



December 14, 2016

29208.0101

VIA WEB PORTAL

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

Attn: Administrative Law Judge Rayne Pearson

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

Dear Mr. King:

Yesterday we received a copy of correspondence from counsel for Shuttle Express, Inc. ("Shuttle Express") responding to Speedishuttle Washington, LLC ("Speedishuttle") report to Administrative Law Judge Pearson on the status of Speedishuttle's efforts to locate information responsive to Shuttle Express' data requests 2 and 12, and to Speedishuttle's request for a deposition conference.

Speedishuttle is generally supportive of the right to respond to its request for a deposition conference. However, it takes a different view with respect to its report to the ALJ, which was specifically requested from Speedishuttle by Administrative Law Judge Pearson on December 2, 2016 during a scheduled discovery conference. And while a simple objection may otherwise have sufficed to address Shuttle Express's attempt to insert itself into Speedishuttle's report and discovery search, and thus there may otherwise have been no need to rebut Shuttle Express's response to Speedishuttle's request for a deposition conference, Shuttle Express has also inserted into its response the kind of inflammatory allegations the Commission cautioned the parties against making,¹ which now require Speedishuttle to offer some response.

Shuttle Express posits DRs 2 and 12 as if they have never been limited. The reality is the ALJ significantly narrowed the requests in two hearings in order to allow efficient and relevant responses by Speedishuttle.

¹ Order 08, fn. 6.

First, while styled as a “suggestion,” Shuttle Express appears to attempt to controvert the ALJ’s ruling in order to reclaim what the ALJ has limited from production, namely a broad, all-encompassing ESI collection. After being apprised of the expense and burden of the discovery sought by Shuttle Express, the ALJ ruled that a comprehensive ESI-style collection of responsive materials was not being ordered.² Shuttle Express’ suggestion ignores that ruling.

It was actually Speedishuttle (not Shuttle Express) that first requested search terms six weeks ago on September 30, 2016. It never received a response to that request. The December 6 email referenced by Shuttle Express does not enumerate likely custodians and again oversteps the ALJ’s ruling. A copy of the referenced email is attached here as Exhibit A since Shuttle Express now relies upon it.

Even a quick reading of the email demonstrates Shuttle Express seeks exceedingly broad categories of documents, beyond what was ordered in the hearing, and states this is what it is seeking “at a minimum.” That again is inconsistent with the law of the case as ordered by the ALJ, after Shuttle Express brought its motion to compel. Continued litigation of this issue is not productive, proportionate, and is unnecessarily expensive.³ As noted by Judge Pearson, discovery is only allowed to the extent it is helpful to the Commission. The ALJ has ruled on what sort of discovery would be helpful. Speedishuttle expects to at least initially provide that consistent with the report filed on December 9.

Second, Shuttle Express again attacks the credibility and integrity of Speedishuttle. Shuttle Express has presented no evidence to support these allegations, yet uses them to justify all types of overreach. The only proffer is an issue already decided by the Commission related to “walk-up service.” Again, the Commission has already ruled on that issue. At the time of the application, Speedishuttle believed that Shuttle Express had an exclusive concession with the airport to offer walk up service. Once Speedishuttle learned that was incorrect it sought to offer the service. Speedishuttle also communicated with Commission staff before offering that service.

Third, the Commission should take Shuttle Express’ scheduling concerns with a grain of salt. Throughout this case, Shuttle Express pressed forward on a schedule despite numerous scheduling constraints and concerns raised by Speedishuttle’s primary counsel related to his trial and case

² The transcript of that hearing is apparently not yet available, and Speedishuttle can supplement its summary if necessary. What is clear, is that the ALJ express rejected the sort of broad, overreaching discovery Shuttle Express now, again, seeks.

³ WAC 480-07-400(3).

schedule that predated this proceeding. The express purpose in persistently pushing for the early hearing date was to ensure that Shuttle Express succeeds in forcing Speedishuttle out of the market by the summer of 2017.

