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 1 BEFORE THE WASHINGTON STATE

 2 UTILITIES AND TRANSPORTATION COMMISSION

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 4 In Re: Application TC-143691 )

 )

 5 SPEEDISHUTTLE WASHINGTON, LLC,)

 D/B/A SPEEDISHUTTLE SEATTLE, )

 6 ) Docket Nos.

 For a Certificate of Public ) TC-143691 and TC-160516

 7 Convenience and Necessity to ) (Consolidated)

 Operate Motor Vehicles in )

 8 Furnishing Passenger and )

 Express Service as an Auto )

 9 Transportation Company )

10 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

11 DISCOVERY CONFERENCE, VOLUME IV

12 Pages 200-219

13 ADMINISTRATIVE LAW JUDGE RAYNE PEARSON

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14

15 1:00 p.m.

16 December 2, 2016

17 Washington Utilities and Transportation Commission

 1300 South Evergreen Park Drive

18 Olympia, Washington 98504-7250

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 1 OLYMPIA, WASHINGTON; DECEMBER 2, 2016

 2 1:00 P.M.

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 5 P R O C E E D I N G S

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 7 JUDGE PEARSON: We will be on the record in

 8 consolidated Dockets TC-143691 and TC-160516. Today is

 9 Friday, December 2nd, 2016, at 1:00 p.m., and we are

10 here to attempt to resolve the remaining issues in the

11 ongoing discovery dispute between the parties as set

12 forth in Shuttle Express' motion to compel and

13 SpeediShuttle's answer to that motion.

14 My name is Rayne Pearson. I'm the

15 administrative law judge presiding over these cases. So

16 let's get started by taking short appearances from the

17 parties.

18 We will begin with -- I'm sorry, I forgot

19 your name already.

20 MR. FASSBURG: No problem. It's Blair

21 Fassburg, I'm with Williams Kastner. I'm here today

22 on --

23 MR. HARLOW: Brooks Harlow --

24 MR. FASSBURG: -- behalf of SpeediShuttle

25 and Dave Wiley --

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 1 JUDGE PEARSON: Hold on, hold on on the

 2 bridge line, please.

 3 If you could take a seat and use your

 4 microphone --

 5 MR. FASSBURG: Sure.

 6 JUDGE PEARSON: -- so the people on the

 7 bridge line can hear you.

 8 MR. FASSBURG: That will certainly help

 9 them.

10 Again, Blair Fassburg with Williams Kastner.

11 I'm here today on --

12 MR. HARLOW: Thank you, Your Honor. I

13 wasn't aware there was someone in the room.

14 MR. FASSBURG: -- behalf of SpeediShuttle.

15 JUDGE PEARSON: Yeah, and I'm not sure his

16 microphone is one.

17 Is the red light on?

18 MR. FASSBURG: It is apparently not.

19 JUDGE PEARSON: Okay. Now they should able

20 to hear you and not talk over you.

21 MR. FASSBURG: I'll try that one more time

22 so they can hear me.

23 Again, Blair Fassburg with Williams Kastner.

24 Dan Velloth had intended to be here today on behalf of

25 SpeediShuttle. He fell ill so I'm here covering. Of

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 1 course, Dave Wiley is on the phone on behalf of

 2 SpeediShuttle as well.

 3 JUDGE PEARSON: Okay.

 4 Mr. Wiley?

 5 MR. WILEY: Yes, Your Honor.

 6 JUDGE PEARSON: Just identify yourself.

 7 MR. WILEY: Yes, Dave Wiley, co-counsel for

 8 SpeediShuttle on the bridge line.

 9 JUDGE PEARSON: Okay.

10 And, Mr. Harlow?

11 MR. HARLOW: Thank you, Your Honor. Brooks

12 Harlow, attorney for petitioner and complainant, Shuttle

13 Express, Inc.

14 JUDGE PEARSON: Okay. Thank you.

15 So just to clarify, today we are only

16 addressing the outstanding data requests issued to

17 SpeediShuttle by Shuttle Express. I will not be

18 addressing the data requests issued to Shuttle Express

19 by SpeediShuttle because SpeediShuttle has not yet filed

20 a motion to compel those responses.

