

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-161257 RESPONSE OF SPEEDISHUTTLE WASHINGTON, LLC d/b/a SPEEDISHUTTLE SEATTLE TO NOTICE OF INTENT TO AMEND ORDER 08
SPEEDISHUTTLE WASHINGTON LLC d/b/a SPEEDISHUTTLE SEATTLE, Complainant, v. SHUTTLE EXPRESS, INC., Respondent.	

1 Speedishuttle Washington, LLC (“Speedishuttle”) provides this response to the Notice of Intent to Amend Order 08 served March 23, 2017 in support of the proposed amendment to Order 08. In its application and throughout the application proceeding in Docket TC-143691, Speedishuttle sought an unrestricted certificate to provide door-to-door shared ride service between SeaTac Airport and King County, Washington, and the proposed amendment will ensure that outcome remains possible in this rehearing.

2 At the application hearing, Speedishuttle demonstrated that despite being the same type of service (door-to-door shared ride) as Shuttle Express, it provided service features which sufficiently differentiated its service from Shuttle Express so that under Commission rules it would be unnecessary to find that Shuttle Express failed to serve to the satisfaction of the Commission. However, Speedishuttle alternatively sought a determination Shuttle Express

RESPONSE OF SPEEDISHUTTLE WASHINGTON, LLC d/b/a
SPEEDISHUTTLE SEATTLE TO NOTICE OF INTENT TO AMEND
ORDER 08 - 1

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failed to serve to the satisfaction of the Commission. Shuttle Express argued in the application hearing that the service differentiation features were meaningless and that Speedishuttle proposed “essentially the same service” as offered by Shuttle Express and argued that the market could not support additional providers. Shuttle Express further sought to reopen the record to submit additional evidence of Shuttle Express’ decline in passenger numbers to support its sustainability arguments and made similar arguments in its Petition for Review of Order 02.

3 In Order 04, the Commission ruled Speedishuttle’s proposed service was not the same service as Shuttle Express and therefore found that pursuant to Commission rules and RCW 81.68.040 it was unnecessary to consider whether Shuttle Express had served to the Commission’s satisfaction. The Commission also overruled Shuttle Express’ Motion to Reopen and arguments regarding sustainability.¹ Speedishuttle contends this ruling was correct, and that pursuant to Commission rule and law, this duly authorized Speedishuttle to receive an unrestricted certificate to provide the service proposed.²

4 This rehearing was initiated based upon a contention that Speedishuttle was not in fact providing the service features it proposed to provide. Because Speedishuttle has demonstrated that it largely provides those features (or has been prevented from fully doing so), Shuttle Express appears to be once again attempting to discount the value of those features to repeat its application case argument that Speedishuttle provides “essentially the same service” as Shuttle Express.

¹ Order 04, p. 5, n. 7.

² Speedishuttle further contends it did in reality implement the service differentiation features the Commission specifically articulated in Order 04 caused Speedishuttle’s service to be different from the service provided by Shuttle Express.

5 Collateral attacks on the Commission’s rulings should not be permitted. However, the Commission expressly ruled it need not make a finding on service to the satisfaction of the Commission to grant Speedishuttle’s application. Thus, to the extent the Commission now believes Speedishuttle must establish that Shuttle Express failed to serve to the satisfaction of the Commission in order to operate the service it proposed without restriction, due process requires that the Commission ultimately make a determination rather than exclude the issue from this proceeding. An amendment to Order 08 should not, however, permit re-arguing issues that were included in the application case and expressly ruled upon, such as the value of Speedishuttle’s service features and sustainability of service.

