

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 (consolidated)

PETITIONER'S RESPONSE TO  
THE COMMISSION'S NOTICE  
OF INTENT TO AMEND ORDER  
08 ISSUED MARCH 23, 2017

**INTRODUCTION**

1 Petitioner/Complainant Shuttle Express, Inc. (“Shuttle Express”) files this response to the Commission’s Notice of Intent to Amend Order 08 issued March 23, 2017 (“Notice”). The Commission should not amend Order 08 as proposed in the Notice. Both the Notice and testimonies of Staff and Speedishuttle Washington, LLC (“Speedishuttle) in this consolidated case conflate a de facto enforcement proceeding against Shuttle Express with a carrier complaint and rehearing of an application for a certificate of an unrelated third party (Speedishuttle). In so doing, the Commission risks giving rights to Speedishuttle that it does not have in an application proceeding or a rehearing thereof. It also risks denying Shuttle Express the rights to which it is entitled under the Washington laws and rules as well as fundamental due process rights to which it is entitled in an enforcement proceeding. These issues will be touched on in this response, though more extensive legal argument and briefing will be reserved for the post-hearing briefs in whatever forum or proceeding the Commission adopts.

## DISCUSSION

2           First, it is important to stress (and the Commission should make clear at the outset) that regardless of its procedural determination on the Notice, the Commission presumably has not prejudged the legality of the transportation discussed in the staff's investigation and testimony. There is an extensive and relevant factual background to that transportation<sup>1</sup> that was largely overlooked or ignored in the Staff's investigation and testimony. Even more importantly, there are overriding legal issues that are also largely ignored in Speedishuttle's and the Staff's testimony.<sup>2</sup> Shuttle Express hopes and assumes that in issuing the Notice the Commission has not prejudged the outcome on the allegations of Docket TC-161257 based on the testimony of just one side and absent any meaningful legal analysis. Shuttle Express will conclusively demonstrate in its responsive testimony, at the hearing, and in post-hearing briefs that the transportation at issue was fully lawful and indeed outside the scope of the Commission's jurisdiction.

3           Second, but perhaps even more importantly, the Notice suggests a remedy that would violate the public service laws—even assuming violations are found.<sup>3</sup> But regardless of the ultimate findings, the only reason to consider the violations alleged by Speedishuttle and the Staff in the context of this long-pending case would be to use a violation—again if found—as grounds for retroactively finding that Shuttle Express was not providing service under its certificate to the satisfaction of the Commission. It is

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<sup>1</sup> New evidence is not needed to establish the background, however. It can largely be found in the records and files in Docket No. TC-12032, including the Staff's report, orders and the transcript.

<sup>2</sup> The Staff's report has one sentence that says, "This rule does not require multiple stops to or from the airport for the trip to fall under auto transportation rules." Pre-filed Exh. No. DP-2 at 9. It provides no explanation or legal analysis as to why Staff reached this conclusion—which is the exact opposite of the conclusion the staff reached about single-stop independent contractor service in TC-120323.

<sup>3</sup> And of course there should be no presumption of a finding of violations at this early stage.

notable that despite past violations that had been found in Docket TC-120323, the Commission previously declined to use those violations to make a finding on satisfaction in this Docket TC-143691. That exercise of restraint was more than appropriate, because to have done so risked committing a serious error of law. The Commission should again decline to accept the invitation of Speedishuttle to commit such error.

4           The fundamental reason that the Commission cannot permit an applicant for new authority to use alleged violations of the public service laws to support a finding of “unsatisfactory service” is that it conflates and violates the very separate and distinct laws governing applications for new certificates for areas already served and violations by existing carriers. New entry is governed by RCW 81.68.040, which permits an applicant to obtain a certificate “to operate in a territory already served by a certificate holder ... , only when the existing auto transportation company ... servicing such territory will not provide the same to the satisfaction of the commission....” The term “same” plainly refers to the service provided, not to regulatory compliance. In contrast, the legislature gave the Commission ample—but distinctly different—remedies to deal with alleged regulatory violations. They include RCW 81.68.030 (amend, alter, revoke, etc. certificate for “willful” violation after notice and hearing) and fines, fees, misdemeanor charges and other penalties in RCW 81.04.380, 385, 387, 390, 400, and 405, and RCW 81.68.080.

5           Despite exhaustive provisions for enforcement in numerous statutes, not one of the laws on violations gives an applicant like Speedishuttle the right to obtain a new certificate as a penalty against the incumbent for regulatory violations. Nor do any of those enforcement statutes empower the Commission to penalize a certificate holder by subjecting it to competition that would otherwise violate RCW 81.68.040. Indeed, under

RCW 81.68.030, the violation must be found to be “willful” before the Commission can alter the rights of a certificate holder.<sup>4</sup>

6           In diminishing the rights of Shuttle Express under its certificate retroactively, the Commission would be adding an additional penalty that has never been approved or enacted into law. There are penalties aplenty in the laws, and indeed, the Staff recommends over a \$1.0 million fine. But crippling the incumbent carrier with unfair and unsustainable competition on top of a massive fine is simply not the type of penalty the legislature has ever contemplated or allowed, regardless of the nature of the violation.

