

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

<p>In re the Application of</p> <p>SPEEDISHUTTLE WASHINGTON, LLC d/b/a SPEEDISHUTTLE SEATTLE</p> <p>For a Certificate of Public Convenience and Necessity to Operate Motor Vehicles in Furnishing Passenger and Express Service as an Auto Transportation Company</p>	<p>DOCKET TC-143691 <i>(Consolidated)</i></p> <p>ORDER 16</p>
<p>SHUTTLE EXPRESS, INC.,</p> <p>Complainant,</p> <p>v.</p> <p>SPEEDISHUTTLE WASHINGTON, LLC d/b/a SPEEDISHUTTLE SEATTLE,</p> <p>Respondent.</p>	<p>DOCKET TC-160516 <i>(Consolidated)</i></p> <p>ORDER 09</p>
<p>SPEEDISHUTTLE WASHINGTON, LLC d/b/a SPEEDISHUTTLE SEATTLE,</p> <p>Complainant,</p> <p>v.</p> <p>SHUTTLE EXPRESS, INC.,</p> <p>Respondent.</p>	<p>DOCKET TC-161257 <i>(Consolidated)</i></p> <p>ORDER 06</p> <p>ORDER GRANTING, IN PART, MOTION IN LIMINE</p>

BACKGROUND

1 On March 30, 2015, the Washington Utilities and Transportation Commission (Commission) entered a final order granting the application of Speedishuttle of

Washington, LLC d/b/a Speedishuttle Seattle (Speedishuttle) for a certificate of public convenience and necessity to operate as an auto transportation company in Docket TC-143691 (Application Docket).

- 2 On May 16, 2016, Shuttle Express, Inc. (Shuttle Express) filed a Petition for Rehearing of Matters in Docket TC-143691 and a formal complaint against Speedishuttle in Docket TC-160516. On August 4, 2016, the Commission consolidated Dockets TC-143691 and TC-160516.
- 3 On December 1, 2016, Speedishuttle filed with the Commission a formal complaint against Shuttle Express in Docket TC-161257. On January 5, 2017, the Commission consolidated Docket TC-161257 with Dockets TC-143691 and TC-160516.
- 4 On January 17, 2017, Speedishuttle filed with the Commission a Motion in Limine to Exclude Referenced Testimony filed by Shuttle Express (Motion). Speedishuttle seeks to exclude portions of testimony filed by three witnesses for Shuttle Express on the basis that it exceeds the scope of the issues in this proceeding or is otherwise inadmissible.
- 5 Specifically, Speedishuttle alleges that the challenged portions of testimony: 1) collaterally attack the Commission's findings in Order 04 that Speedishuttle's proposed service was different than the service Shuttle Express provides; 2) attempt to reopen the litigation record by making arguments about marketing sustainability; 3) collaterally attack the Commission's 2013 rulemaking and reinterpret the Commission's "same service" standards; 4) inappropriately address walk-up, or on-demand, service; 5) reinterpret hearing testimony related to personal greeters; 6) attack the means, methods, benefits, or manner of providing the service features in Speedishuttle's business model; 7) discuss average total cost, which is irrelevant to predatory pricing claims under federal case law; and 8) contain improper character attacks.
- 6 On January 27, 2017, Shuttle Express filed an Answer in Opposition to Motion in Limine (Answer). In its Answer, Shuttle Express argues that Speedishuttle's Motion fails to articulate that the testimony at issue is clearly inadmissible and highly prejudicial, as required. Shuttle Express suggests that the issues raised in the Motion should go to the weight of the challenged testimony, which should be addressed in the final order rather than decided prior to the hearing.