6 Speedishuttle strongly supports the goal here of amending Order 08 on the Commission’s own Motion. But in doing so, it does not waive its current and persisting legal argument that unappealed Final Order 04 was and is the legally correct Order in its finding, under WAC 480-30-140 and RCW 81.68.040, to wit:

[Under WAC 480-30-116] ...[a]ll three elements must be present for the Commission to deny an application to serve a given route. We agree that Speedishuttle does not propose to offer the same service Shuttle Express provides and thus need not address whether Shuttle Express is providing service to the Commission’s satisfaction.³

As we discussed with respect to Shuttle Express, we reach the question of satisfactory service only if we make a finding that the Applicant seeks to provide the same service an existing carrier currently provides. Again, we make no such finding here.⁴

7 As the Notice indicates, Speedishuttle previously asked the Commission to find, on the brief adjudicative proceeding record, that Shuttle Express *was not providing service to the*

³ Order 04, ¶17, p. 6.

⁴ Order 04, ¶30, p. 10.

Commission's satisfaction. Order 04 appropriately found that current law did not require such finding for Speedishuttle to be granted the (unrestricted) certificate it applied for. That ruling is supported by a previous decision of the Court of Appeals, which found the Commission has broad discretion and flexibility to determine when an existing provider's service is adequate,⁵ which discretion the Commission well-exercised in the 2013 rulemaking amending WAC 480-30-140 to provide non-exclusive objective criteria for auto transportation applicants like Speedishuttle.

8 Order 08, however, found that because the Commission had not made a finding (it twice determined in the same order it need not make), Speedishuttle was limited to serving *only* the customer base the Commission found was different in Order 04.⁶ Because that language seems inapposite to Order 04's grant of Speedishuttle's application for an unrestricted certificate, and because Order 08 limited the scope of this proceeding to whether Speedishuttle was in fact providing the service it was authorized to provide and whether its fares were below cost, Speedishuttle enthusiastically agrees Order 08 should now be amended to include the issue the Commission appears to believe it must reach to grant an unrestricted certificate: service to the satisfaction of the Commission.

9 While it welcomes any related revision to Order 08, Speedishuttle also firmly believes the Commission already received ample and sufficient evidence in Docket No. TC-143691 about Shuttle Express' conduct which would demonstrate that it failed to serve to the satisfaction of the

⁵ *Pacific Northwest Transp. Serv., Inc. v. WUTC*, 91 Wn. App. 589, 596-97 (1998)(holding that RCW 81.68.040 permits the Commission to judge the need for additional service in any rational way it chooses).

⁶ This fundamental correlation of not the "same service" finding and omission of a finding of service to the satisfaction of the Commission is at the heart of the parties' legal dispute on rehearing.

Commission. The Commission, in Order 04, stated it did not need to reach the issue of service to the satisfaction of the Commission, not that there was insufficient evidence to do so.⁷ Thus, the Commission should also now be permitted to determine Shuttle Express' historic failure to comply with Commission rules and law demonstrated a failure to serve to the satisfaction of the Commission at the time of the BAP.

10 Speedishuttle's complaint, its testimony of March 17 in the consolidated docket, and the Staff's investigation report and testimony of the same date all collectively provide evidence directly contravening any continuing representation by Shuttle Express that either on the initial BAP record or the rehearing/consolidated complaint record to date it has or is serving to the satisfaction of the Commission. At the time of the filing of Speedishuttle's application on October 10, 2014 and since the expiration of its exemption approval on January 14, 2014, Shuttle Express continued to provide "rescue service"⁸ according to the Staff investigation report Exhibit ___DP-2 which persisted not only through the day of the hearing on Speedishuttle's application (directly contrary to Mr. Kajanoff's testimony under oath), but most likely up until it sought and was granted another, lengthier exemption request on September 29, 2016.

11 Once again, Shuttle Express prefers to seek forgiveness rather than permission.⁹ As bluntly characterized by Chairman Danner at the prior exemption proceeding record on December 12, 2013:

⁷ A position Shuttle Express apparently suggests was adopted by the Commission.

⁸ Use of independent contractors to transport passengers who originally reserved shared ride auto transportation service.

⁹ Order 04, Docket TC-120323, *WUTC v. Shuttle Express, Inc.* (Mar. 2014), ¶30 at 12.

