

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 SPEEDISHUTTLE WASHINGTON, LLC'S OBJECTIONS TO, AND MOTION IN LIMINE AS TO PORTIONS OF PRE-FILED REBUTTAL TESTIMONY SUBMITTED BY SHUTTLE EXPRESS, INC.
SPEEDISHUTTLE WASHINGTON LLC d/b/a SPEEDISHUTTLE SEATTLE, Complainant, v. SHUTTLE EXPRESS, INC., Respondent.	

1 Pursuant to WAC 480-07-375 and 480-07-495(1), Speedishuttle hereby objects to the admission of and moves to exclude portions of the pre-filed rebuttal testimony submitted by Shuttle Express which exceeds the scope of these consolidated proceedings and which was filed as response/rebuttal testimony but which in fact response or rebuts nothing.

I. MOTION

2 On February 3, 2017, the Commission entered Order 16/09/06 in these proceedings, granting, in part, Speedishuttle's Motion in Limine filed January 17, 2017. In that Order the Commission ruled, "[w]e grant Speedishuttle's Motion to the limited extent that it seeks to exclude testimony that exceeds the scope of this proceeding,"¹ and struck portions of the testimony of Paul

¹ ¶7.

Kajanoff and Don Wood which related to the subject of sustainability of multiple door-to-door auto transportation providers serving the same territory, which arguments had been previously rejected in Order 04.²

3 Subsequent to the entrance of that Order, Shuttle Express has once again sought to alter and/or reconsider the scope of this proceeding to allow discovery and testimony on sustainability of multiple providers in Petitioner’s Response to the Commission’s Notice of Intent to Amend Order 08 Issued March 23, 2017 (“Petitioner’s Response to Notice to Amend”).³ Moreover, in that filing, Shuttle Express foreshadowed its intention to pre-file testimony which it understood exceeded the scope of this proceeding, by stating:

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. 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.⁴

4 The Commission expressly rejected that overture in Order 17, ruling that Shuttle Express failed to establish any connection between satisfactory service and the market sustainability of two auto transportation providers serving the same territory.⁵ The Commission similarly rejected, in Order 17, Shuttle Express’ procedurally inappropriate request in Petitioner’s Response to Notice

² ¶¶ 11-13.

³ ¶¶ 10, 12.

⁴ ¶ 12.

⁵ Order 17, ¶18.

of Intend to Amend to then permit previously-disallowed discovery on financial and ridership information.

5 Despite that recent ruling, and apparently still unwilling or unable to accept the Commission's orders, Shuttle Express nonetheless proceeded just two days later, to submit pre-filed testimony which indeed exceeded scope of these proceedings, consistent with Shuttle Express' Response to Notice of Intent to Amend. Worse, some of the testimony which was filed is simply the same testimony which the Commission ruled inadmissible in Order 16 in granting in part Speedishuttle's Motion in Limine, but resubmitted now under the guise of a response to the pre-filed testimony of Speedishuttle witness Jack Roemer.

6 While the Commissions' rulings on the scope of these consolidated proceedings have been adequately clear and consistent,⁶ Shuttle Express' theories and arguments about what Speedishuttle has allegedly done wrong and why Shuttle Express' meandering testimony on sustainability and its (analytically erroneous) predicate testimony regarding profitability, profitability projections, and market trends are admissible have been ever evolving. Its most recent renditions, made through the testimony of its rebuttal witnesses, claim that testimony on sustainability should be admitted for a number of new reasons, including because that testimony also addresses its complaint against Speedishuttle, and that "changed circumstances" due to a change in Shuttle Express' profitability somehow now requires it.⁷ In reality, Shuttle Express' complaint was originally predicated upon alleged "fares below cost," and despite the nebulous

⁶ Admittedly, Speedishuttle has sought clarity regarding the scope of the proceeding at times in the past, and particularly so when attempting to determine which of the 87 data requests it received from Shuttle Express actually required a response and through its previous Motion in Limine.

⁷ See Response/Rebuttal Testimony of Paul Kajanoff, Exhibit ____ (PK-2T), 3: 10 – 4: 13.

allegations and attempts at subsequent revision to expand the scope of the complaint to include any unfair or oppressive pricing practices Shuttle Express is capable of imagining, the Commission has limited the scope of this proceeding in Order 08. Although it has clarified the scope on numerous occasions including in discovery rulings by the Administrative Law Judge and has just added the issue of whether Shuttle Express has and will provide service to the satisfaction of the Commission, the Commission has never expanded the scope of Shuttle Express' rehearing petition and complaint beyond whether Speedishuttle is providing the "same service" as Shuttle Express and whether its fares were below cost. Thus, Shuttle Express' elastic and evolving views of admissibility are tied not to the scope of these proceedings as determined by the Commission, but by its own interpretive construction of the facts and theories alleged in its complaint.

7 Shuttle Express also illogically argues that testimony regarding sustainability (and predicate testimony relevant thereto) should be permitted to address the "broad public interest" issues raised in this proceeding. Despite Shuttle Express' consistently broad interpretation and incantation of RCW 81.04.120, the Commission has previously rejected Shuttle Express' argument that particular information "goes to" the public interest as a basis for discovery in this proceeding and for good reason – by that amorphous standard any evidence could be conceivably admissible, and the scope of evidence and time required to examine witnesses in this proceeding would be endlessly expanded.