21 So based on the issue list submitted by the

22 parties on Wednesday -- and thank you for that, that was

23 very helpful -- it appears the parties are in agreement

24 that the remaining outstanding data requests are numbers

25 2, 12, and then 14 through 16, which were grouped

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 1 together and modified at the first discovery hearing on

 2 September 27th.

 3 So before we get started, I want to just

 4 check in with the parties about whether any progress has

 5 been made with respect to those outstanding data

 6 requests.

 7 MR. HARLOW: I'm happy to report, Your

 8 Honor, that there has been.

 9 JUDGE PEARSON: Great.

10 MR. HARLOW: Dave, did you want to go first?

11 MR. WILEY: No, I -- I wanted you -- you to

12 go first.

13 MR. HARLOW: Okay. So we have -- we have

14 executed a nondisclosure agreement. It's a two-party

15 between Shuttle Express and SpeediShuttle. The Staff is

16 not a party to it. I understand they're aware of it. I

17 haven't talked to them about it recently. The gist of

18 the nondisclosure is that SpeediShuttle will produce

19 certain data, and I think we're primarily talking about

20 financials, but this could cover other things, pursuant

21 to requests 14 through 16 as modified. Those will be

22 treated as confidential, reviewed by employees and

23 outside experts.

24 This is a two-way agreement. Conceivably

25 Shuttle Express could produce documents under this. It

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 1 does mean Staff would not get them, and we do have

 2 provisions in the agreement that would allow

 3 confidential data to support testimony without actually

 4 putting the confidential data into the record.

 5 And so we -- we're very hopeful this will be

 6 a long-term workaround and will carry us to the end of

 7 the case. But we did want to make it clear that -- that

 8 we aren't waiving, I assume Mr. Wiley isn't either, the

 9 right to compel production if, for some reason, the

10 workaround doesn't work. For example, if Staff were to

11 object to testimony because of the lack of foundation or

12 something like that, but we -- we don't think that's

13 likely to happen. We think this will reach a

14 compromise, a middle ground between the parties' desire

15 for confidentiality and the need to develop the full

16 record.

17 JUDE PEARSON: Okay. So does that mean we

18 no longer have to address Data Requests 14 through 16?

19 MR. HARLOW: Other than as to the -- the

20 sanctions due to the delay and -- which is based partly

21 on these financials as well, the answer would be no, we

22 don't have to -- we don't have to order. We're

23 expecting -- we're expecting to get something early next

24 week.

25 JUDGE PEARSON: Okay.

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 1 MR. HARLOW: And, again, we might deem that

 2 to be inadequate but hopefully -- hopefully not.

 3 JUDGE PEARSON: Okay.

 4 MR. WILEY: Your Honor, if I could just say

 5 that I -- if they, you know, that the -- knowing these

 6 two parties, there may be continuing dispute about

 7 adequacy, and we will obviously bring that issue to you

 8 after we do the production of the document, okay?

 9 JUDGE PEARSON: Okay. Well, I hope that's

10 not the case.

11 MR. WILEY: Yeah, so do we, Your Honor.

12 MR. HARLOW: You're not the only one, Your

13 Honor.

14 JUDGE PEARSON: So I don't need to hear any

15 further discussion from the parties on the remaining

16 data requests because the parties' written submissions

17 contained all the information that I need to make my

18 decision. And as was the case on September 27th, I will

19 not be issuing a written order. My decisions will be

20 made from the bench today, so please do take notes and

21 feel free to ask clarifying questions.

22 However, we are just down to the two

23 remaining Data Requests, 2 and 12, and with respect to

24 Data Request No. 2, SpeediShuttle was directed to

25 provide any correspondence that demonstrates how

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 1 SpeediShuttle is executing the business plan approved by

 2 the Commission and providing only the service it is

 3 authorized to provide.

