

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 19,981

IN THE MATTER OF:

Served November 18, 2022

Application of WASHINGTON SHUTTLE,)
INC., Trading as SUPERSHUTTLE,)
EXECUCAR, and EXPRESS, to Acquire)
Control of SUPREME AIRPORT SHUTTLE,)
LLC, Trading as SUPREME AIRPORT)
SHUTTLE)

Case No. AP-2018-075

By application filed March 29, 2018, applicant, Washington Shuttle, Inc., trading as SuperShuttle, ExecuCar, and Express, WMATC No. 369, ("Washington Shuttle" or "SuperShuttle"), seeks Commission approval under Article XII, Section 3, of the Washington Metropolitan Area Transit Regulation Compact,¹ (Compact), to consolidate operations with, obtain assets from, and/or acquire control of Supreme Airport Shuttle, LLC, trading as Supreme Airport Shuttle, WMATC No. 1957.

Applicant also has filed a motion to dismiss the application on the ground that the Commission lacks jurisdiction and a motion for confidential treatment of a portion of the parties' written agreement.

The application and motions are unopposed.

I. SCOPE OF APPROVAL

The Compact applies to: "the transportation for hire by any carrier of persons between any points in the Metropolitan District,"² excluding "transportation solely within the Commonwealth of Virginia."³

Pursuant to Article XII, Section 3(a), of the Compact: A carrier or any person controlling, controlled by, or under common control with a carrier shall obtain Commission approval to -

¹ Pub. L. No. 101-505, § 1, 104 Stat. 1300 (1990), amended by Pub. L. No. 111-160, 124 Stat. 1124 (2010) (amending tit. I, art. III).

² Compact, tit. II, art. XI, § 1. The Metropolitan District includes: the District of Columbia; the cities of Alexandria and Falls Church of the Commonwealth of Virginia; Arlington County and Fairfax County of the Commonwealth of Virginia, the political subdivisions located within those counties, and that portion of Loudoun County, Virginia, occupied by the Washington Dulles International Airport; Montgomery County and Prince George's County of the State of Maryland, and the political subdivisions located within those counties Compact, tit. I, art. I.

³ Compact, tit. II, art. XI, § 3(g). Other exclusions, none germane, are found at art. XI, § 3(a)-(f), (h).

- (i) consolidate or merge any part of the ownership, management, or operation of its property or franchise with a carrier that operates in the Metropolitan District;
- (ii) purchase, lease, or contract to operate a substantial part of the property or franchise of another carrier that operates in the Metropolitan District; or
- (iii) acquire control of another carrier that operates in the Metropolitan District through ownership of its stock or other means.

II. MOTION TO DISMISS

Washington Shuttle acknowledges entering into an agreement with Supreme Airport Shuttle on or about November 7, 2017, in which Supreme Airport Shuttle agrees not to compete against Washington Shuttle for business at Ronald Reagan Washington National Airport and Washington Dulles International Airport for a period of five years. But Washington Shuttle contends that the parties "did not consolidate or merge any part of their business operations," that Washington Shuttle "did not purchase, lease, or contract to operate a substantial portion of Supreme's property or franchise," and that Washington Shuttle "did not acquire any control over Supreme, through purchase of stock or otherwise."⁴

While there is no evidence of a statutory merger, we do not agree that the agreement in question is not subject to approval under Article XII, Section 3, of the Compact. The mergers and acquisitions section of the Compact "was intended to capture all forms of unification, whether whole or partial, temporary or permanent, equipment-focused or operating authority-focused"⁵ and is to be "liberally construed to effectuate its purposes."⁶ The affidavits submitted by Washington Shuttle in support of its motion to dismiss place the transaction at issue firmly within our jurisdiction.

"The term 'control' means more than mere legal control; it encompasses every type of control in fact; all pertinent facts and circumstances are considered."⁷ "[V]eto power over extraordinary corporate transactions" is an indicator of control.⁸

Commission records show that prior to November 2017, both parties shuttled passengers between Ronald Reagan Washington National Airport and Washington Dulles International Airport, on the one hand, and other points in the Metropolitan District, on the other. Under the terms of

⁴ Motion to Dismiss at 11.

⁵ *In re Am. Coach Lines, Inc.*, No. AP-87-20, Order No. 3094 (Nov. 18, 1987).

⁶ Compact, tit. I, art. X, § 2.

⁷ *In re Wash. Shuttle, Inc., t/a SuperShuttle*, No. AP-96-13, Order No. 4801 at 2 (Mar. 28, 1996); *In re Peter Pan Bus Lines, Inc.*, No. AP-93-19, Order No. 4130 (July 12, 1993) (citations omitted).

