

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

SHUTTLE EXPRESS, INC.,

Petitioner and Complainant,

v.

SPEEDI SHUTTLE WASHINGTON, LLC

Respondent.

DOCKET NOS.

TC-143691

TC-160516

PETITIONER'S SUMMARY OF
ISSUES RE RESPONDENT'S
FAILURE TO TIMELY COMPLY
WITH DISCOVERY RULING OF
SEPTEMBER 27, 2016

INTRODUCTION

1 It has now been over two months since the Commission ruled that Respondent's responses to data requests served over three and a half months ago were inadequate and must be timely supplemented. While progress has been made, sadly it has been slow, cumbersome, and unduly expensive for the Petitioner. And full responses in accordance with the ruling still have not been provided. The chronology really tells the story best.

CHRONOLOGY

2 The saga of Petitioner's discovery efforts has been as follows:¹

6/28 Respondent first raises the possibility of non-disclosure agreement to cover financial data; Petitioner agrees to consider same if prepared by Respondent

8/17 First Data Requests Served

¹ To be clear, not every potentially relevant communication is shown here. The focus is on Petitioner's extensive and repeated efforts that were required to obtain even partial compliance with the September 27, 2016 ruling. All dates are in 2016. See accompanying Harlow Declaration ("Dec.") for support and details.

8/31 Objections and minimal responses served

9/13 Motion to Compel filed

9/27 ALJ rules certain data responses to be answered with modifications, by 9/30 and 10/17²

9/30 Supplemental responses provided by Respondent to DRs 1, 2, 5, 8, and 13

10/17 No further responses of any kind provided as agreed on 9/27

10/20 Mr. Harlow inquired about the missing 10/17 answers and production; Mr. Wiley asserted non-response to a “stand down” suggestion excused or delayed provision of any further answers³

10/20 - 11/30 Petitioner exchanged approximately 40-45 emails and several lengthy phone calls in an effort to obtain reasonable compliance with the 9/27 ruling; incurring at least \$10,000 -\$15,000 or more in legal costs to the Petitioner, plus the costs of motions

10/28 Off the record call with ALJ requested by Respondent to “clarify” ruling

11/4 Supplemental responses provided by Respondent to DRs 3, 4, 7, 9, 17, and 20.

11/17 Partial supplement to DR 19 provided; DR 9 response clarified informally, but no supplemental response provided

11/22 After months of discussion, Respondent first provides a proposed non-disclosure agreement

11/30 Petitioner filed supplement to Motion to Compel

² Initially the due date was to be 10/11. Petitioner agreed that 10/17 would be timely. Respondent and ALJ agreed. See TR at 195-96.

³ Harlow Dec., Exh. A.

DISCUSSION

A. Respondent Has Not Fully Nor Timely Complied With The Commission's Ruling.

3 To call the discovery path in this case “tortured” would be an understatement, as the foregoing chronology well-illustrates. Petitioner has—after over four months, one motion to compel, a clarification call with the bench, several dozen informal efforts at resolution, and nearly endless patience—received most, but still not all, of the discovery responses that were ordered. But they were not received by October 17th, as agreed. Rather, they came dribbling in late and sometimes still incomplete, requiring several delays in the case, ultimately including the hearing date itself.

4 Still outstanding and unanswered are Data Request Nos. 2, 12, 14-16, all as modified and clarified in the September 27th ruling (“Ruling”). These are important omissions and full and speedy⁴ compliance with the Ruling is essential out of fairness to the Petitioner and the Commission and its processes. In this supplement, Petitioner will remind the Commission why the responses are important, but will not extensively argue the points.⁵ At this point in the process, the responses should be provided, because *the ongoing failure to do so is a violation of the Ruling.*

5 Data Request No. 2 sought: “copies of all emails between or among SS personnel and/or third parties that address or relate to the availability or provision of services to passengers or potential in the market who do not speak or do not read and write English or who are tech-savvy.” The Ruling required: “Any correspondence that demonstrates how SpeediShuttle is executing the business plan approved by the Commission, and providing

⁴ Pun intended.

⁵ Since this is a simultaneous filing with Respondent, Petitioner will also briefly pre-emptively respond to Respondent's expected excuses for non-compliance. But, again, the issue at hand is did Respondent comply with the Ruling and, if not, when must Respondent do so.

only the service it is authorized to provide.” TR at 187-88. Since the Ruling, *not a single* letter, email, text or any other form of written or recorded instance of correspondence has been provided by Respondent.⁶

6 Data Request No. 12 sought: “Provide all documents that reflect, show, or relate to an attempt by Speedishuttle to compete with Shuttle Express or to carry passengers that could instead take Shuttle Express, including advertising, communications with the Port of Seattle, or communications with trade associations or travel groups.” The Ruling required: “SpeediShuttle must provide all documents that concern or address SpeediShuttle providing service other than the service described in the business plan approved by the Commission.” TR at 189-190. Since the Ruling not a single document has been provided. Nor has a supplemental response been provided.⁷ These documents are critically important to show Respondent’s true intentions when it sought its certificate.

7 Respondent has asserted in this case what is often called a “white-heart, empty-head” defense to this action. Petitioner has reason to believe that contemporaneous documents from 2014 and 2015 will show that Speedishuttle knew full well, at all times, that it was going to compete fully, across the entire market, for any and all passengers as were already being satisfactorily served by Shuttle Express. Such hidden intentions could be very material to the Commission’s determination of the scope and scale of remedies that may be found to be in the public interest.