 4 And Data Request No. 12 required

 5 SpeediShuttle to provide all documents that concerned

 6 SpeediShuttle providing service other than the service

 7 described in the business plan approved by the

 8 Commission. And in hindsight, I do think that those are

 9 very broad requests, and so I'm going to combine them

10 into one data request because they really are two sides

11 of the same coin.

12 So now I'm modifying it to say that

13 SpeediShuttle must provide any correspondence it has

14 about how it operates in Seattle. So for example, this

15 would be correspondence with the Port of Seattle, with

16 its employees or its suppliers, et cetera, discussing or

17 directing the operations of the company including any

18 guidelines about which customers can be served. And I

19 hope that that's more clear.

20 MR. HARLOW: One would hope. It's difficult

21 from our perspective, Your Honor -- this is Brooks

22 Harlow for the court reporter -- because we don't know

23 what we're looking for. We don't know what's -- what's

24 there to be produced or not be produced, but we thought

25 about kind of hypotheticals. For example, we have

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 1 several dozen contracts between SpeediShuttle and

 2 booking agents. Those include hotels, travel agents,

 3 cruise lines, consolidators, basically wholesale

 4 providers. And so we would expect there would be --

 5 those contracts don't come into existence automatically.

 6 We would expect there to be correspondence between

 7 SpeediShuttle and those providers before and after the

 8 contract was entered into that discusses service and who

 9 was to be served.

10 JUDGE PEARSON: And I think that's

11 covered --

12 MR. HARLOW: Okay.

13 JUDGE PEARSON: -- because it goes to the

14 operations of the company, how the company is operated.

15 MR. HARLOW: Right, that's -- so that's one

16 area. And the other main area we would expect to be

17 internal correspondence likely between Mr. Morton and

18 Mr. Roemer, the two witnesses in the application case,

19 discussing how the case would be -- you know, things

20 that aren't confident -- privileged obviously, with

21 Mr. Wiley they'd be privileged, but internal emails as

22 they decided to enter this market and what they were

23 going to do, how they were going to phrase it. They may

24 have had other consultants such as Mr. Rally (phonetic)

25 with the Hudson Group, people like that about what could

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 1 be served, how they would either comply with the statute

 2 at issue here or try to get around it.

 3 MR. WILEY: Could I respond, Your Honor?

 4 JUDGE PEARSON: Sure.

 5 MR. WILEY: That's -- that's an example of

 6 the overbreadth of the request. First of all, as you

 7 know in our report, I -- I indicated what we had said

 8 with respect to electronically stored information

 9 requesting search terms that were never provided. I can

10 assure the tribunal, based on recent experience with

11 electronically stored information, that that is not

12 something that's provided in even weeks. It takes

13 months to determine, to -- to -- to narrow search terms,

14 to get the custodian. The Commission nor the Washington

15 superior courts have any protocol on ESI. As a matter

16 of fact, I've never been in a case at the Commission

17 where ESI has ever been sought or allowed.

18 Now, if it's going to be allowed here, we

19 need to get reasonable search terms, and we need to get

20 estimates of what that's going to cost, who the

21 custodians are. You can't just do a broad search that

22 says correspondence bearing on how the business is

23 operating. It doesn't work that way if we are seeking

24 internal email correspondence.

25 So that is why we requested on September

0211

 1 30th some of the search terms and custodial

 2 designations, never got a word on that, and subsequent

 3 data requests that aren't at issue here from them that

 4 we've answered, objected to anything involving

 5 electronically stored information.

 6 So until we get a protocol like the Western

 7 District of Washington has for federal court or the

 8 superior courts adopted, which the Commission looks at

 9 by analogy, we have absolutely no guidance here. And I

10 can assure everyone that electronically stored

11 information takes an inordinate amount of time to

12 assemble and is extremely costly. In the current case

13 I'm involved, way over $100,000.

14 MR. HARLOW: Your Honor, if I may respond as

15 well. I've been involved in discovery of electronic

16 documents and it's taken anywhere from hours to weeks

17 from cases. But, you know, first of all, Mr. Wiley's

18 rearguing the September 27th ruling.

