

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC.,
Petitioner and Complainant,
v.
SPEEDISHUTTLE WASHINGTON, LLC,
Respondent.

SPEEDISHUTTLE WASHINGTON LLC
d/b/a SPEEDISHUTTLE SEATTLE,
Complainant,
v.
SHUTTLE EXPRESS, INC.,
Respondent.

DOCKET NOS.
TC-143691, TC-160516 & TC-161257
SPEEDISHUTTLE WASHINGTON, LLC'S
MOTION TO COMPEL DATA REQUEST
RESPONSES TO SPEEDISHUTTLE'S
SECOND SET OF DATA REQUESTS TO
SHUTTLE EXPRESS, INC.

1 Pursuant to WAC 480-07-375(1)(c) and 480-07-405(3), Speedishuttle Washington, LLC
("Speedishuttle") moves the Commission for an order overruling objections asserted by Shuttle
Express, Inc. ("Shuttle Express") and compelling Shuttle Express to provide complete responses
to Second Data Requests of Speedishuttle Washington, LLC to Shuttle Express, Inc.

I. RELEVANT PROCEDURAL BACKGROUND

2 The UTC entered Order 15/08/05 revising the procedural schedule in this consolidated
proceeding on January 18, 2017. That procedural schedule set a deadline of March 17, 2017 for
Speedishuttle's Opening Testimony.

3 On January 20, 2017, Speedishuttle served its Second Data Requests to Shuttle Express, Inc.
which included 26 discrete data requests limited to the following topics: 1) Data Requests

Relating to Unauthorized Commissions, Rebates and Payments, 2) Data Requests Relating to “Rescue Service,” and 3) Data Requests Relating to Shuttle Express’ Predatory Pricing Allegation, in View of Order 14. The latter category was served in order to seek additional information relevant to Shuttle Express’ “predatory pricing” complaint relative to Shuttle Express’ representations of that Complaint made in its Answer in Opposition to Respondent’s Motion for Summary Determination, filed January 10, 2017.

4 On January 24, 2017, UTC Staff also served data requests to Shuttle Express. Those data requests related to the allegations made in Speedishuttle’s Complaint against Shuttle Express.

5 On February 3, 2017, Shuttle Express served on Speedishuttle its Answers and Objections of Petitioner Shuttle Express, Inc. A true and correct copy of Shuttle Express’ Answers and Objections, which include Speedishuttle’s Second Data Requests to Shuttle Express, are attached hereto as Exhibit A. Of the 26 discrete data requests served on Shuttle Express, Shuttle Express objected to every data request and provided sufficient responses to just 3 requests. Many of the responses simply directed Speedishuttle to the responses Shuttle Express provided to UTC staff, who had not posed the same data requests as Speedishuttle. Thus, those responses were also inadequate as to Speedishuttle’s requests.

6 Also on February 3, 2017, Shuttle Express served responses to UTC Staff’s data requests. These data request responses provided some of the substantive information Speedishuttle sought, but not all. A true and correct copy of Shuttle Express’ data request responses to UTC Staff are attached hereto as Exhibit B.

7 On February 8, 2017, counsel for Speedishuttle sent an email to counsel for Shuttle Express attempting to confer on Shuttle Express' objections and responses to Speedishuttle's data requests. In the spirit of compromise and in order to elicit a more complete response from Shuttle Express, Speedishuttle offered to limit its requests in numerous ways. After several communications between the parties over the course of the following week, Shuttle Express made clear it would not provide even the more limited responses Speedishuttle had suggested in compromise. Shuttle Express did supplement one response, on February 13, 2017. That particular data request and response are not at issue in this motion.

8 With time elapsing, Speedishuttle, while mindful of the admonition against cumulative motion practice as referenced in Order 13/06/03, has little alternative now but to file this Motion to Compel.

II. ARGUMENT

9 Due to the limited time between the issuance of Order 15/08/05, by which the UTC revised the procedural schedule for this consolidated proceeding and the March 17, 2017 deadline for Speedishuttle to file Opening Testimony, Speedishuttle has sought to quickly obtain discovery from Shuttle Express relevant to Speedishuttle's Complaint against Shuttle Express. Because Shuttle Express objected without providing complete responses to the overwhelming majority of Speedishuttle's data requests, Speedishuttle subsequently made an expeditious effort to confer with Shuttle Express in good faith in order to resolve the dispute of the parties. That effort failed, but the time constraints on Speedishuttle remains. Thus, Speedishuttle finds it necessary to move to compel responses to the following data requests served to Shuttle Express:

A. Discovery on Unauthorized Commission Payments

10 In its data request responses, Shuttle Express admitted it makes payments to hotel concierges pursuant to a referral agreement between Shuttle Express and the hotel concierge. However, Shuttle Express refused to provide the information by which Speedishuttle, and ultimately the UTC, can determine whether the persons receiving referral payments were operating with permission of the UTC. The following requests are at issue in this Motion in this respect:

11 **Data Request No. 15.** Please identify each person (including entities and individuals) to whom you paid Unauthorized Commissions for referrals or bookings from January 1, 2013 to the present. Include in your description the name, address and phone number of each such person.

