BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHUTTLE EXPRESS, INC., Petitioner and Complainant, v. SPEEDI SHUTTLE WASHINGTON, LLC Respondent.	DECLARATION OF BROOKS HARLOW IN SUPPORT OF OF SHUTTLE EXPRESS SUMMARY OF ISSUES DOCKET NOS. TC-143691 TC-160516

1 I, Brooks Harlow, am Counsel for Shuttle Express, Inc. ("Shuttle Express" or "Petitioner"). I make this declaration in support of the Shuttle Express Summary of Issues. Except as noted, this declaration is based on personal knowledge.

2 Below is a chronology of Petitioner's discovery efforts going back to this June, based on our own files, public records and filings. Not every potentially relevant communication is shown. The focus is on Petitioner's extensive and repeated efforts that were required to obtain compliance with the Commission's September 27, 2016 ruling ("Ruling") and since that date. All dates are in 2016.

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

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 10/17
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 answers[1]
10/20 - 11//30	Petitioner exchanged approximately 40-45 emails and several lengthy phone calls regarding compliance with the 9/27 ruling
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

3 The dozens of emails and several phone calls with counsel for Respondent since October 20th incurred at least $10,000 -$15,000 of legal costs to the Petitioner. This does not include the motions or the current filings and arguments. All told, the total legal costs incurred attempting to obtain timely and full compliance with the September 27th Ruling is almost certainly greater than $25,000.

[1] Emails attached as Exh. A.

4 Attached as Exhibit A is an email exchange with Mr. Wiley regarding the lack of any supplemental responses on or after October the 17th.

5 Respondent has never provided any correspondence in response to Data Request No. 2. On November 22, 2016, in response to Data Request No. 19 and No. 2, Respondent 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.

6 Respondent has never provided a single document responsive to Data Request No. 12 before or since the Ruling. Respondent has asserted, informally that it has produced "hundreds of Bates numbered pages." But while voluminous, they consist of nothing more than documents available publicly on Speedishuttle's Internet website and public filings with this Commission. Not one iota of internal memos or documentation has been produce.

7 Since the Ruling, Respondent has not provided a single document or financial statement. Nor has a supplemental response of any kind been provided as to Data Request Nos. 14-16, as modified and clarified in the Ruling.

8 Attached as Exhibit B is an email exchange with Mr. Wiley regarding Data requests 2 and 12.

9 Attached as Exhibit C is an email exchange with Mr. Wiley regarding Petitioner's responses to Speedishuttle's Data requests.

I declare under penalty of perjury under the laws of the State of Washington that the statements in this declaration are true and correct to the best of my knowledge, information, and belief.

Executed at McLean, Virginia this 30th day of November, 2016.

LUKAS, NACE, GUTIERREZ & SACHS, LLP

Brooks E. Harlow, WSBA 11843 Counsel for Shuttle Express, Inc. 8300 Greensboro Dr. Suite 1200
McLean, VA 22102
Phone: 703-584-8680
Fax: 703-584-8696
bharlow@fcclaw.com

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:

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	David W. Wiley Williams Kastner Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 206-233-2895 Email: dwiley@williamskastner.com

Dated at McLean, Virginia this 30th day of November, 2016.

Elisheva Simon
Legal Assistant

Exhibit A

Brooks Harlow

From: Brooks Harlow
Sent: Thursday, October 20, 2016 4:32 PM
To: Wiley, Dave
Cc: jbeattie@utc.wa.gov; Elisheva Simon
Subject: Shuttle Express/Speedishuttle

Importance: High

Dave, I was expecting the bulk of your discovery responses by this Monday, the 17th. I have no record of receiving anything from you this week or for several weeks. Your client does not have a stay or suspension yet. When can I expect to receive your pending answers?

Thank you in advance for your update.

Best,

Brooks E. Harlow
Lukas, Nace, Gutierrez & Sachs, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
Direct: 703-584-8680
Cell: 206-650-8206
Fax: 703-584-8696
Email: bharlow@fcclaw.com

Brooks Harlow

From: Brooks Harlow
Sent: Thursday, October 20, 2016 4:55 PM
To: Wiley, Dave
Cc: Elisheva Simon; Beattie, Julian (UTC)
Subject: RE: Update

Importance: High

If you interpreted my lack of response (when I told you repeatedly I had zero time) to your question as a stipulation that is a stretch, at best. I read your cryptic 10/7/16 email on the fly, but certainly never interpreted your "stand down" suggestion to even address the written discovery responses of Speedishuttle that the ALJ had ordered. The whole context of the email string below was limited to the notice of deposition we had contemplated and your letter regarding the Shuttle Express responses to Speedishuttle's written discovery. Each of us was free to unilaterally "stand down" on those matters, which we have done. But if you are now saying that we had a stipulation or understanding that Speedishuttle would (again) not timely provide the its discovery responses as directed, then we are far from the same page. That was not addressed in your emails and I certainly did not agree to it—nor would I have done so.