DISCUSSION AND DECISION

- 7 We grant Speedishuttle’s Motion to the limited extent that it seeks to exclude testimony that exceeds the scope of this proceeding. We decline, however, to make factual determinations related to witness credibility or interpretation of Commission laws and rules, and deny Speedishuttle’s Motion to the extent that it requests the Commission to resolve factual disputes between the parties.
- 8 In its Answer, Shuttle Express argues that Speedishuttle’s Motion is improper because it fails to establish that the testimony it seeks to exclude is both inadmissible and highly prejudicial. While Shuttle Express acknowledges that Washington case law on motions in limine applies only to jury cases, it nevertheless urges the Commission to adopt the “inadmissible and highly prejudicial” standard. We decline to do so.
- 9 The “highly prejudicial” standard, which is intended to shield juries from hearing information that may unfairly taint their perception, does not apply in the context of administrative proceedings. The administrative law judge, unlike a jury, is presumably capable of making an unbiased determination about whether the challenged evidence is admissible and how much weight to afford it, if any. The standard we apply here is whether the testimony at issue is relevant, and therefore admissible, in this proceeding. WAC 480-07-495(1) provides that:

All relevant evidence is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. The presiding officer will consider, but is not required to follow, the rules of evidence governing civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence.

The Commission thus has broad discretion to consider any evidence it deems relevant, and, equally, to reject any evidence it deems irrelevant. At this stage of the proceedings, the Commission is considering only prefiled testimony that may be offered into evidence at the hearing. The Commission, therefore, need only determine whether any portion of that testimony is so demonstrably irrelevant to the disputed issues that the Commission would not admit it into evidence if it were offered. Making such a determination now conserves party and Commission resources by striking prefiled testimony to which no other party must respond. Accordingly, we exclude the portions of witness testimony that

exceed the scope of the issues that are properly before us. We address Speedishuttle's arguments in turn.

10 **Collateral Attack on Order 04.** In its Motion, Speedishuttle argues that portions of testimony filed by Don Wood, Paul Kajanoff, and Wesley Marks attempt to establish that the service features in Speedishuttle's business model do not actually distinguish Speedishuttle's service from Shuttle Express's service. We disagree. The bulk of the testimony and evidence attempts to demonstrate that the service Speedishuttle currently provides is inconsistent with the business model approved by the Commission, which fits squarely within the scope of issues we have repeatedly determined are before us. Accordingly, we deny Speedishuttle's Motion with respect to this issue.

11 **Testimony Related to Market Sustainability.** Speedishuttle also argues Shuttle Express's witness testimony and evidence attempts to reopen and argue the issue of market sustainability, which was rejected in Order 04. We agree, in part, and exclude portions of Mr. Kajanoff's testimony related to market sustainability. We will, however, allow those portions of Mr. Kajanoff's testimony that address the reduction in trips Shuttle Express made between the airport and downtown Seattle hotels since Speedishuttle entered the market. As we noted in Order 08, this relates directly to Shuttle Express's allegations that "Speedishuttle is not targeting the customers the Commission authorized that company to serve and is providing the same service Shuttle Express has the exclusive right to provide, resulting in injury to Shuttle Express."¹

12 Speedishuttle also takes issue with portions of Mr. Wood's testimony related to market sustainability. Like portions of Mr. Kajanoff's testimony, Mr. Wood's testimony focuses on the sustainability of the market when two providers offer the same service, not when two providers offer different service.

13 Accordingly, we will allow Mr. Wood's testimony, but exclude the following portions of Mr. Kajanoff's testimony:

1. Page 2, lines 16-19
2. Page 3, lines 1-13
3. Page 4, lines 1-11

¹ Order 08 ¶20.