⁶ On November 22, 2016, in response to Data Request No. 19 and No. 2, Respondent finally provided its ticketing agent contracts as filed with the Commission. The filings contained cover letters from Speedishuttle to the Commission. The vast bulk of that supplemental response had already been obtained by Petitioner from the Commission via a request for public records. And the minimal correspondence consisted of mere transmittal letters and requests for approval to the agency, which are public documents.

⁷ Informal emails were exchanged. Harlow Dec., Exh. B. But there has been no resolution or supplement.

8 Since the Ruling, Respondent not provided any financial statements, documents or other financial data. Nor has a supplemental response of any kind been provided as to Data Request Nos. 14-16, as modified and clarified in the Ruling. Respondent has repeatedly argued that such information is proprietary, going back to as early as June. But despite repeated offers by Petitioner to consider a non-disclosure agreement (“NDA”), no such NDA was proffered until last week, November 22nd.

9 Since last week, the parties (excluding staff) have been attempting to finalize a mutually acceptable NDA. Agreement may be reached by this Friday, but absent agreement, the Ruling will need to be enforced. The issue is not, as Respondent has asserted, limited to its current operating losses in the SeaTac market. Rather, the issue is whether two direct competitors in the door-to-door share ride market is sustainable in the long-term under any scenario. Reasonably accurate and complete financial information goes to this key public interest issue.

10 It is difficult to predict exactly what excuses Respondent will file today regarding its failures. To start with, the parties should not even be arguing about the propriety of the Ruling at this late stage. No administrative review of the Ruling was sought. And to the extent clarity is an issue, Respondent received an off the record clarification call on October 20th and has had another six weeks to seek further clarification.

11 In the extensive informal attempts at resolution, Respondent seems to be hung up on the terms “business plan” or “business model.” See Harlow Dec., Exh. B. But Respondent is not entitled to unilaterally withhold documents simply because they may not contain a particular word or phrase. Respondent’s counsel seems to be saying that Respondent’s subjective interpretation of the Commission’s orders and how those orders might be

argued by the parties, or applied by the Commission at and after the hearing, should govern what should be produced. That is far from the standard, which is “reasonably calculated to lead to the discovery of admissible evidence.” It even encompasses non-admissible evidence.

12 The responding party may not filter discovery responses based on their theory or understanding of the case. And the Ruling effectively considered and rejected such improper and narrow interpretations of the scope of discovery already. *See generally*, Speedishuttle’s Response In Opposition To Shuttle Express’ Motion To Compel Data Request Responses (Sept. 20, 2016) and Ruling.

13 Respondent may also argue the difficulty of locating and producing responsive documents. Such an argument would meet the old adage of “a day late and a dollar short.” There are numerous ways to handle discovery that may require review of numerous documents. To date, Respondent seems to have failed to pursue any of them with any notable diligence or timeliness. From the perspective of the Petitioner, all that can be clearly seen is stonewalling.

B. Respondent’s Discovery Requests Should Not Be An Issue At This Time.

14 Petitioner understands that Respondent will also be filing for some sort of relief regarding its first data requests to the Petitioner. Petitioner submits such a request should not be considered at this time. The purpose of the December 2nd conference was to give Petitioner an opportunity to follow up with the Commission on Respondent’s ongoing failures to comply with the Ruling. Thus, the conference is an extension of a fully-briefed motion and the Ruling, plus 40-50 informal communications between the parties since then that have narrowed the outstanding issues.

15 In contrast to the follow up on the Ruling, Respondent has not moved to compel and has heretofore not really articulated in any current and meaningful way why its discovery is relevant nor why Petitioner's timely responses were incomplete. The latest informal correspondence between the parties of any substance on the topic is attached to the Harlow Dec., Exh. C. Since then, there have been no detailed follow-up discussions or correspondence, only superficial and broad brush requests to supplement.

16 While Petitioner urgently needs Respondent's discovery responses due to the expected deadline for filing its testimony of December 21st, Respondent's testimony is not expected to be due until January the 18th. There is time to follow the normal procedures. Effectively allowing Respondent to obtain a discovery ruling with no motion and no opportunity to respond could well be prejudicial.

C. Respondent Should Be Sanctioned \$100 Per Day For Its Delays And Failures.

17 Sanctions or penalties for failure to make discovery in Commission cases are rare. Petitioner does not seek them lightly. But Respondent's delays and failures to comply with both the initial discovery and the Ruling are unprecedented in counsel's experience. Moreover, they have cost the Petitioner dearly—over \$10,000 just since October the 20th, and not counting this pleading or any of the difficulties prior to mid-October. If the entire discovery dispute and discussions are considered, the cost to Petitioner from attorney fees that should not have been incurred is likely in well in excess of \$25,000. This is a staggering sum and is for work that should not have been needed, but for Respondent's repeated failures and refusals to make discovery.

18 Under the circumstances, a sanction of not less than \$100 per day, from October 17th until full compliance with the Ruling is not only appropriate, it is relatively modest. The

sanction should be paid promptly and should not await the conclusion of the case.

CONCLUSION

19 Based on the foregoing and accompanying declaration of Brooks Harlow, Shuttle Express urges the Commission to order full answers by no later than noon on December 9th, and award sanctions of not less than \$100 per day, from October 17th until full compliance with the Ruling is finally accomplished.

Respectfully submitted this 30th day of November, 2016.

LUKAS, NACE, GUTIERREZ & SACHS,
LLP



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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2016, I served a copy 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: jbeattie@utc.wa.gov</p>	<p>David W. Wiley Williams Kastner Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 206-233-2895 Email: dwiley@williamskastner.com</p>
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Dated at McLean, Virginia this 30th day of November, 2016.



Elisheva
Simon Legal
Assistant