8 Finally, in a number of instances, amounting to an unfortunately large volume of testimony, Shuttle Express submitted pre-filed testimony as purportedly "responsive" or "rebuttal" testimony, but in reality responds to or rebuts nothing. That is, in numerous places the witness

first testifies and complains that Speedishuttle’s witness Jack Roemer did not address the issue, only to then plunge into a long discussion and critique of the subject of that omission anyway. In other places, for example in much of the testimony of Don J. Wood, the witness states he is responding to other witnesses, but then provides testimony that is not in subject or substance responsive to any other witness. For example, Mr. Wood states he will respond to Jack Roemer and David Pratt, but instead pontificates for numerous pages on regulatory policy, a topic which was not addressed by any other witness so directly, in a blatant attempt to revise, guide, or critique the current regulatory policies of the Commission. Because the practice of filing testimony out of sequence in violation of the procedural schedule ultimately deprives the respondent of due process or opportunity to respond, the Commission should refuse to sanction this practice and strike testimony filed out of sequence by Shuttle Express absent leave for good cause from the Administrative Law Judge.⁸

9 Once again, in order to limit this proceeding to the scope actually authorized by the Commission, and to enhance efficiency at the hearing, Speedishuttle files its objections to testimony and motion in limine.

II. TESTIMONY TO WHICH SPEEDISHUTTLE OBJECTS AND MOVES TO EXCLUDE FROM THE HEARING RECORD

A. Response/Rebuttal Testimony of Petitioner/Complainant Shuttle Express, Inc. by Paul Kajanoff filed April 5, 2017

Page: Lines	Basis of Objection/Motion
2: 15-18	Testimony regarding sustainability

⁸ See *In the Matter of the Petition of Verizon Northwest, Inc.*, Ninth Supplemental Order, Docket No. UT-11439 (Nov. 1, 2002).

	<p>This testimony plainly addresses the excluded issue of market sustainability, which has been and should continue to be excluded from this proceeding.</p>
3: 1-2	<p>Testimony regarding sustainability</p> <p>This testimony plainly addresses the excluded issue of market sustainability, which has been and should continue to be excluded from this proceeding.</p>
3: 3-7	<p>Testimony regarding sustainability</p> <p>This is additional testimony regarding market sustainability, which again should be struck in conformance with the Commission’s previous orders.</p>
3: 10 – 5: 8	<p>Testimony regarding sustainability</p> <p>This testimony plainly addresses the excluded issue of market sustainability and should be struck.</p>
5: 15-16	<p>Testimony regarding sustainability</p> <p>The testimony identified addresses market sustainability of multiple providers.</p>
6: 13 – 7: 10	<p>Testimony filed out of sequence in violation of the procedural schedule</p> <p>This testimony is not rebuttal, as it clearly indicates that it is responding to something not addressed by Mr. Roemer. The question to which this testimony responds actually asks “Is anything missing from Mr. Roemer’s testimony as well?” Thus, unless parties are now permitted to attack silence in rebuttal, this testimony is out of sequence at this stage of the proceeding.</p>
8: 11 – 9: 4	<p>Testimony filed out of sequence in violation of the procedural schedule</p>

This testimony is not rebuttal, as it clearly indicates that it is responding to something not addressed by Mr. Roemer. In this testimony the answer includes the following: “Mr. Roemer said almost nothing in his response testimony about this failure to serve to the full extent of their authority.” Thus, this testimony clearly acknowledges that it is not responsive or rebuttal in nature.

9: 5-15

Testimony regarding sustainability

This testimony addresses the excluded issue of market sustainability and should not be permitted.

10: 8 - 13: 9

Testimony regarding sustainability

This precise testimony was the subject of Speedishuttle’s Motion in Limine and was struck by the Commission in Order 16 as relating to sustainability, which the Commission previously ruled was outside the scope of this proceeding and previously rejected in Order 04. *See* Order 16, ¶ 13. It now purports to be re-offered, over the Commission’s prior ruling, here as rebuttal to Mr. Roemer’s complaint that there is no foundation to the conclusions offered by Shuttle Express witnesses that that Speedishuttle was the cause of Shuttle Express’ passenger declines. Shuttle Express appears to justify its disregard for Commission orders based upon an argument that Mr. Roemer “opened the door” by making a basic challenge to the foundation of conclusory statements made by Shuttle Express, which Speedishuttle sought to strike, but was not excluded by the Commission. Shuttle Express’ premise then, is “damned if

you don't, damned if you do." Either it gets to make unfounded conclusory statements without response, or it gets to include all of its testimony despite the Commission's prior order to the contrary.

14: 8 – 15: 7 **Testimony regarding financial fitness and sustainability**

This testimony appears to challenge the Commission's ruling regarding financial fitness, which is not something a protestant is permitted to do in transportation application proceedings. This testimony is also again directed to the issue of sustainability of a second provider, which the Commission has excluded from this proceeding.