Again, please advise when we can expect that the overdue responses will be forthcoming.

From: Wiley, Dave [mailto:dwiley@williamskastner.com]
Sent: Thursday, October 20, 2016 4:40 PM
To: Brooks Harlow <bharlow@fcclaw.com>
Cc: Elisheva Simon <esimon@fcclaw.com>; Beattie, Julian (UTC) <Jbeattie@utc.wa.gov>
Subject: FW: Update

Brooks: This was my last communication with you on this and by the lack of response since that time I fully assumed we were on the same page, particularly after your return from vacation. Dave.

From: Wiley, Dave
Sent: Friday, October 07, 2016 10:44 AM
To: 'Brooks Harlow'
Subject: RE: Update

OK: Why don't we then just have both sides "stand down" until after your return, your Response is submitted and the Commission's Order is issued which I would expect will be the week of October 24 which coincides pretty closely with your two week interval?

Best, Dave.

From: Brooks Harlow [mailto:bharlow@fcclaw.com]
Sent: Friday, October 07, 2016 10:30 AM
To: Wiley, Dave
Subject: RE: Update

Do what you want with your letter, but I can't spend much time on it for almost 2 weeks. After my vacation, I have 2 days in Lincoln, NE for a workshop. Then I have that answer to do. Won't be long before I am as busy as you!

Best,
Brooks

From: Wiley, Dave [mailto:dwiley@williamskastner.com]
Sent: Friday, October 07, 2016 1:22 PM
To: Brooks Harlow <bharlow@fcclaw.com>
Subject: Update

Hi Brooks: Thanks for this. I'm interpreting this then as a "hold" on my letter in response to our "meet and confer" Wednesday which I had planned to get out today in followup, highlighting what we are still insisting be produced by your client and summarizing what we had agreed to forego, and our current gathering of discovery, since if the Commission should suspend the proceeding and then there is a future restart, the majority of the responses would have to be updated to the current time period.

I am available the first part of the week of October 17 for another "meet and confer" and possibly to get on a call with Judge Pearson and Julian as well when we could discuss the deposition subpoena as I have done further research on this and am reaffirming opposition to any deposition of Cecil Morton who is not intended as a witness by us and who is a Hawaii state resident. Jack Roemer, whom we have offered to be deposed in Seattle and who also lives outside Washington, is our management witness as you know, is much more involved in the day-to-day operations, and has all the background and was directly involved in the "walk up issue" if any testimony in any prospective proceeding is even to be allowed on that topic which is my understanding of why you want to call Cecil.

Enjoy your time off and if you come up for air in the next ten days and need to contact me about this, I'm around.

Dave.

From: Brooks Harlow [mailto:bharlow@fcclaw.com]
Sent: Friday, October 07, 2016 7:28 AM
To: Wiley, Dave
Cc: Elisheva Simon

Dave, last night's notice took away what little spare time I had today. I don't think I will be getting the dep notice out after all. We'll deal with it when I get back. Same with your discovery.

Best,
Brooks

From: Wiley, Dave [mailto:dwiley@williamskastner.com]
Sent: Thursday, October 06, 2016 4:10 PM
To: Brooks Harlow <bharlow@fcclaw.com>
Subject: RE: Broadening of Employment Relationship Standards

I appreciate the head's up and we will be objecting and we can tee this up on your return. I will try to get that letter out on our "meet and confer" yesterday and what you agreed to (which was few and far between) and what you were going to talk with your client about by tomorrow, although it sounds like today is your last day until the 17th but I still want to get it out by week's end. Dave.

Exhibit B

From: Brooks Harlow
Sent: Wednesday, November 16, 2016 5:50 PM
To: Gruber, Maggi <MGruber@williamskastner.com>
Cc: Wiley, Dave <dwiley@williamskastner.com>; Elisheva Simon <esimon@fcclaw.com>; Velloth, Daniel <dvelloth@williamskastner.com>
Subject: RE: Shuttle Express v Speedishuttle; Dave Wiley Responses

Dave, there is some progress here, but not much. It's not what I expected after our call. Here's where we are on your discovery responses.