7           Finally, the Notice would expand the issues in a completely unfair and one-sided way. Introducing the alleged violations as retroactive support on “satisfaction” would unfairly allow Speedishuttle to bolster a record that would otherwise seem to lack any material support for the representations and assumptions that underlaid the grant of the Speedishuttle certificate. Indeed, the record so far conclusively demonstrates that in hindsight the grant of the Speedishuttle certificate was not justified. It was based on misconceptions about the illusory “new and different” character of the proposed service. Rather than expanding the market by serving the “unserved,” it has divided the market in a way that threatens the very viability and sustainability of share ride airporter service in King County. But putting aside for now the great risk to the public interest, injecting alleged enforcement issues in the way Staff and Speedishuttle propose can only help Speedishuttle and can only harm Shuttle Express.

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<sup>4</sup> Allowing a new certificate in an area already served by a certificate holder is, at the very least, a *de facto* alteration of the rights of the existing certificate holder.

The issue of the satisfactory nature of the service of Shuttle Express should not be reheard in these dockets, especially based on evidence that is not at all new. The existence of the single-stop independent contractor referrals that is the basis of Mr. Pratt's pre-filed testimony in this docket was well-known by both staff and the Commission in the 2012 docket. The Staff's answer to the Shuttle Express petition for review explained it fully:

The enforcement in this proceeding addresses only the **multi-stop** (that is, **share-ride**) transportation provided by independent contractors on behalf of Shuttle Express. Staff witness Betty Young explained this at hearing in response to Judge Torem's questions:

Q [By Judge Torem] So is it Commission Staff's position, then, that anytime Shuttle Express dispatches somebody for regulated service, and it's in a vehicle operated by them under their certificate, it has to be an employee of the company?

A [Betty Young] That's what the Commission's rules require, yes.

Q [Judge Torem] If an independent contractor drives, for whatever reason, it's a violation of this particular rule [WAC 480-30-213(2)]. Is that the Commission's position?

A [Betty Young] The independent contractors can provide other service, which is completely fine under their limo license or under their for-hire authority. That's regulated through the Department of Licensing. However, once it switches over into **share ride service** on Shuttle Express's regulated routes, that's where it violates Commission rules<sup>5</sup>

Of course, a single-stop service is not "share ride," as the Staff witness explained. Nor does single-stop allow for any question that the service is being provided under a "single contract" which is required for the service to come under the jurisdiction of the DOL as limousine service.<sup>6</sup>

<sup>5</sup> TC-120323, Commission Staff's Answer to Petition for Administrative Review, at 7, filed Jan. 13, 2014.

<sup>6</sup> See RCW 46.04.276 ("Limousine carrier means a person engaged in the transportation of a person or group of persons, who, under a single contract, acquires, on a prearranged basis, the use of a limousine to travel to a specified destination or for a particular itinerary) and RCW 46.04.274 ("Limousine" means a category of for hire, chauffeur-driven, unmetered, unmarked luxury motor vehicles.") The statutes do not specify who can or must do the

9           The term “limousine” is defined by the nature of the motor vehicle, not the parties nor history of the arrangement of or entry into the single contract. RCW 46.04.274. Because the single-stop transportation is provided in a limousine, by a limousine carrier, the Commission has no jurisdiction over it. *E.g.*, Washington Laws, 1996, Ch. 87, § 22. Accordingly, both the Staff and the Commission found no violation for the more than 6,000 single-stop trips revealed repeatedly in Docket TC-120323. Of the 12,075 total trips—both single and multi-stop—that were unquestionably known and discussed extensively by the Staff in its report and the Commission in its orders,<sup>7</sup> only the 5,715 multi-stop trips were the subject of any enforcement action whatsoever.<sup>8</sup>

10           The fact of past and ongoing single-stop referrals to independent contractors is not at all new, but merely an apparently new and previously undisclosed enforcement interpretation by the Staff. Thus, if it is to be introduced here then in fairness the Commission should also permit Shuttle Express to broaden the issues somewhat. The Commission’s prior orders in this case on discovery and testimony have made it difficult for Shuttle Express to fully vet the broad and critically important public interest issues that underlie the case.

11           The Commission through both its proposed actions (massive fines) and its inaction is putting the very existence of county-wide share ride service in King County at great risk. Uber, light rail, and cheap gas and parking are factors presently outside the control of the Commission. But Speedishuttle and Shuttle Express are within its ambit.

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prearrangement or with who the single contract must be made. For single stop trips, the contract is either between the limousine carrier and the single person or party, or between the limousine carrier and Shuttle Express.