...I am concerned with the message we would send to the other companies if we say “you know, it’s okay to be a scofflaw,” especially a regulated company.¹⁰

My question – you know the thing that troubles me is they’re coming in after showing a pattern and many years of flaunting the regulations, that do exist, simply because they don’t agree with them or they’re contrary to their economic interests.¹¹

This is also a company whose President flatly testified at a Commission proceeding in 2013 during the second enforcement action involving “rescue service” for violations of WAC 480-30-213:

[s]o because we are forced to violate part of the Commission rules, which we’ve been doing for 25 years, I think it’s an oversight of the Commission, of not knowing how to regulate us.¹²

12 The Commission there previously found this determination spoke to the intent/willfulness of Shuttle Express’ actions. Speedishuttle believes these past contradictions in sworn testimony and apparent arrogance for compliance are in and of themselves indisputable indicia of service not to the Commission’s satisfaction as a matter of law both at the time of the BAP and at present.

13 Shuttle Express will likely continue to seek to cloak its historic pattern of disregard of Commission law and rule with assertions that its conduct and operations are permissible and entitled to a statutory shield from challenge to service exclusivity based on the initial omission in finding its service not to the satisfaction of the Commission. Despite the weight of incontrovertible testimony at previous hearings, in sworn declarations and in final orders of the Commission, Shuttle Express is expected to vociferously argue that none of this should in any

¹⁰ Audio recording of Open Meeting. Docket No. TC-132141, (Dec. 2013).

¹¹ *Id.*

¹² Order 04, Docket TC-120323, ¶31, p. 12. Shuttle Express here defends violation of law “by necessity.”

rehearing/complaint proceeding constitute service not to the Commission's satisfaction. However, prior Commission case law is to the contrary. Indeed, in a Title 81 RCW application case, the Commission has previously concluded under a service to the satisfaction of the Commission entry standard, in Order M.V.G. No. 1402, *In re R.S.T. Disposal d/b/a Tri-Star Disposal et al*, GA-845 and 851 (Jul. 1989), that an existing carrier which failed to comply with enforcement requests, with its own promises to comply, with repeated and knowing violations of law which it failed to correct until ordered to do so by the Commission, will not provide service to the Commission's satisfaction.¹⁴ By amending Order 08 to enable such a finding, Speedishuttle trusts the Commission demonstrates it will not be persuaded by Shuttle Express' continued rhetorical smokescreens.¹⁵

14 Speedishuttle does not, however, believe any revision to the present procedural schedule is necessary to present evidence on this issue to the Commission. The evidentiary record presented at the BAP is closed, while Speedishuttle believes sufficient additional evidence to support a finding has been or will be submitted within the confines of the present procedural schedule. Because this issue is one upon which Speedishuttle ostensibly carries the burden of proof, the final round of testimony dedicated to Speedishuttle's rebuttal in its complaint case should also serve as the rebuttal on the satisfactory service issue without response from Shuttle Express. Thus, no extension or additional testimony round appears necessary to submit relevant evidence in the appropriate sequence.


¹⁴ Order M.V.G. No. 1402 at ¶ 9, p. 3 and ¶ 17, p. 4.

¹⁵ Including any argument that allowing Speedishuttle to continue operating under an unrestricted certificate somehow constitutes a diminution of the certificate rights of Shuttle Express.

15 In summary, Speedishuttle concurs Order 08 should be amended to avoid a procedural outcome which might preclude Speedishuttle from preserving its unrestricted certificate in a rehearing. Shuttle Express' historic regulatory compliance orientation, avowed posture and established conduct simply must not be afforded an imprimatur of service to the satisfaction of the Commission any longer. Stopping short of any such finding now in Speedishuttle's view is contrary to the public interest in ignoring behavior that has been repeatedly documented as intentionally flouting law and rule and, concomitantly, encouraging disrespect and disregard for Commission policies and its laws in serving the public interest.

DATED this 30th day of March, 2017.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE


I hereby certify that on March 30, 2017, I caused to be served the original and one (1) copy of the foregoing documents and attachments to the following address via US 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>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 30th day of March, 2017.



Maggi Gruber
Legal Assistant

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ORDER 08 - 9

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