Fourth, Shuttle Express' vague allusion to remedies and that they may turn on the "public interest test" appears to be yet another hook with which to end-run and relitigate the entirety of the application BAP. Speedishuttle now requests the Commission foreclose this argument, and if required, will formally address this by motion. This attempt to broaden the hearing with irrelevant evidence and testimony is also contrary to Order 08, which Shuttle Express did not appeal:

We nevertheless share the concerns Speedishuttle and Staff express about the scope of rehearing. We will not allow Shuttle Express to relitigate the BAP.⁴

The Commission duly limited what it was prepared to hear in this proceeding. That did not include evidence related to the "public interest test." Indeed, the benefit to the traveling public and the impact on the sustainability of service was part of the application BAP and already litigated.⁵ The limitation on the present hearing was plainly articulated by the ALJ in the September 27, 2016 hearing where she stated the two issues in the consolidated case:

6 [...] I want to clarify the scope
7 of the proceeding at this point, and just make it clear
8 that it's limited to, number one, whether SpeediShuttle
9 is providing the service the Commission authorized it to
10 provide consistent with the business model approved by
11 the Commission in Docket TC-143691, and whether
12 SpeediShuttle is providing service below cost as alleged
13 in the complaint in Docket TC-160516. **And those are the**
14 **only issues that we're looking at.**⁶

Notably absent from this ruling are the considerations of the public interest theme raised with increasing frequency by Shuttle Express or market sustainability even as to remedy.⁷ Shuttle Express'

⁴ Order 08, at ¶24

⁵ WAC 480-30-140(1)(b).

⁶ Transcript of September 27, 2016 hearing, at p. 185 (emphasis added).


continued efforts to expand the proceeding are at odds with the rulings in this case and if they are the basis for justifying the relevance of DRs 2 and 12 to this proceeding, this likely explains why it has been so difficult to satisfy Shuttle Express.⁸

Finally, regarding the deposition of Mr. Morton, we remain open to a deposition conference, but note that notwithstanding Shuttle Express' authority, there is not a "right" to the deposition sought. It is merely a permissible act under WAC 480-07-410(1), and if the main basis to seek that deposition is to question Mr. Morton on the "walk up" issue that the Commission already knows the answer to, it is clear that such a deposition is not significant to the issues in this case.⁹

In sum, Shuttle Express persists on multiple tracks with a disclosed purpose – to drive Speedishuttle out of the market. Through that lens, though Shuttle Express can engage in discovery, it must be permissible under WAC 480-07-400(3) and in support of the case the Commission has made clear it is prepared to hear.

Yours truly,

WILLIAMS, KASTNER & GIBBS PLLC



Daniel J. Velloth
David W. Wiley

⁷ The remedies sought by Shuttle Express in this case will be addressed in the correct forum, but Speedishuttle contends they overreach, and seek to supplant the Commission entirely, by establishing Shuttle Express the *defacto* enforcer of its view of the public interest in proscribing competition.

⁸ Shuttle Express also incorrectly states Speedishuttle admits to non-compliance with the business model. Again, Speedishuttle contends it is operating consistent with the business model approved by the Commission under its unrestricted auto transportation certificate.

⁹ And on which the Commission issued its written determination on December 14, 2015.

EXHIBIT A

From: Brooks Harlow <bharlow@fcclaw.com>
Sent: Tuesday, December 06, 2016 7:47 AM
To: Wiley, Dave
Cc: Velloth, Daniel; Gruber, Maggi; Elisheva Simon
Subject: Shuttle Express, Dkt. TC-143691, DR 12

Follow Up Flag: Follow up
Flag Status: Flagged

Dave, following up on our conference with the ALJ last week re DR 12, I will share some thoughts that may help you and your client get started. Here is the kind of correspondence we are expecting to see, at a minimum:

1. With Speedi's wholesalers/ticket agents or representatives (or prospects) discussing the services Speedi would, could, or might offer and that the third parties could sell or refer to potential passengers or travel groups or organizers. We know Speedi has dozens of these and they didn't come from nowhere.
2. Similarly, with hotels, travel agents, cruise lines, or aggregators regarding Speedi's services or proposed services.
3. With the Hudson Group and other contractors or vendors which would know or want to know the kinds of services offered by Speedi.
4. With travel or transportation industry trade associations or organizations and their officers, staff or other members.
5. With the persons and entities that supported or asked to support the original auto transportation application or submitted or were asked to submit supporting letters for the hearing.
6. And discussions with any of the foregoing regarding contracts or contract negotiation.

This is not intended to limit the ALJ's ruling, but I'm guessing it would cover the vast majority of what should be produced under her ruling. And all of the foregoing should be easy to search and probably resides on the hard drives of a small handful of individuals.

We hope this helps and look forward to resolving this outstanding response in the very near future.

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

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