Data Request No. 19. For each person to whom Unauthorized Commissions have been paid during the period of January 1, 2013 to the present, produce documents from which the total commissions paid can be determined, including but not limited to cancelled checks, receipts reflecting payment, invoices, or other written requests for payment.

Data Request No. 20. Describe the total numeric amount in dollars of all Unauthorized Commissions paid by Shuttle Express during the period of January 1, 2013 to the present.

12 By these requests Speedishuttle requested that Shuttle Express identify each person to whom Shuttle Express paid commissions during a stated time period and produce information which will reflect the total amount paid to each.

13 Shuttle Express objected that these requests sought irrelevant information. Speedishuttle's Complaint against Shuttle Express alleges that Shuttle Express made unlawful commission and or rebate payments in violation of state law. These requests seek information by which it can be determined whether commission payments made by Shuttle Express were unlawful, and for

those which were, the number of violations and total dollar amount of commission payments. Thus, they are plainly relevant despite Shuttle Express' continued contention otherwise.

14 Shuttle Express also objected that these requests are overbroad. In order that the Commission may determine whether commission payments made by Shuttle Express were truly paid to ticket agents under valid and approved ticket agent agreements, or were unauthorized commissions as alleged by Speedishuttle, sufficient information must be produced by Shuttle Express so that the persons paid commissions can first be compared to Shuttle Express' UTC-approved ticket agent agreements, and the unapproved commissions then tallied and totaled. Thus, this request is narrowly tailored to seek only the information necessary to make that determination.

15 Shuttle Express also objected that these requests are burdensome. However, beyond the specific example given by Speedishuttle in its Complaint, the evidence needed to establish the frequency of unlawful commission payments and total dollar amount of unlawful commission payments is exclusively in the possession of Shuttle Express. Thus, any burden on Shuttle Express is outweighed by the need of Speedishuttle in obtaining this information.

16 Shuttle Express also objected that the information requested is proprietary. However, Shuttle Express' ticket agent agreements must be filed with the Commission and are therefore a matter of public record. Shuttle Express cannot avoid abiding by Commission rules by failing to file commission agreements and then refuse to produce them on the basis that they are proprietary. To be lawful they must be filed and once filed they are no longer proprietary. Thus, Shuttle Express' position is baseless and its objections should be overruled.

17 Nevertheless, Speedishuttle offered to compromise on these requests to some degree, but Shuttle Express refused to provide anything beyond the response it intends to provide to UTC Staff, which appears to be the Form 1099 documents Shuttle Express issued to a number of persons or entities. However, these documents have not been produced to Speedishuttle and may be redacted in ways that will not enable the Commission to resolve Speedishuttle’s Complaint, and the documents will not be produced for the entire time period requested by Speedishuttle. Moreover, the IRS does not require the issuance of Form 1099 documents for cumulative payments of under \$600.00.¹ Many of the persons paid commissions by Shuttle Express might not receive a Form 1099. Thus, by limiting its response to the production of Form 1099s issued Shuttle Express may avoid providing a complete response to the inquiry at issue. Consequently, Speedishuttle seeks an order overruling Shuttle Express’ objections to data requests 15, 19, and 20, and ordering it to produce the information requested.

B. Data Requests Related to Predatory Pricing Complaint

18 Shuttle Express asserted in its Complaint that Speedishuttle engaged in “predatory pricing” based on its fares being below cost. Whether Speedishuttle engaged in predatory pricing as defined in federal law, was addressed in Speedishuttle’s Motion for Summary Determination. Shuttle Express’ Answer in Opposition to Speedishuttle’s Motion for Summary Determination (“Answer in Opposition”) argued its Complaint is not based upon federal standards for predatory pricing, and insisted instead that the UTC had more plenary powers, which it asserted as follows:

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

¹ 26 CFR 1.6041-1(a).

