

Docket Nos. TC-143691 and TC-160516  
(Consolidated) - Vol. IV

In re the Application of Speedishuttle  
Washington, LLC

December 2, 2016



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A P P E A R A N C E S

ADMINISTRATIVE LAW JUDGE:

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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

6  
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 --

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

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

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

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.



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

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

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

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

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

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

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

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 --



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

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

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.

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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C E R T I F I C A T E

STATE OF WASHINGTON

COUNTY OF THURSTON

I, Tayler Russell, a Certified Shorthand Reporter  
in and for the State of Washington, do hereby certify  
that the foregoing transcript is true and accurate to  
the best of my knowledge, skill and ability.

\_\_\_\_\_  
Tayler Russell, CCR