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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 In re: Application TC-091931 of)
4 SHUTTLE EXPRESS, INC.) Docket No. TC-091931
5 For Extension of Authority under)
6 Certificate No. C-975, For a)
7 Certificate of Public Convenience and) VOLUME I
8 Necessity to Operate Motor Vehicles in) PAGES 1-21
9 Furnishing Passenger and Express)
10 Service as an Auto Transportation)
11 Company)
12 -----)

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12 A prehearing conference in the above matter was held on
13 Tuesday, September 28, 2010, at 10:00 a.m., at 1300 South
14 Evergreen Park Drive Southwest, Olympia, Washington, before
15 Administrative Law Judge ADAM TOREM.

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17 The parties were present as follows:

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19 SHUTTLE EXPRESS, by Brooks Harlow, Attorney at Law,
20 Miller Nash, LLP, 601 Union Street, Suite 4400, Seattle,
Washington 98101; telephone 206-777-7406 -- on Bridge line

21 SEATAC SHUTTLE, by Mike Lauver and John Solin, PO Box
22 2895, Oak Harbor, Washington 98277; telephone 360-679-4003
-- on Bridge line

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25 Tami Lynn Vondran, CCR No. 2157

Court Reporter

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P R O C E E D I N G S

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(Proceedings went on the record at

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10:09 a.m.)

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JUDGE ADAM TOREM: All right. Good morning. This

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is Docket TC-091931. It's an application of Shuttle

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Express, Incorporated to extend their certificate, which is

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already exiting, No. C-975. My name is Adam Torem, spelled

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T-o-r-e-m. I'm an administrative law judge for the

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Washington Utilities & Transportation Commission. I'm in

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Olympia this morning on Tuesday the 28th of September 2010.

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It's about ten minutes after ten in the morning. I've been

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speaking with the applicant and the protestant in this

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matter to sort out some administrative details, and we've

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now gone on the record. I'm going to take, very quickly,

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the appearances for both. They provided their contact

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information to the court reporter already. So appearing for

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the applicant Shuttle Express we have?

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MR. HARLOW: Good morning, Your Honor, this is

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Brooks Harlow.

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JUDGE ADAM TOREM: And appearing on behalf of the

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protestant SeaTac Shuttle we have?

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MR. SOLIN: John Solin.

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MR. LAUVER: Good morning, this is Mike Lauver.

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JUDGE ADAM TOREM: All right, thank you all. My

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understanding is that the application was originally filed

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1 on the 17th of December and published in the Commission's
2 transportation docket December 22nd of 2009. And,
3 Mr. Harlow, your client was seeking to remove some existing
4 language limiting vehicles to less than or equal to seven
5 passenger vans from the Shuttle Express certificate.

6 SeaTac Shuttle filed a protest electronically on
7 January 20th, 2010 opposing the extension as not in the
8 public interest. And there was some indication that SeaTac
9 Shuttle may be able to agree to the application extension if
10 there was some sort of restrictive amendment.

11 In between December and January and this time
12 there was a motion filed to strike the protest as untimely.
13 And in Order 01 I granted that back on February the 25th of
14 2010.

15 Some time passed and upon a petition for
16 administrative review the full Commission reinstated the
17 protest in Order 02. That was issued on August 25, 2010 and
18 was a procedural decision as how to classify the application
19 and the protest and treat them not as an adjudication but by
20 different rules which have a little bit more relaxed items
21 as to what could be filed electronically and what could be
22 filed or was required to be filed in a hard copy to perfect
23 service.

24 So we're back essentially to where we started in
25 January with a protest of the Shuttle Express application.

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1 So today's agenda we want to sort out exactly what the
2 issues presented for hearing are; decide on the type of
3 witness testimony we want, whether that be prefiled written
4 testimony or simple verbal testimony provided at a hearing
5 subject to cross-examination; and we'll also sort out
6 exactly how many copies we need to file with all pleadings
7 going forward.

8 Before we went on the record we did agree that the
9 hearing itself should take place in Seattle, that's where
10 the majority of the witnesses might be, so for their
11 convenience we're going to try to secure a facility in the
12 SeaTac or Seattle area. And the two dates that we have
13 narrowed down are Tuesday, November 30th or Wednesday,
14 December 1st.

15 Gentlemen, does that match what we talked about
16 before going on the record?

17 MR. HARLOW: Yes, Your Honor, again, subject to
18 witness availability on the 30th or the 1st, which I'll get
19 back to you just as quickly as possible after the
20 conference.

21 JUDGE ADAM TOREM: All right. Thank you.

22 MR. LAUVER: That's SeaTac Shuttle's
23 understanding, too.

24 JUDGE ADAM TOREM: Let's turn then back to you,
25 Mr. Harlow, and find out on the issues presented. My

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1 reading of the application was the request for removing that
2 language, and that was the only issue presented?