Respondent's admissions it is priced below cost. 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.²

This statement is further explained in a footnote, by which Shuttle Express now admits it is not necessarily seeking to raise Speedishuttle's fares:

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.³

19 While never fully articulated in Shuttle Express' Complaint, the evolving position taken by Shuttle Express in its Answer in Opposition demonstrates that Shuttle Express is not necessarily concerned with the level of the fares set by Speedishuttle. The gravamen of Shuttle Express' complaint is apparently the loss of passengers, which it singularly attempts to attribute to Speedishuttle.

20 Setting that aside for this Motion, Shuttle Express' stated basis for its Complaint –fares below cost—is overly simplistic and ignores reality through conspicuous omission. What is omitted by

² Petitioner's Answer in Opposition to Respondent's Motion for Summary Determination, ¶ 20.

³ *Id.*, n. 20.

Shuttle Express is that the nature of the service at issue is share ride. Share ride service operates much like public transportation in that isolated individual fares are not sufficient to exceed the cost of service. With share ride, multiple fares per trip are necessary to turn a profit.

- 21 For a share ride service provider to ensure its fares will cover the average variable cost (the additional incremental cost of making a single trip) of providing service, it must know how many passengers will ride on a particular trip before ever setting its fares. This, however, is nearly, if not actually impossible, and therefore every share ride service provider is likely to experience instances during which service is provided at a loss for a particular trip.
- 22 Considering this, and the intense competition regulated auto transportation companies face from non-regulated transportation companies, the reality is that what makes a door-to-door share ride service profitable is a complicated issue which requires more than an analysis of total revenue compared to total cost.⁴
- 23 Shuttle Express, in an apparent attempt to avoid that reality, has attempted to establish its complaint case solely through the existence of Speedishuttle's operating losses. This, however, does nothing to reflect how Speedishuttle's fares are unfair, unjust, or oppressive to Shuttle Express and should not be viewed as helpful to the Commission. What would be helpful to the Commission in determining what is unfair, unjust and oppressive (or the converse) to Shuttle Express, is information by which Speedishuttle's fares-to-cost ratio can be compared to Shuttle Express' fares-to-cost ratio for various market segments.

⁴ This was at least to some degree recognized by the UTC in the 2013 rulemaking in Docket TC-121328, when it permitted auto transportation companies to operate on flexible fares.

24 In that regard, Shuttle Express sought discovery from Speedishuttle on its financial data, and more specifically, it requested a financial statement to show its costs and revenues. That information was proprietary, but nonetheless Speedishuttle produced it pursuant to a confidentiality agreement which protects the information from public disclosure. Shuttle Express, in turn, later trumpeted that it proved that Speedishuttle's fares were unfair and oppressive to Shuttle Express. However, once again, Shuttle Express may possibly be operating at an even lower fare-to-cost ratio than Speedishuttle. Thus, Speedishuttle sought responses to the following requests:

Data Request No. 31. Describe separately Shuttle Express' average variable cost for providing a door-to-door share ride trip from Sea-Tac Airport to each of the following locations: downtown Seattle; downtown Bellevue; and Sammamish, Washington.

Data Request No. 32. Identify the number of adult passengers which Shuttle Express must transport on a round-trip fare for its fares to exceed average variable cost for a door-to-door share ride trip from Sea-Tac Airport to each of the following locations: downtown Seattle; downtown Bellevue; and Sammamish, Washington.

Data Request No. 33. Describe separately Shuttle Express' present average total cost for providing a door-to-door share ride trip from Sea-Tac Airport to each of the following locations: downtown Seattle; downtown Bellevue; and Sammamish, Washington.

Data Request No. 34. Identify the number of adult passengers which Shuttle Express must transport on a round-trip fare for its fares to exceed average total cost for a door-to-door share ride trip from Sea-Tac Airport to each of the following locations: downtown Seattle; downtown Bellevue; and Sammamish, Washington.

Data Request No. 35. Admit that Shuttle Express has made door-to-door share ride trips for which its fares received do not exceed its average variable cost.

Data Request No. 36. Admit that Shuttle Express made door-to-door share ride trips for which its fares received did not exceed its average variable cost prior to Speedishuttle's certificate application in Washington.

Data Request No. 37. Admit Shuttle Express has made door-to-door share ride trips for which its fares received do not exceed its average total cost.

Data Request No. 38. Admit that Shuttle Express made door-to-door share ride trips for which its fares received did not exceed its average total cost prior to Speedishuttle's certificate application in Washington.

Data Request No. 39. Admit Shuttle Express' average variable cost for providing door-to-door share ride service exceeds the total fares charged for two people, booked together, consisting of a single adult passenger travelling with a single child passenger.

Data Request No. 40. Admit Shuttle Express' average variable cost for providing door-to-door share ride service exceeds the total fare charged for a single adult passenger.