19 Second, Mr. Wiley is asking us for search

20 terms -- basically asking us to take a bunch of darts

21 into a darkened room and throw them at the dartboard.

22 We -- we can't see the bulls-eye. In fact, we can't

23 even see the dartboard. That's not the way the search

24 should be done. The search is to be done by the

25 respondent to the discovery, and they have to manipulate

0212

 1 it and they have to see whether they're getting results,

 2 and, yes, it does take some time if they want to sort

 3 out the irrelevant material.

 4 But the other really easy solution, and this

 5 is -- this is where the discovery takes hours, not

 6 weeks, is to simply turn over what's called a PST file,

 7 which is the email files and can be limited to a folder

 8 if the respondent keeps their folders in a -- you know,

 9 in a -- in a subject matter way which we don't know

10 because we've been given no information about what this

11 supposed mass email is.

12 I don't know how Mr. Roemer can send 350,000

13 emails in a little over a year, and really the key

14 periods are when they were applying for the authority.

15 But they can turn that over and simply do a search by

16 sender and recipient and -- and remove Mr. Wiley and his

17 law firm and any other law firms that may have been

18 involved in it. And it would be up to us to do the

19 searches, and I would be happy to do the searches. I'm

20 not going to spend weeks on it. I think I could find

21 what I need in a few -- in a day or two. I spent more

22 time than that just trying get some kind of a file or

23 some kind of a piece of paper, and we've got nothing.

24 MR. WILEY: Your Honor, the Western District

25 protocol clearly calls for search terms and custodians

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 1 in order to -- to effectuate electronically stored

 2 information searches. Turning over a PST file or the

 3 keys to the warehouse by a competitor to another

 4 competitor where there's no protective order and clearly

 5 confidentiality agreement doesn't go to this, it's just

 6 completely unreasonable, and it's -- it's harmful and

 7 tortuously interfering potentially. And we're not going

 8 to subject ourselves to that kind of exposure in a

 9 competitive industry.

10 JUDGE PEARSON: Okay. Thank you. I just

11 want to remind the parties that this is not civil

12 litigation in superior court. The Commission allows

13 discovery, which means that the Commission can revoke

14 discovery at any time, and it's for the purpose of

15 producing information that assists the Commission in

16 making its decision. So that's what I'm interested in.

17 I have fine-tuned the data requests to help

18 me, as the presiding officer, get the information that I

19 need to make a decision. And I am sensitive to the fact

20 that it will take time to produce these documents, and

21 so I think that SpeediShuttle needs to provide them as

22 they become available, probably on an ongoing basis and

23 keep Shuttle Express apprised of your progress as you do

24 so.

25 MR. WILEY: Are you saying we can't have

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 1 search terms, Your Honor? We don't even know what to

 2 look for. You want every piece of correspondence we've

 3 generated since 2014.

 4 JUDGE PEARSON: And what -- what I told you

 5 to look for is correspondence about -- specifically

 6 about the operations in Seattle such as which customers

 7 SpeediShuttle will be serving. Things of that nature,

 8 things that go to the business model that was approved

 9 by the Commission.

10 MR. WILEY: We'll probably need more

11 guidance on this in the future, Your Honor, because that

12 seriously broadens that, and without search terms or

13 custodial limitations, I don't know how we can even

14 begin to identify that over two years of time.

15 JUDGE PEARSON: Well, I'll tell you right

16 now, Mr. Wiley, that I will exclude, you know, the

17 internal strategizing emails, if you will, between

18 Mr. Roemer and Mr. Morton as Mr. Harlow has requested,

19 looking more broadly, like I said, at correspondence

20 with the Port, general emails to employees with

21 directions about the operations, et cetera.

22 MR. WILEY: That's more helpful, Your Honor.

23 We will continue -- I hope you'll be available for

24 questions on this. We don't want to be portrayed as

25 stonewalling --

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 1 JUDGE PEARSON: Absolutely.

 2 MR. WILEY: -- by the other side. We're

 3 having difficulty with these kind of broad requests.