⁸ Order No. 4130.

the November 2017 agreement, Supreme Airport Shuttle is barred from providing shared ride transportation services "to and from Washington Reagan and Washington Dulles international airports" for a period of five years.⁹

According to the affidavit of Dwight Kines, which has been submitted in support of the motion:

In or around April 2017, Supreme approached SuperShuttle and expressed the realization that Supreme was having issues remaining profitable at Reagan and Dulles. There simply was not enough business at Reagan and Dulles to sustain both Supreme and SuperShuttle and their respective independent contractors.

On or about November 7, 2017, Supreme ceased its provision of shuttle services in the Washington Metropolitan Area, including at Reagan and Dulles.

In anticipation of Supreme's cessation of operations at Reagan and Dulles, SuperShuttle and Supreme entered into a business transaction in which Supreme agreed not to compete for business at Reagan and Dulles for a period of five (5) years in exchange for payment. Some of the terms of the business transaction are memorialized in an agreement between SuperShuttle and Supreme dated November 2017 ("Agreement").¹⁰

Supreme Airport Shuttle's CEO, Matthew Mohebbi, agrees with Mr. Kines's description of the preclusive terms of the non-compete provision in the agreement, an agreement that places in Washington Shuttle's hands, for a period of five years, the power to prevent Supreme Airport Shuttle from reentering the one WMATC market it was created to serve.¹¹

According to Mr. Mohebbi, Supreme Airport Shuttle "was organized in 2012 for the purposes of providing airport shuttle and related services in and around Maryland, Washington, DC, and Virginia."¹² And according to Supreme Airport Shuttle's tariff on file with the Commission in 2017, airport van service was the only service Supreme Airport Shuttle was providing under its WMATC operating authority when it entered into the non-compete agreement with Washington Shuttle.

⁹ Agreement of November 2017 at 6-7, § 2.02(a)(iii), & Exhibit A thereto, CONFIDENTIALITY, NON-SOLICITATION AND NON-COMPETITION AGREEMENT at 2-3, § 2.

¹⁰ Affidavit of Dwight Kines at 3, ¶¶ 14-16 (Mar. 15, 2018) ("Kines Aff."). Mr. Kines is Vice President of Transdev on Demand, Inc., which "owns one hundred percent (100%) of SuperShuttle, International Inc., which, in turn, owns one hundred percent (100%) of Washington Shuttle." *Id.* at 1, ¶¶ 2-3.

¹¹ Affidavit of Matthew Mohebbi at 2, ¶ 12 (Mar. 28, 2018) ("Mohebbi Aff.").

¹² Mohebbi Aff. at 1, ¶ 4.

On these facts, Washington Shuttle's power to veto Supreme Airport Shuttle's reentry into the airport shuttle market within the Metropolitan District for a period of five years constitutes an acquisition of control by means other than through ownership of stock, within the meaning of Article XII, Section 3(a)(iii), of the Compact.

For the foregoing reasons, the motion to dismiss the application for lack of jurisdiction shall be denied.

III. MOTION FOR CONFIDENTIAL TREATMENT

Washington Shuttle requests that portions of the November 2017 agreement containing information relating to the amount of consideration passing from Washington Shuttle to Supreme Airport Shuttle, and information relating to Washington Shuttle's revenue from operations, be treated as confidential and shielded from public view. Washington Shuttle has submitted redacted and unredacted copies of the agreement and requests that the unredacted version be returned.

Prior to amendment of the Compact in 1991, the public interest analysis [in a merger or acquisition] would have focused on the transferee's fitness, the fairness of the purchase price, the resulting competitive balance, the dormancy of operating rights, the benefits to the riding public, and the interest of affected employees. The dormancy inquiry was a means of guarding against the transfer of operating rights which had fallen into such disuse as to no longer serve a public need. The purchase price inquiry was necessary to prevent the transferee from passing exorbitant acquisition costs on to captive customers in the form of rate increases. Public necessity and ratemaking issues are no longer relevant concerns under the amended Compact.¹³

The redacted version of the November 2017 agreement submitted by Washington Shuttle shields from public view only (1) information relating to the amount of consideration passing from Washington Shuttle to Supreme Airport Shuttle and (2) information relating to Washington Shuttle's operations revenue. Accordingly, the motion for confidential treatment shall be granted. The unredacted version of the agreement shall be returned to Washington Shuttle at the end of this proceeding, as extended by any administrative reconsideration and by any judicial review.

