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December 13, 2016

VIA WEB PORTAL

Mr. Steven King
Executive Director and Secretary
Washington Utilities and Transportation Commission
PO Box 47250
1300 S. Evergreen Park Drive, SW
Olympia, WA 98504-7250

Attn: Administrative Law Judge Rayne Pearson

Re: TC-143691 & TC-160516; *Shuttle Express Inc. v. Speedishuttle Washington, LLC*

Dear Mr. King:

You and the Administrative Law Judge (ALJ) have recently received two letters from Respondent.¹ While we are generally supportive of informal efforts to resolve discovery disputes, written submissions should not be one-sided. Accordingly, first we offer a suggestion as to Data Requests 2 and 12 and then a partial response regarding the deposition of Mr. Morton.

Given the difficulties we have had for the last three months in getting a substantive response to Data Request Nos. 2 and 12, plus the ALJ's comment at the last hearing about the lack of good communications between the parties, on top of the very short timeframe between the projected production date and the due date for opening testimony, we thought it might advance things some if we responded to Mr. Wiley's letter of last Friday, the 9th with a further suggestion. The concern we have with Mr. Wiley's report is that it is essentially a "black box." He identified "various searches" without providing any details. The process of searching and developing and evaluating searches is inherently (and admittedly) a filtering and restricting of the scope of electronic document production. Done properly, it can be an invaluable tool and a reasonable proxy for a full production. Done improperly, it can lead to withholding of numerous documents

¹ One of those letters was filed in the case and one was not. We are filing this response. We think it best to err on the side of filing.

that are subject to production. And done in a biased fashion, it can lead to the withholding of documents that could be dispositive of an issue in the case.

We have raised serious issues in this case regarding the credibility and integrity of Mr. Wiley's client. To be clear, if Mr. Wiley's firm is actively involved in or managing the search process, then we do not think integrity is an issue at all. But we don't know that from last week's report. And inadvertence still is an issue. Either the Respondent or counsel for the Respondent is making judgments about what search terms to run, without any communication with Petitioner or the bench regarding those judgments. Given our history on these two requests, we could well receive unduly narrow or entirely irrelevant responses this Friday, with no time to make corrections and broaden or modify the searches prior to the due date for testimony.

We suggest that the bench informally urge the parties to communicate or even collaborate during the search process. For example, last Tuesday I sent Mr. Wiley an email providing a listed enumeration of likely senders and recipients of correspondence that should satisfy the vast majority of documents that you ruled should be produced. We have had zero response to that email and do not know if our suggestion has been incorporated into the ongoing searches. But we do believe the collaborative process we attempted to start last week is much more likely to lead to responsive documents and could well save both parties considerable time and effort.

Regarding the deposition of Mr. Morton, we would be open to a deposition conference to discuss the deposition of Mr. Morton and the logistics of the deposition of Mr. Roemer, provided it could be conducted by phone. We note that the Commission's rule on depositions does not limit them to witnesses, but also encompasses other persons, "if the presiding officer approves the deposition on a finding that the person appears to possess information significant to the party's case." WAC 480-07-410(1). Mr. Morton was a key—indeed lead—witness earlier in this docket as President and owner of Speedishuttle. From his testimony and position, he was obviously an active participant in the development of both the business model that was proposed to the Commission as well as the one that is actually being operated today.² Moreover, the Commission's rule on depositions incorporates CR 30, which in turn implicitly ties into CR 43. An un-assailed precedent in Superior Court for decades is that officers and managing agents can be compelled to attend trial and depositions in Washington merely by notice. *Campbell v. A. H. Robins Company*, 32 Wn. App. 9 (1982).

Finally, we question Mr. Wiley's narrow interpretation of the scope of facts that may be presented at the hearing. While the Respondent seemingly admits that it is not operating the business model that the Commission had anticipated, there is still the question of the appropriate remedy, which under the statutes could range from no relief at all to cancellation of

² Purpose of Morton testimony was "to differentiate service to show that we are not the same service as is being offered by the objectors...." *E.g.* TR at 26.

Respondent's certificate. The remedy may well turn on the somewhat subjective "public interest" test and other factors. This is why the correspondence ordered to be produced in response to Data Requests 2 and 12 is important, as well as the actions and scienter of the owner of the company. Was the testimony of no "walk up" service by Mr. Morton a prevarication? Or merely an innocent mistake, as Respondent has asserted in several briefs in this case without any evidentiary support? These issues, among others, could be important to the Commission in fashioning an appropriate remedy, or to a court in reviewing the case.

We look forward to discussing the discovery issues productively and efficiently. For example, we do not think a lengthy deposition of Mr. Morton is necessary. And we are willing to consider deposing him by telephone, so he does not have to bear the burden of time and expense to travel from Hawaii.

Thank you for your consideration.

Yours truly,

A handwritten signature in cursive script that reads "Brooks E. Harlow".

Brooks E. Harlow