 4 JUDGE PEARSON: Okay.

 5 MR. WILEY: That's why we initially

 6 requested what we did on September 30th so...

 7 JUDGE PEARSON: Okay. So that covers the

 8 remaining data requests, which brings us to the last

 9 remaining issue which is the penalties requested by

10 Shuttle Express. I won't be assessing penalties at this

11 juncture. When I read through the Company's

12 correspondence on discovery, it's -- it's apparent that

13 communication was poor on both sides. I do think that

14 it could be better and that it wasn't clear on either

15 side what was going on or -- or when communication would

16 be provided. So keeping that in mind, obviously we do

17 have that authority to do that if it goes on for much

18 longer, but I won't assess penalties at this point.

19 Is there anything further from any of the

20 parties?

21 MR. WILEY: Mr. Harlow, you go first.

22 MR. HARLOW: Oh, I was just going to inquire

23 we have a timetable targeted early next week, which is

24 acceptable to us for the financials, and I wanted to

25 know about 2 and 12, what kind of timing does Your Honor

0216

 1 have in mind there?

 2 JUDGE PEARSON: Mr. Wiley, what do you think

 3 would be reasonable?

 4 MR. WILEY: Well, that's part of my problem,

 5 Your Honor. Until I know the scope -- until this point

 6 in time, I've never even understood the parameters of

 7 the request. We now have your refinement of that, which

 8 is more helpful than anything I've received from -- from

 9 Shuttle Express which, you know, inquired as to what

10 they were looking for. But I will have to talk with the

11 client and find out what type of parameters we are

12 looking at and then report back, which I can do

13 hopefully by the end of next week.

14 And but -- but, Your Honor, I do want to

15 clarify since you said there was no pending motion to

16 compel on our data requests to Shuttle Express, I assume

17 that you would, then, want that teed up through a motion

18 to compel.

19 JUDGE PEARSON: Correct.

20 MR. WILEY: Okay. We will file one, Your

21 Honor.

22 JUDGE PEARSON: Okay.

23 Mr. Harlow, did you have anything further?

24 MR. HARLOW: Okay. I heard -- I heard

25 Mr. Wiley saying he was going to report back next week

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 1 on the parameters.

 2 JUDGE PEARSON: So what I'd like him to

 3 report back on is with an expect -- or an estimate of

 4 when it will be provided.

 5 MR. WILEY: And that's fair, Your Honor, so

 6 long as I understand -- I'll go over your ruling and

 7 talk to the client and understand what documents might

 8 be responsive at this point because I don't know that --

 9 I -- I would hesitate to give a timetable other than

10 what I can -- can report back, which I assume I can do

11 by writing in a letter or an email.

12 JUDGE PEARSON: Okay. That's fine.

13 MR. WILEY: Well, we may have to if -- if

14 there are, you know, privileged issues, et cetera, we're

15 going to be back to you on that, okay?

16 JUDGE PEARSON: Sure.

17 Okay. Anything else?

18 MR. HARLOW: Well, Your Honor, we had a typo

19 when we told you Mr. Pearson. I apologize for that.

20 JUDGE PEARSON: I didn't notice.

21 MR. HARLOW: We could amend it. I could

22 blame Word, but I don't think it was their fault.

23 JUDGE PEARSON: Okay. Is that all?

24 MR. FASSBURG: I believe that's it for us,

25 Your Honor.

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 1 JUDGE PEARSON: Okay. All right. Well,

 2 thank you. Thank you all for calling in today.

 3 MR. HARLOW: Thank you, Your Honor.

 4 MR. WILEY: Bye-bye.

 5 JUDGE PEARSON: Okay. We're adjourned.

 6 (Adjourned at 1:20 p.m.)

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 3 STATE OF WASHINGTON

 4 COUNTY OF THURSTON

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 6 I, Tayler Russell, a Certified Shorthand Reporter

 7 in and for the State of Washington, do hereby certify

 8 that the foregoing transcript is true and accurate to

 9 the best of my knowledge, skill and ability.

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 Tayler Russell, CCR

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