IV. DISMISSAL OF APPLICATION AS MOOT

The Commission may approve an application under Article XII, Section 3, if it finds that the proposed transaction is consistent with the public interest.¹⁴ The public interest analysis focuses on the

¹³ *In re Bos. Coach-Wash. Corp.*, No. AP-93-21, Order No. 4163 at 2-3 (Sept. 13, 1993).

¹⁴ Compact, tit. II, art. XII, § 3(c).

fitness of the acquiring party, the resulting competitive balance, and the interest of affected employees.¹⁵

The record shows that consistent with the terms of its non-competition agreement, Supreme Airport Shuttle ceased its provision of shuttle services in the Washington Metropolitan Area, including at Reagan and Dulles Airports on or around November 7, 2017. Supreme Airport Shuttle's WMATC certificate of authority was subsequently revoked on March 12, 2018, for failure to maintain on file with the Commission proof of insurance as required by Regulation No. 58 and failure to pay a \$100 late insurance fee.¹⁶ Less than two weeks later, Washington Shuttle filed the instant application on March 29, 2018.

Commission precedent holds that "the relevant time for determining whether a carrier 'operates in the Metropolitan District' shall be determined as of the date the application in question is filed."¹⁷ However, in this case, the application seeking Commission approval of the transaction was submitted after, rather than before, the effective date of the transaction.¹⁸ On the eve of the transaction, both Washington Shuttle and Supreme Airport Shuttle were operating in the Metropolitan District, and therefore, this transaction is subject to approval under Article XII, Section 3, of the Compact.

This result is not changed by the fact that after the transaction, Supreme Airport Shuttle discontinued operations or that its WMATC certificate of authority was later revoked. This Commission has previously held that its jurisdiction to review a transaction under Article XII, Section 3, of the Compact is not defeated when the target of the transaction subsequently voluntarily terminates its WMATC certificate of authority.¹⁹ To hold otherwise would allow parties to evade review of a transaction subject to Article XII, Section 3(a), by simply completing the transaction and terminating the target entity's operations in the Metropolitan District before a decision is rendered.

A subsequent change in status of the acquiring party, Washington Shuttle, is however a different matter. We take official notice that while this application was pending, Washington Shuttle ceased its

¹⁵ *In re Veolia Transp. Servs., Inc.*, No. AP-07-001, Order No. 11,580 at 2 (Sept. 18, 2008).

¹⁶ *In re Supreme Airport Shuttle, LLC, t/a Supreme Airport Shuttle*, No. MP-18-013, Order No. 17,501 (Mar. 12, 2018).

¹⁷ *In re Upscale Limo. Serv. LLC*, No. AP-08-142, Order No. 11,644 (Oct. 24, 2008) (citing *In re VIP Coach Servs., Inc., & White House Sightseeing Corp.*, No. AP-84-06, Order No. 2550 at 4-5 (May 1, 1984)).

¹⁸ We expressly note that Commission approval is required prior to entering into a transaction subject to Article XII, Section 3(a). See Order No. 11,580 at 7 (assessing civil forfeitures for failing to obtain Commission approval in advance of merger and of acquisitions).

¹⁹ *In re Acad. Express, L.L.C., t/a Acad.*, No. AP-11-079, Order No. 12,932 (Aug. 2, 2011).

operations in the Metropolitan District on December 15, 2019.²⁰ On December 27, 2019, WMATC Certificate No. 369 was terminated at Washington Shuttle's request.²¹

Given that both the acquiring party, Washington Shuttle, and the target of the transaction, Supreme Airport Shuttle, have ceased all operations in the Metropolitan District, and the noncompetition agreement at issue expired while this proceeding was still pending, we find the issues in this case have become moot, and we need not reach a determination of whether the transaction is consistent with the public interest. Accordingly, the application shall be dismissed.

THEREFORE, IT IS ORDERED:

1. That the motion of Washington Shuttle, Inc., to dismiss this application for lack of jurisdiction is hereby denied.

2. That applicant's request for confidential treatment of business records is hereby granted to the extent described above.

3. That Case No. AP-2018-075 is hereby dismissed.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS RICHARD AND LOTT:



Jeffrey M. Lehmann
Executive Director

²⁰ Ian Duncan, *SuperShuttle Halts Service to Dulles and National Airports amid Reports it's Going out of Business*, WASH. POST, Dec. 16, 2019, https://www.washingtonpost.com/local/trafficandcommuting/supershuttle-halts-van-service-to-dulles-and-national-airports-amid-reports-its-going-out-of-business/2019/12/16/007c7fc6-204a-11ea-86f3-3b5019d451db_story.html.

²¹ *In re Wash. Shuttle, Inc., t/a SuperShuttle, ExecuCar, and Express*, No. AP-19-214, Order No. 18,585 (Dec. 27, 2019).