*** Re 2, the ruling was:

Any correspondence that
16 demonstrates how SpeediShuttle is executing the business
17 plan approved by the Commission, and providing only the
18 service it is authorized to provide.

No correspondence has been provided at any time. You now claim not to understand the ALJ's ruling. You failed to raise that at the hearing when she ruled. You now raise that justification for the first time (to my recollection) almost two months later.

Next, I re-read the 9/30/16 response. To the extent you are relying on the ticket agreements, I think you need to provide them, not just Go.

*** Re 9, if you provide a supplemental response to that effect, I think that would be sufficient.

*** Re 12, the ruling was:

SpeediShuttle must
23 provide all documents that concern SpeediShuttle
24 providing service other than the service described in
25 the business plan approved by the Commission.

Nothing has been provided since August and you failed to address it in your email.

*** Re 14-16, if we get the financials by the end of this week, that will be sufficient. The stipulation you offered is not a reasonable substitute for what she ordered.

*** Re 19, thank you for the Go agreement. What about the rest of them?

*** Re 20, I understand you are working on it – pending.

*** We are working on responding to your follow up to Speedishuttle's data requests to Shuttle Express. We should be close.

*** Scheduling, still deferred for now. Hope you get something from the federal court soon. We need to nail this down or take it to the judge very soon. I don't complain much, but I'm actually quite busy, too with multiple hearings all over the country and I need some certainty to juggle everything.

Brooks E. Harlow
Lukas, Nace, Gutierrez & Sachs, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
Direct: 703-584-8680
Cell: 206-650-8206
Fax: 703-584-8696
Email: bharlow@fcclaw.com

From: Gruber, Maggi [mailto:MGruber@williamskastner.com]
Sent: Tuesday, November 15, 2016 5:39 PM
To: Brooks Harlow <bharlow@fcclaw.com>
Cc: Wiley, Dave <dwiley@williamskastner.com>; Elisheva Simon <esimon@fcclaw.com>; Velloth, Daniel <dvelloth@williamskastner.com>
Subject: Shuttle Express v Speedishuttle; Dave Wiley Responses

Mr. Harlow:

Below are Dave Wiley's responses to your November 13 email, which he drafted on his way out the door to the airport, per his agreement with you today:

Good afternoon, Dave. We now have Order 09. I spent most of Friday digesting it and analyzing how it impacts our case going forward, particularly regarding the outstanding discovery, and also regarding overall scheduling.

We have concluded that Order 09 does not have any meaningful impact on the scope of Petitioner's discovery as ruled by the ALJ a month and a half ago. True, it appears now almost a foregone conclusion Speedishuttle will be held not to have "determined how to implement [its approved business] plan consistent with its regulatory obligations." In theory that narrows the issues and could therefore narrow the discovery. But in practice we do not think it does. Moreover, the ALJ's discovery order anticipated, and is completely consistent with, both Order 08 and Order 09.

The reason discovery is not narrowed is that the Commission has given no hint whether or how it might act if it does find that Speedishuttle is not following the business plan that was approved. I am reasonably sure your client will vigorously resist any significant consequences or relief for Shuttle Express. In the end, it is likely to come down to a determination of the "public interest." In large part, our outstanding discovery is calculated to lead to admissible evidence bearing on what relief may be in the public interest under the circumstances.

In a nutshell, we are back to where we were almost a month ago. Respondent has overdue discovery, and we need it very soon to be able to timely undertake expert analysis and prepare our testimony. Since your emails in the string below, there have been a few changes. Here's my understanding of the current status:

DRs 2 and 12 have not changed—nothing new has been provided.
Speedishuttle has produced numerous documents and responses demonstrating it is operating consistent with the business model approved by the Commission. At all times, Speedishuttle has offered and continues to provide a business model that includes luxury vehicles, significantly increased accessibility for non-English speaking customers, individually-tailored customer service, tourism information and Wi-Fi service as specified by Order 04. Neither Speedishuttle nor the Commission, until the judge's ruling and Order 09, has ever referred to a "business plan" as opposed to a "business model" thus, we do not understand what the term "business plan" means relevant to Order 04 or even 08 and the oral ruling on September 27th. Please reread our response on September 30, 2016 to DR2 and the hundreds of Bates numbered pages responsive thereto. Particularly in light of Order 08, we are unaware of what more could be provided based on your response. Since Order 09 appears to be suggesting now a forward-looking analysis of Speedishuttle's operations particularly in light of ¶16 of Order 09 describing the proceeding as possibly providing the company "with an opportunity to conform its operations" with the new service model, this is a discovery and evidentiary issue that has been complicated, not clarified by Orders 08 and 09 as you infer, and we believe we have provided you documents responsive to that business model. In rereading the answer to DR 2, maybe you can further clarify.