4. Page 5, lines 1-7

- 14 **Collateral Attack on the Commission’s 2013 Rulemaking.** Speedishuttle next argues that Mr. Wood’s testimony attempts to reinterpret the “same service” standard set forth in WAC 480-30-140(2). We decline to determine whether Mr. Wood’s interpretation of Commission rules is accurate at this juncture. Mr. Wood’s testimony related to his understanding of Commission rules, correct or not, does not exceed the scope of the issues in this proceeding. We deny Speedishuttle’s Motion with respect to this issue.
- 15 **Testimony Related to Walk-up Service.** Speedishuttle further argues that Shuttle Express continues to attack Speedishuttle’s walk-up service, which ignores the Commission’s final adjudication of that issue. Speedishuttle claims that the Commission found in Order 08 that this issue exceeds the scope of this proceeding. We disagree. In Order 08, we held that we will not “permit a collateral attack on our rules that do not distinguish between ‘prearranged’ and ‘walk up’ door to door service.”² We did not, however, preclude Shuttle Express from demonstrating that the way in which Speedishuttle provides walk-up service is inconsistent with the business model approved by the Commission, which is precisely what the challenged testimony attempts to establish. Accordingly, we deny Speedishuttle’s Motion with respect to this issue.
- 16 **Reinterpretation of Application Hearing Testimony.** Speedishuttle contends that Mr. Wood and Mr. Marks misquote testimony from the Application Hearing by claiming that Speedishuttle represented each of its personal greeters would be multilingual. We decline to make a determination about the factual accuracy of these witnesses’ testimony at this stage of the proceeding, and deny Speedishuttle’s Motion with respect to this issue.
- 17 **Testimony that Attacks Means, Methods, Benefits, or Manner of Providing Service Features.** Speedishuttle claims that Shuttle Express challenges the Commission’s finding that Speedishuttle proposed to offer different service than Shuttle Express provides by maligning the service features that Speedishuttle currently provides. We agree that Mr. Wood’s opinions regarding what constitutes different service exceed the scope of the issues we will consider, and grant Speedishuttle’s Motion with respect to certain portions of his testimony. We decline, however, to exclude Mr. Marks’s or Mr. Kajanoff’s testimony, both of which focus on quantifying the extent to which Speedishuttle has adopted its proposed business model.

² *Id.* at ¶24.

18 Accordingly, we exclude the following portions of Wood’s testimony:

1. Page 12, line 12 beginning at “and” through line 19
2. Page 13, lines 1-3, lines 13-16
3. Page 14, lines 1-6; line 16 beginning at “Unlike” through line 18

19 **Testimony Related to Average Total Cost of Service.** Speedishuttle also argues that Mr. Kajanoff’s testimony erroneously relies on data related to average total cost to support its argument that Speedishuttle engages in predatory pricing. As we held in Order 14, however, Shuttle Express alleges that Speedishuttle is providing service below cost in violation of RCW 81.04.110 and RCW 81.28.010, not anti-trust laws. Speedishuttle relies on federal case law related to predatory pricing to support its argument that Mr. Kajanoff’s testimony should be excluded, which is irrelevant to this proceeding. Accordingly, we deny Speedishuttle’s Motion as it relates to this issue.

20 **Improper Character Attacks.** Finally, Speedishuttle argues that Shuttle Express filed testimonial “character evidence” that violates the Rules of Evidence. We grant Speedishuttle’s Motion related to this issue, in part, because portions of Mr. Kajanoff’s testimony exceed the scope of this proceeding. The administrative law judge informed the parties at the December 28, 2016, discovery conference that information regarding Speedishuttle’s motives for entering the Seattle market is not useful to the Commission in making its determination about whether Speedishuttle is providing service consistent with the business model the Commission approved. Mr. Kajanoff’s testimony regarding Speedishuttle’s motives and alleged mistreatment of its employees is therefore irrelevant to this proceeding. Specifically, we exclude the following portions of Mr. Kajanoff’s testimony:

1. Page 15, lines 11-21
2. Page 16, lines 1-22
3. Page 17, lines 1-16

21 By this Order, the Commission determines only that the excluded testimony would not be admitted if offered at the hearing. The Commission makes no determination regarding the admissibility of the remaining prefiled testimony.

ORDER

THE COMMISSION ORDERS THAT:

- 22 (1) Speedishuttle of Washington, LLC d/b/a Speedishuttle Seattle's Motion in Limine to Exclude Referenced Testimony filed by Shuttle Express is GRANTED, in part, as described in paragraphs 13, 18, and 20, above. The Commission otherwise DENIES the Motion.
- 23 (2) Shuttle Express, Inc. must file revised, redlined testimony consistent with the terms of this Order.

DATED at Olympia, Washington, and effective February 3, 2017.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RAYNE PEARSON
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.