

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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1 BEFORE THE WASHINGTON STATE
 2 UTILITIES AND TRANSPORTATION COMMISSION

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
 Convenience and Necessity to) (Consolidated)
 Operate Motor Vehicles in)
 8 Furnishing Passenger and)
 Express Service as an Auto)
 9 Transportation Company)

11 DISCOVERY CONFERENCE, VOLUME IV
 12 Pages 200-219
 13 ADMINISTRATIVE LAW JUDGE RAYNE PEARSON

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

20 REPORTED BY: TAYLER RUSSELL, CCR #3358
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1 OLYMPIA, WASHINGTON; DECEMBER 2, 2016
 2 1:00 P.M.
 3 --o0o--

5 PROCEEDINGS

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 APPEARANCES
 2 ADMINISTRATIVE LAW JUDGE:

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8 FOR SPEEDISHUTTLE WASHINGTON, LLC:

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20 * * * * *

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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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<p>1 course, Dave Wiley is on the phone on behalf of</p> <p>2 SpeediShuttle as well.</p> <p>3 JUDGE PEARSON: Okay.</p> <p>4 Mr. Wiley?</p> <p>5 MR. WILEY: Yes, Your Honor.</p> <p>6 JUDGE PEARSON: Just identify yourself.</p> <p>7 MR. WILEY: Yes, Dave Wiley, co-counsel for</p> <p>8 SpeediShuttle on the bridge line.</p> <p>9 JUDGE PEARSON: Okay.</p> <p>10 And, Mr. Harlow?</p> <p>11 MR. HARLOW: Thank you, Your Honor. Brooks</p> <p>12 Harlow, attorney for petitioner and complainant, Shuttle</p> <p>13 Express, Inc.</p> <p>14 JUDGE PEARSON: Okay. Thank you.</p> <p>15 So just to clarify, today we are only</p> <p>16 addressing the outstanding data requests issued to</p> <p>17 SpeediShuttle by Shuttle Express. I will not be</p> <p>18 addressing the data requests issued to Shuttle Express</p> <p>19 by SpeediShuttle because SpeediShuttle has not yet filed</p> <p>20 a motion to compel those responses.</p> <p>21 So based on the issue list submitted by the</p> <p>22 parties on Wednesday -- and thank you for that, that was</p> <p>23 very helpful -- it appears the parties are in agreement</p> <p>24 that the remaining outstanding data requests are numbers</p> <p>25 2, 12, and then 14 through 16, which were grouped</p>	<p>1 does mean Staff would not get them, and we do have</p> <p>2 provisions in the agreement that would allow</p> <p>3 confidential data to support testimony without actually</p> <p>4 putting the confidential data into the record.</p> <p>5 And so we -- we're very hopeful this will be</p> <p>6 a long-term workaround and will carry us to the end of</p> <p>7 the case. But we did want to make it clear that -- that</p> <p>8 we aren't waiving, I assume Mr. Wiley isn't either, the</p> <p>9 right to compel production if, for some reason, the</p> <p>10 workaround doesn't work. For example, if Staff were to</p> <p>11 object to testimony because of the lack of foundation or</p> <p>12 something like that, but we -- we don't think that's</p> <p>13 likely to happen. We think this will reach a</p> <p>14 compromise, a middle ground between the parties' desire</p> <p>15 for confidentiality and the need to develop the full</p> <p>16 record.</p> <p>17 JUDE PEARSON: Okay. So does that mean we</p> <p>18 no longer have to address Data Requests 14 through 16?</p> <p>19 MR. HARLOW: Other than as to the -- the</p> <p>20 sanctions due to the delay and -- which is based partly</p> <p>21 on these financials as well, the answer would be no, we</p> <p>22 don't have to -- we don't have to order. We're</p> <p>23 expecting -- we're expecting to get something early next</p> <p>24 week.</p> <p>25 JUDGE PEARSON: Okay.</p>
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<p>1 together and modified at the first discovery hearing on</p> <p>2 September 27th.</p> <p>3 So before we get started, I want to just</p> <p>4 check in with the parties about whether any progress has</p> <p>5 been made with respect to those outstanding data</p> <p>6 requests.</p> <p>7 MR. HARLOW: I'm happy to report, Your</p> <p>8 Honor, that there has been.</p> <p>9 JUDGE PEARSON: Great.</p> <p>10 MR. HARLOW: Dave, did you want to go first?</p> <p>11 MR. WILEY: No, I -- I wanted you -- you to</p> <p>12 go first.</p> <p>13 MR. HARLOW: Okay. So we have -- we have</p> <p>14 executed a nondisclosure agreement. It's a two-party</p> <p>15 between Shuttle Express and SpeediShuttle. The Staff is</p> <p>16 not a party to it. I understand they're aware of it. I</p> <p>17 haven't talked to them about it recently. The gist of</p> <p>18 the nondisclosure is that SpeediShuttle will produce</p> <p>19 certain data, and I think we're primarily talking about</p> <p>20 financials, but this could cover other things, pursuant</p> <p>21 to requests 14 through 16 as modified. Those will be</p> <p>22 treated as confidential, reviewed by employees and</p> <p>23 outside experts.</p> <p>24 This is a two-way agreement. Conceivably</p> <p>25 Shuttle Express could produce documents under this. It</p>	<p>1 MR. HARLOW: And, again, we might deem that</p> <p>2 to be inadequate but hopefully -- hopefully not.</p> <p>3 JUDGE PEARSON: Okay.</p> <p>4 MR. WILEY: Your Honor, if I could just say</p> <p>5 that I -- if they, you know, that the -- knowing these</p> <p>6 two parties, there may be continuing dispute about</p> <p>7 adequacy, and we will obviously bring that issue to you</p> <p>8 after we do the production of the document, okay?</p> <p>9 JUDGE PEARSON: Okay. Well, I hope that's</p> <p>10 not the case.</p> <p>11 MR. WILEY: Yeah, so do we, Your Honor.</p> <p>12 MR. HARLOW: You're not the only one, Your</p> <p>13 Honor.</p> <p>14 JUDGE PEARSON: So I don't need to hear any</p> <p>15 further discussion from the parties on the remaining</p> <p>16 data requests because the parties' written submissions</p> <p>17 contained all the information that I need to make my</p> <p>18 decision. And as was the case on September 27th, I will</p> <p>19 not be issuing a written order. My decisions will be</p> <p>20 made from the bench today, so please do take notes and</p> <p>21 feel free to ask clarifying questions.</p> <p>22 However, we are just down to the two</p> <p>23 remaining Data Requests, 2 and 12, and with respect to</p> <p>24 Data Request No. 2, SpeediShuttle was directed to</p> <p>25 provide any correspondence that demonstrates how</p>

