [a carrier] are unreasonable, unremunerative, discriminatory, illegal, unfair, intending or tending to oppress the complainant.” The foregoing discussion only touches on some of the other more blatant public interest issues raised by the complaint and pre-filed testimony to date. Much more can be found in the pre-filed testimony and more will come out at the hearing. Operating below cost is a big part of the actions complained of, but the operating losses are inextricably intertwined with much broader issues.

23 Finally, the touchstone of the Commission’s charge and reason for its existence is to protect and promote the public interest: “The utilities and transportation commission

²⁰ To be clear, the remedy in this case is not necessarily to order Speedishuttle to raise all of its rates. The heart of the problem is it is now clear that the total volume of share ride passengers in King County is not sufficient to support two carriers doing the same business and competing for the same passenger demographic. Raising some (e.g. downtown Seattle, which undercuts Shuttle Express) or all of Speedishuttle’s fares could be part of the relief requested and granted after the facts are fully developed at the hearing. But it is likely that much broader relief is necessary to unwind the threat to the public interest that Speedishuttle’s entry has created in this challenging market.

shall ... [r]egulate in the public interest, as provided by the public service laws, all persons engaging in the transportation of persons or property within this state for compensation.” RCW 80.01.040. As Shuttle Express has noted previously, the public interest standard is a “supple instrument for the exercise of discretion by the expert body ... charged to carry out ... legislative policy.” *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The Commission’s “legislative policy” is not found in the antitrust laws.

24 The Commission here is in no way constrained by Respondent’s unduly narrow interpretation of the scope of issues raised by the Complaint or by Federal antitrust law. Rather, it is constrained by the Washington public service laws and the broader public interest. The acts and omissions of Speedishuttle have been contrary to both.

CONCLUSION

25 If ever a case cried out for a full review and hearing to protect and preserve the public interest, this one does. Rather than spurning a hearing based on a motion to dismiss that was filed without waiting to even look at the supporting evidence, the Commission should be eager to get this case to hearing. The sooner the problems that exist in the share ride market can be addressed, the greater chance the Commission has to solve those problems before it is too late for the carriers and the public. The Motion should be denied.

Respectfully submitted this 10th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2017, I served a copy the foregoing document via email, with a copy via first class mail, postage prepaid, to:

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Dated at McLean, Virginia this 10th day of January, 2017.

/s/ Linda Evans Legal Assistant