25 Shuttle Express asserted a multitude of identical objections to each and every one of these requests.

26 Shuttle Express objected that these requests were irrelevant. As discussed above, these requests are squarely aimed at showing that Speedishuttle's fares are not unfair or oppressive to Shuttle Express because the information is essential to demonstrating some simple realities regarding the fare-to-cost ratio for each provider's share ride service which must be considered in order to determine whether Speedishuttle's fares are unfair, unjust or oppressive to Shuttle Express.

27 Shuttle Express also objected that these requests were overbroad. To the contrary, rather than seeking all of Shuttle Express' financial data, Speedishuttle asked for the narrowest possible

information needed to draw a comparison between Speedishuttle and Shuttle Express' fares and costs for door-to-door share ride service in order to provide a comparison between Speedishuttle and Shuttle Express' door-to-door share ride fares-to-cost ratio.

- 28 Shuttle Express further objected that these requests are unduly burdensome. This boilerplate objection should also be overruled. Shuttle Express cannot seek to prove that Speedishuttle's fares are unfair, unjust and oppressive to Shuttle Express without actually demonstrating how its own door-to-door share ride service works. Further, Shuttle Express is the sole party in possession of the information and the need to Speedishuttle outweighs the burden on Shuttle Express. The below cost/predatory pricing allegation hardly exists in a vacuum.
- 29 Finally, Shuttle Express objects that the information sought is proprietary and would allow Speedishuttle to use it to gain an unfair competitive advantage. Yet, Shuttle Express successfully persisted in receiving a financial statement from Speedishuttle which revealed far more information than merely the cost of operating providing service for individual trips. It is simply incredulous and entirely inconsistent for Shuttle Express to be unwilling to share narrower information with Speedishuttle than Shuttle Express insisted upon receiving from Speedishuttle. If Shuttle Express' objection is sustained, the result will be an unbalanced presentation of information to the Commission, through which the Commission will hear only of Speedishuttle's startup losses, and nothing about the specific cost attributes of how the two companies' share ride services operate. That evidentiary imbalance should not be tolerated in a due process environment.

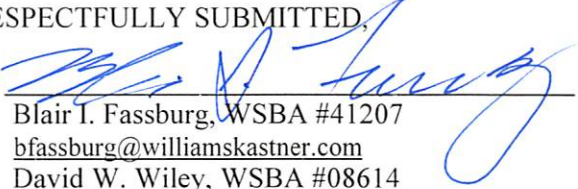
III. CONCLUSION

30 For the reasons stated above, Speedishuttle respectfully requests the Commission grant this Motion to Compel.

DATED this 21st day of February, 2017.

RESPECTFULLY SUBMITTED,

By


Blair I. Fassburg, WSBA #41207
bfassburg@williamskastner.com
David W. Wiley, WSBA #08614
dwiley@williamskastner.com

Attorneys for Speedishuttle Washington, LLC

CERTIFICATE OF SERVICE

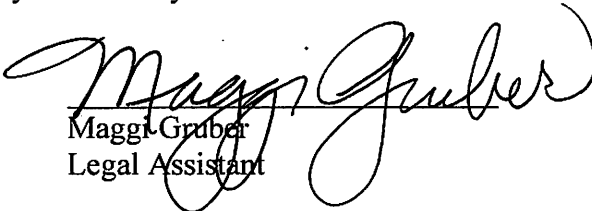
I hereby certify that on February 21, 2017, I caused to be served the original and three (3) copies of the foregoing documents and attachments to the following address via first class mail:

Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
Attn.: Records Center
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

I further certify that I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing documents and attachments via the WUTC web portal; and served a copy via email and/or first class mail, postage prepaid, to:

<p>Julian Beattie Assistant Attorney General 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>Greg Kopta Director/Administrative Law Judge 1300 S. Evergreen Park Drive SW P.O. Box 47250 Olympia, WA 98504-7250 (360)-664-1355 Email: gkopta@utc.wa.gov</p>
<p>Brooks Harlow Lukas, Nace, Gutierrez & Sachs, LLP 8300 Greensboro Dr. Suite 1200 McLean, VA 22102 (703) 584-8680 Email: bharlow@fcclaw.com</p>	<p>Rayne Pearson Administrative Law Judge 1300 S. Evergreen Park Drive SW P.O. Box 47250 Olympia, WA 98504-7250 360-664-1136 Email: rpearson@utc.wa.gov</p>

Dated at Seattle, Washington this 21st day of February 2017.


Maggi Gruber
Legal Assistant