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<p>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</p>	<p>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</p>
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<p>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</p>	<p>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</p>

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<p>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</p>	<p>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 --</p>
Page 213	Page 215
<p>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</p>	<p>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</p>

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<p>1 have in mind there?</p> <p>2 JUDGE PEARSON: Mr. Wiley, what do you think</p> <p>3 would be reasonable?</p> <p>4 MR. WILEY: Well, that's part of my problem,</p> <p>5 Your Honor. Until I know the scope -- until this point</p> <p>6 in time, I've never even understood the parameters of</p> <p>7 the request. We now have your refinement of that, which</p> <p>8 is more helpful than anything I've received from -- from</p> <p>9 Shuttle Express which, you know, inquired as to what</p> <p>10 they were looking for. But I will have to talk with the</p> <p>11 client and find out what type of parameters we are</p> <p>12 looking at and then report back, which I can do</p> <p>13 hopefully by the end of next week.</p> <p>14 And but -- but, Your Honor, I do want to</p> <p>15 clarify since you said there was no pending motion to</p> <p>16 compel on our data requests to Shuttle Express, I assume</p> <p>17 that you would, then, want that teed up through a motion</p> <p>18 to compel.</p> <p>19 JUDGE PEARSON: Correct.</p> <p>20 MR. WILEY: Okay. We will file one, Your</p> <p>21 Honor.</p> <p>22 JUDGE PEARSON: Okay.</p> <p>23 Mr. Harlow, did you have anything further?</p> <p>24 MR. HARLOW: Okay. I heard -- I heard</p> <p>25 Mr. Wiley saying he was going to report back next week</p>	<p>1 JUDGE PEARSON: Okay. All right. Well,</p> <p>2 thank you. Thank you all for calling in today.</p> <p>3 MR. HARLOW: Thank you, Your Honor.</p> <p>4 MR. WILEY: Bye-bye.</p> <p>5 JUDGE PEARSON: Okay. We're adjourned.</p> <p>6 (Adjourned at 1:20 p.m.)</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
Page 217	Page 219
<p>1 on the parameters.</p> <p>2 JUDGE PEARSON: So what I'd like him to</p> <p>3 report back on is with an expect -- or an estimate of</p> <p>4 when it will be provided.</p> <p>5 MR. WILEY: And that's fair, Your Honor, so</p> <p>6 long as I understand -- I'll go over your ruling and</p> <p>7 talk to the client and understand what documents might</p> <p>8 be responsive at this point because I don't know that --</p> <p>9 I -- I would hesitate to give a timetable other than</p> <p>10 what I can -- can report back, which I assume I can do</p> <p>11 by writing in a letter or an email.</p> <p>12 JUDGE PEARSON: Okay. That's fine.</p> <p>13 MR. WILEY: Well, we may have to if -- if</p> <p>14 there are, you know, privileged issues, et cetera, we're</p> <p>15 going to be back to you on that, okay?</p> <p>16 JUDGE PEARSON: Sure.</p> <p>17 Okay. Anything else?</p> <p>18 MR. HARLOW: Well, Your Honor, we had a typo</p> <p>19 when we told you Mr. Pearson. I apologize for that.</p> <p>20 JUDGE PEARSON: I didn't notice.</p> <p>21 MR. HARLOW: We could amend it. I could</p> <p>22 blame Word, but I don't think it was their fault.</p> <p>23 JUDGE PEARSON: Okay. Is that all?</p> <p>24 MR. FASSBURG: I believe that's it for us,</p> <p>25 Your Honor.</p>	<p>1 CERTIFICATE</p> <p>2</p> <p>3 STATE OF WASHINGTON</p> <p>4 COUNTY OF THURSTON</p> <p>5</p> <p>6 I, Tayler Russell, a Certified Shorthand Reporter</p> <p>7 in and for the State of Washington, do hereby certify</p> <p>8 that the foregoing transcript is true and accurate to</p> <p>9 the best of my knowledge, skill and ability.</p> <p>10</p> <p>11</p> <p>12 Tayler Russell, CCR _____</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>