<sup>7</sup> *See, e.g.*, TC-120323 Staff Investigation Report by Betty Young at 10-12, March 2013.

<sup>8</sup> *See* TC-120323 Commission Order 03, Nov. 11, 2013, and Commission Order 04, March 19, 2014.

And this case tees up critically important public interest issues about the two carriers and the share ride market generally. Thwarting some of Shuttle Express’s good faith efforts to get all the relevant facts into the record is not the best way for the Commission to ensure that the broad and long-term public interest is served.

12 If satisfaction is to be re-tried, then the Commission should also allow all of the upcoming Shuttle Express pre-filed rebuttal testimony that fairly addresses the responsive testimony of Speedishuttle and the Staff, notwithstanding Order 16 and prior rulings that have been somewhat restrictive on the scope of evidence regarding the long term public interest implications of the case.<sup>9</sup> Further, the Commission should allow and enforce the pending Shuttle Express discovery of Speedishuttle—especially the financial and ridership data that is essential to showing that having two direct competitors in this market is plainly unsustainable in the long term. These small but important revisions do not require any expansion of the current case schedule.<sup>10</sup>

13 Finally, the Notice asked for comments on the schedule, should the Commission proceed to add “satisfaction” based on the Staff’s investigation to the issues to be considered in these dockets. Shuttle Express urges no changes to the current schedule. These dockets are already proceeding unusually slowly. The Commission already ordered a several month delay to the hearing due to the filing of the complaint in TC-161257.<sup>11</sup> The reason for that delay was to allow the Staff to undertake and file its

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<sup>9</sup> TC-143691, TC-160516, TC-161257 - Order 16, Order 09, Order 06 - Order on Motion in Limine, Feb. 3, 2107.

<sup>10</sup> The discovery at issue was already served on March 20, 2017, the first business day after the other parties served their pre-filed testimony. Responses are due on April 3, 2017. All of the data requests are explicitly targeted at Speedishuttle’s March 17<sup>th</sup> testimony and thus should be allowed in any event.

<sup>11</sup> TC-143691, TC-160516, TC-161257 - Order 15, Order 08, Order 05 - Order Revising Procedural Schedule, Jan. 18, 2017.

investigation—now done—and to allow Shuttle Express to file responsive testimony—already due April 5<sup>th</sup>. The previously delayed schedule also allows Staff and Speedishuttle to file rebuttal testimony on the Staff’s investigation, due April 24<sup>th</sup>. The facts are largely admitted or can be found in the record of Docket TC-120323, making the open issues primarily legal and policy issues. So little or no discovery should be needed and the current schedule already allows for sufficient time to file three full rounds of testimony and conduct the hearing as currently scheduled on May 10<sup>th</sup> and 12<sup>th</sup>. One possible change that Shuttle Express may request could be to post-hearing briefing. This issue can be addressed at the hearing, at the conclusion of the evidence.

14           Given that these dockets have already been delayed twice, first for multiple motions and petitions by Speedishuttle to revise or set aside interlocutory orders and then to specifically accommodate the issues in Staff’s testimony, no further delays are warranted. Delay would be very prejudicial to Shuttle Express and risks further and possibly irreparable harm to the public interest, because the long-term viability of share ride service in King County is most definitely at stake in these dockets.

### **CONCLUSION**

15           The Commission should not modify Order 08, as set forth in the Notice, as the Staff’s testimony will be shown to be nothing more than a different outcome based on old facts. The single-stop independent contractor trips were known and fully investigated already in TC-120323,<sup>12</sup> and disregarded as being lawful. But if the Commission does broaden the case somewhat to the benefit of Speedishuttle, it should ensure that Shuttle

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<sup>12</sup> Which docket was also repeatedly cited by Speedishuttle in its application hearing and materials in 2014 and 2015 in TC-143691.



Express is given similar leeway to full and fairly respond to all the issues implicated by Speedishuttle's prefiled testimony. And regardless of whether Order 08 is amended or not, the case schedule should not be changed.

Respectfully submitted this 30<sup>th</sup> day of March, 2017.

LUKAS, LAFURIA, GUTIERREZ & SACHS, LLP



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## CERTIFICATE OF SERVICE

I hereby certify that on March 30<sup>th</sup>, 2017, I served a copy of 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: <a href="mailto:jbeattie@utc.wa.gov">jbeattie@utc.wa.gov</a></p>	<p>David W. Wiley Blair I. Fassburg Williams Kastner Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 (206) 233-2895 Email: <a href="mailto:dwiley@williamskastner.com">dwiley@williamskastner.com</a> Email: <a href="mailto:bfassburg@williamskastner.com">bfassburg@williamskastner.com</a></p>
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Dated at Tysons, Virginia this 30<sup>th</sup> day of March, 2017.



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Joseph Mirshak  
Legal Assistant  
LUKAS, LAFURIA, GUTIERREZ & SACHS, LLP