As to DR 19, in a side email you asserted there are no responsive agreements other than ticketing agreements filed with the Commission. But those have not truly "been provided" as you and the ALJ assert. We could get them from the Commission (and have asked for them now), but if we want to make them exhibits that process raises issues of authentication, completeness, and currency that should be all but non-existent with a data request response. We renew our request to you, accordingly.
Enclosed is the original GO Group ticketing agreement filed with the Commission.

Next, as to DR 9, despite your comments below, we still find the response to be ambiguous and renew our request that you supplement to clarify.
Of the roughly 13,000 on demand ***reservations*** noted in the response to Request 7, 11,000 (85%) are to the downtown area, mostly to the cruise piers and downtown hotels that are only served by route service by Shuttle Express. The time frame that was covered by the data we pulled was 6/12/2015 (the first day we had an on-demand reservation booked) through August 31, 2016.

As to the requests for financial information (DRs 14-16), in a side exchange we offered to consider a non-disclosure agreement and even provided you with a template. The ball is in your court on that. We can't wait much longer for the information, given our case schedule. We can still work on the non-disclosure idea, but we need the data promptly regardless and the ALJ ordered it some time ago.
We are actively working on this. Dan has edited your rendition (thank you) and I am reviewing on the flight to Phoenix today and will get the version to the client for review/revision/approval/rejection. However, we still must confront the judge's ruling on 9/27/16 that limits the totality of the issues on the financial front to whether Speedishuttle is operating below cost. We have repeatedly offered to stipulate that we have not made an operating profit since commencing operations on May, 2015. We even told the judge on 10/28 on our call we

would answer an RFA on that, but one was not forthcoming, likely due to your apparent aversion to any limitation on financial issue production to a direct competitor which creates potential business tort liability for all.

As to DR 20, in a side discussion you indicated that Respondent reports its outbound trips electronically to the Port using a transponder. That is still a "report" and it has to be recorded somehow by Respondent and the Port. We need those trip counts in whatever form they can be reasonably produced. If the transponder reports trips by time and date, we would like that detail as well, not just monthly totals.
As I indicated we don't have any "reports filed with the Port" which is the judge's ruling. Transponders do not separately "report" to the Port. DR 19, as revised, asked for documents Speedishuttle files with the Port and again, there are not any.

In conclusion, when can we expect the remaining outstanding or incomplete responses to be provided? I understood you had been continuing to work on them, so I hope it will not take more than a few more days.

Next, as far as overall scheduling, here is what I propose:
We still critically need to work these date adjustments out. I propose a discovery conference under WAC 480-07-415 the week of November 28. I need relief which I have maintained since August 2, on the hearing date most of all, due to my federal court schedule but as I mentioned, I may have a more conservative hearing date proposal than what I initially envisioned.

12/5/16 – Petitioner testimony
12/23/16 – Respondent and staff testimony
Week of 12/27 – Depositions of Respondent's witness(es)/officer
1/6/17 – Respondent reply testimony
1/13/17 – Discovery cutoff
2/1/17 – Hearing
TBA - Depositions of Shuttle Express witnesses (when do you want them?)

This proposal cuts your testimony time by 3 days compared to the prior schedule. But it cuts our reply time by a week. Overall, we think this proposal is a reasonable compromise given that the reason we had to continue the Petitioner's opening testimony due date was Respondent's discovery delays. It is the weekend and I do need to run this by our client, to make sure it can work with any holiday or travel plans. We do need to pin down the new dates soon, so I'm running it by you at the same time.

Subject to my client's approval I propose that Mr. Roemer be deposed in Seattle and Mr. Morton be deposed by telephone. I'd love to go to Hawaii, but I don't think we have time and it's expensive for all of us. Otherwise I will have to ask the ALJ to order both of them to Olympia and I think she will grant that request. Given the importance of Mr. Morton, I think this is a meaningful concession. If your client can agree, I think we can as well.