15: 8 – 16: 2 **Testimony regarding sustainability**

This testimony addresses Speedishuttle's plan for profitability, which relates only to the issue of sustainability and should be excluded from this proceeding.

16: 15 – 18: 10 **Testimony filed out of sequence in violation of the procedural schedule**

This testimony is not rebuttal in any way. It does not address any testimony submitted on behalf of Jack Roemer. It is thus out of sequence and should not be permitted.

18: 11-22 **Testimony regarding sustainability**

Mr. Kajanoff's testimony regarding Shuttle Express' operating losses is proffered for the purpose of establishing how multiple providers cannot be sustained in the market and thereby exceeds the scope of this proceeding. Thus,

it should be struck.

B. Responsive And Rebuttal Testimony Of Petitioner/Complainant Shuttle Express, Inc. By Don J. Wood

Page: Lines	Basis of Objection/Motion
2: 17 – 14: 9	<p>Testimony filed out of sequence in violation of the procedural schedule and outside the scope of this proceeding</p> <p>While it is unfortunately a large portion of Mr. Wood’s total testimony, the testimony at these pages and lines is not rebuttal or responsive. It does not respond to any specific testimony of any witness, but appears instead to be a deliberate attempt to offer Mr. Wood’s specific conclusions out of sequence so that no response would be possible. As discussed above, this testimony addresses regulatory policy, which is a subject discussed by other witnesses and therefore does not respond to other witnesses. Additionally, this testimony does not address the issues the Commission has allowed in the rehearing or complaint cases. Thus, this testimony should be struck.</p>
12: 18 – 13: 21.	<p>Testimony regarding sustainability</p> <p>This testimony appears to assert legal argument as to why sustainability should be considered by the Commission in the context of Shuttle Express’ pricing complaint. As repeatedly noted, this type of testimony disregards the Commission’s ruling regarding the scope of Shuttle Express’ complaint case. While perhaps not strict a basis of admissibility, Speedishuttle would also note that Shuttle Express here appears to adopt Speedishuttle’s arguments regarding</p>

federal predatory pricing standards. Speedishuttle addressed those standards in order to demonstrate why as a matter of law Shuttle Express can never establish that Speedishuttle engaged in predatory pricing. In response to Speedishuttle's Motion for Summary Determination, Shuttle Express insisted those standards were inapplicable in a UTC regulatory proceeding. The Commission apparently agreed in Order 14, ¶7. Thus, it seems Shuttle Express would once again like to have it both ways. However, rather than now establishing the applicability of those standards, Shuttle Express offers speculation about how Speedishuttle's pricing could be harmful without any testimonial predicate or foundation.

17: 5 – 15

Testimony regarding sustainability

Once again, this (flawed) testimony regarding the overall market trends and whether either provider can recover its costs addresses the excluded issue of sustainability.

30: 11 – 32:
5.

Testimony regarding sustainability

This testimony yet again attempts to insert issues of market sustainability which have been repeatedly excluded from this proceeding by the Commission and were previously addressed and rejected at the application phase of Docket TC-143691.

C. Responsive Testimony of Petitioner/Complainant Shuttle Express, Inc. by Wesley A. Marks

Page: Lines | Basis of Objection/Motion

SPEEDISHUTTLE WASHINGTON, LLC'S OBJECTIONS TO, AND MOTION IN LIMINE AS TO PORTIONS OF PRE-FILED REBUTTAL TESTIMONY SUBMITTED BY SHUTTLE EXPRESS, INC. - 10

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

24: 1—25:
19

Testimony regarding sustainability

Mr. Marks explicitly states that his testimony is addressing sustainability when he states “Shared ride service requires some minimum level of passenger volume and density to remain sustainable...” He offers this testimony despite the Commission’s previous rulings excluding sustainability. Thus, it too should be properly excluded from this proceeding.

10 For all the reasons stated above, Speedishuttle respectfully requests the Commission grant this Motion and exclude the referenced testimony from further examination and consideration in this proceeding.

DATED this 26th day of April, 2017.

RESPECTFULLY SUBMITTED,

By /s/ Blair I. Fassburg

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 April 26, 2017, I provided to the Washington Utilities and Transportation Commission’s Secretary an official electronic file containing the foregoing document(s) via the web portal and provided an electronic copy to:

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: jbeattie@utc.wa.gov	Rayne Pearson Administrative Law Judge 1300 S. Evergreen Park Drive S.W. P.O. Box 47250 Olympia, WA 98504-7250 (360) 664-1160 rpearson@utc.wa.gov
Brooks Harlow Lukas, Nace, Gutierrez & Sachs, LLP 8300 Greensboro Dr. Suite 1200 McLean, VA 22102 (703) 584-8680 Email: bharlow@fcclaw.com	Jennifer Cameron-Rulkowski Office of the Attorney General Utilities and Transportation Division 1400 S. Evergreen Park Dr. SW P.O. Box 40128 Olympia, WA 98504-0128 (360) 664-1192 jcameron@wutc.wa.gov

Signed at Seattle, Washington the 26th day of April, 2017.



Maggi Gruber
Legal Assistant
mgruber@williamskastner.com