I am not ignoring your discovery, but that's a separate issue that we will take up in due course.
We need this particularly in light of your successive data requests which in the midst of all the other issues, was very time-pressured. We now request follow-up on your outstanding responses on which we "met and conferred" September 20, 2016.

Finally, you have asserted that your client may seek to appeal Order 09 to the courts. I have extensively researched whether that is a final order for purposes of review and it most definitely

is not. "An agency action is "final" when it 'imposes an obligation, denies a right, or fixes a legal relationship as a consummation of the administrative process.'" *Wells Fargo Bank, N.A. v. Dep't of Revenue,* 166 Wash. App. 342, 356, 271 P.3d 268, 276 (2012), as corrected (Apr. 18, 2012) (citing *Bock v. State,* 91 Wash.2d 94, 99, 586 P.2d 1173 (1978)); *see also, United & Informed Citizen Advocates Network v. WUTC,* 97 Wash.App. 1032 (1999)(unpublished). Order 09 is certainly helpful to our case, but it affords Petitioner absolutely no remedy and does not require the Respondent to do anything whatsoever. Thus, it cannot constitute a final order for appeal purposes under the APA or any of the cases I could find on the point.

Not until the Commission decides whether and what remedy it will order—after hearing and briefing—at the conclusion of the case, will there be an appealable order. Indeed, despite Order 09 it is possible that Petitioner—not respondent—would be the "aggrieved" party and the one seeking judicial review, if no meaningful relief were ordered. We urge you not to pursue an appeal at this time as it would be premature and improper. If and when Respondent is aggrieved and wants to go to court it will be able to, eventually. But it makes no sense to try that gambit without a complete record.
As you know, we fundamentally disagree on this point.

Maggi Gruber
Williams Kastner | Legal Assistant
601 Union Street, Suite 4100
Seattle, WA 98101-2380
P: 206-233-2972 | F: 206-628-6611
www.williamskastner.com

Exhibit C

Brooks Harlow

From: Wiley, Dave <dwiley@williamskastner.com>
Sent: Thursday, November 17, 2016 3:15 PM
To: Brooks Harlow
Subject: RE: "Meet and Confer" Letter following October 5 Conference

Brooks: As you would say in so many words, this is a very disappointing and insufficient response in our view lending more "grist for the mill" for a discovery conference. Since I am out Thanksgiving week in my grandpa role, I think it important that we talk tomorrow including discussing proposed scheduling changes as you suggest as a priority in yesterday's latest email which I admittedly have only glanced at due to intense deposition preparations.

Late tomorrow morning PST is best for me. Give me some alternate times for you. Dave.

From: Brooks Harlow [mailto:bharlow@fcclaw.com]
Sent: Thursday, November 17, 2016 9:06 AM
To: Wiley, Dave
Cc: Beattie, Julian (UTC); Elisheva Simon; Gruber, Maggi; Velloth, Daniel
Subject: RE: "Meet and Confer" Letter following October 5 Conference

Dave, we can have a discovery conference if you want. I have reviewed you letter and discussed it with the client. Below is our latest position Respondent's data requests to Shuttle Express. This is intended to respond to your more recent emails as well, to the extent they were intended to touch on your data requests. This response make any conference go quickly, if one is needed at all:

DR 1 – If there is reason to amend the response, we will do so.
DR 2 – Withdrawn.
DR 3 – Still not relevant, making further work unduly burdensome.
DR 4 – Still vague and even less relevant under Orders 08 and 09. Since you plan to take depositions I will allow our witness(es) to answer questions about this topic (subject to privilege and work product), if that's how you want to spend your time. That would be much more efficient than this vague DR, in our view.
DR 5 – The financial statements (including annual reports) that we cannot readily find and may not even still exist are too remote in time to be material to the case. They are over 20 years old. With such old documents, the burden on Respondent to get the annual reports from the UTC is less than the burden on Petitioner to go through uncatalogued and unorganized old boxes of unknown content.
DR 6 – Not at issue.
DR 7 – We stand by our objections—even less relevant under Orders 08 and 09.
DR 8 – Withdrawn.
DR 9 – Not at issue.
DR 10 – The answer stands.
DR 11 - Not at issue.
DR 12 – We stand by our objections—even less relevant under Orders 08 and 09. We can discuss, however.
DR 13 - We stand by our objections—even less relevant under Orders 08 and 09. We can discuss, however.
DR 14 – Reserved. We don't see this as relevant under Orders 08 and 09.

Brooks E. Harlow
Lukas, Nace, Gutierrez & Sachs, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
Direct: 703-584-8680