3 MR. HARLOW: Yes, Your Honor. And we are frankly
4 concerned by some of the filings, as well as off-record
5 statements by the protestant. There may be an attempt to
6 kind of go back and dig up issues in another Docket 090118
7 which had to do with Whidbey SeaTac Shuttle's ability to
8 serve Paine Field, and also that this is kind of very
9 clearly indicated in the request for administrative review
10 of your Order No. 1, that Whidbey SeaTac Shuttle seems to
11 want to use this proceeding as a way to spur the Staff to
12 engage in an enforcement proceeding. And we think that's
13 really beyond the scope of issues of either the application
14 or the protest and would request that the prehearing
15 conference order include a limitation on the issues,
16 specifically to focus on whether or not the use of vehicles
17 larger than seven passengers is in the public interest.

18 JUDGE ADAM TOREM: Mr. Lauver? Mr. Solin?

19 MR. LAUVER: Whether or not the use of the seven
20 passenger vehicles or larger is of public interest at this
21 point is not really what's at issue here. What's at issue
22 is the fact that Shuttle Express has been using--for many,
23 many, many years in violation of their certificate
24 authority--vehicles larger than seven passengers and,
25 therefore, is in violation of 480-30-141 subject to

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1 suspension or revocation of their certificate and should not
2 be granted additional authority based on their past
3 performance. The fact that whether -- the fact that the
4 public may or may not be served by now granting this does
5 not negate the fact that they have been operating illegally
6 for years.

7 JUDGE ADAM TOREM: All right. Well, I certainly
8 could read into the prior pleadings and the protest itself
9 that that was an issue for SeaTac Shuttle. In this kind of
10 a case, as an ALJ, I don't have independent authority to
11 file a complaint and institute an investigation. I simply
12 take the application that's before me and under the criteria
13 elsewhere in the administrative rules have to judge whether
14 it's in the public interest and whether or not Shuttle
15 Express would have the financial capability and the
16 equipment capabilities to serve the public as the terms of
17 their certificate might be.

18 It certainly could be part of your case that they
19 have already got these larger vehicles. As it shows in
20 their application, clearly these are 10 passenger vans, and
21 that they're bringing their certificate into practice with
22 what they're -- or into conformance with their practice, not
23 the other way around. Whether that's a public interest
24 issue or argument you can make? That would be fine. But I
25 can't turn this, as Mr. Harlow points out, into an

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1 enforcement proceeding.

2 In the interest of trying to see whether or not
3 Commission Staff would be interested in intervening in this
4 case I did make phone calls yesterday to Mr. Steve King's
5 office and Gene Eckhardt, and both of them indicated to me
6 that Staff had no intention of appearing today or
7 intervening in the case by phone and filing a petition for
8 intervention or otherwise participating as a party in the
9 case.

10 So I've tried to look at that, Mr. Lauver and
11 Mr. Solin, to see that they were aware that this case was
12 still viable now that it came back from the Commissioners
13 and on the docket for today if they chose to appear. But
14 I'm the only one, along with the court reporter, in the
15 hearing room today, and I believe that you three are the
16 only ones on the Bridge line. So I have no power to compel
17 Staff to come and intervene in the case.

18 MR. LAUVER: We're not asking for that
19 necessarily, we're just pointing out that they're not
20 serving to the satisfaction of the Commission or under the
21 terms of their authority and, therefore, should not and
22 cannot be granted additional authority. In fact, their
23 current authority is completely suspect.

24 JUDGE ADAM TOREM: Well, I'll allow you to make
25 that particular limited issue at the hearing to question if

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1 the public interest is served by having someone, as I said,
2 conform their certificate to their past practice, which you
3 can briefly bring into the record showing that it was
4 noncompliant. But I don't want to spend a lot of time at
5 the hearing questioning that. That will be part of the
6 decision I have to issue on the substance of this case. And
7 if you can show me under the regulations where the criteria
8 say do not grant this extension of the certificate--which in
9 this case would be a removal of limiting language--then that
10 may be the way I rule. But I certainly won't be able to
11 revoke their certificate within the scope of this
12 proceeding.

13 What I can tell you is if you wish to have a
14 complaint filed to--maybe you have already done this--bring
15 this to the attention of Staff, and it will be within their
16 discretion to seek such a penalty or seek such a complaint.
17 There are other ways to have private party complaints
18 handled by Commission Staff and brought before an
19 administrative law judge, but Mr. Harlow's client and their
20 application here is not the right process.

21 If there were perhaps two docket numbers in
22 process they might be combined and consolidated for the
23 convenience of the process, but that's certainly not the
24 case. As Mr. Harlow referenced Docket TC-090118 I saw that
25 there was an initial order in that case on August 12th of

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1 last year, and a final order on December 10th of last year.

2 MR. LAUVER: This case to us has no particular
3 connection to that case. This is an examination of the
4 issue of operating outside the scope of their authority and
5 then applying for an extension of that authority. The way
6 I'm understanding the conversation now any operator can go
7 do something illegally and then apply after the fact to
8 cover their tracks and that seems an acceptable practice.

9 JUDGE ADAM TOREM: I can't comment on a blanket
10 statement like that, Mr. Lauver, but I can tell you that
11 they've applied to change the equipment listed and remove
12 limiting language from the less than or equal to seven
13 passenger vans, and they want to remove that so they can
14 operate, apparently, any size vehicles they choose.

15 MR. LAUVER: Apparently to operate within the
16 scope of their authority which they are not currently doing.

17 JUDGE ADAM TOREM: Right. And as I've told you, I
18 don't have the discretion to bring an enforcement action but
19 simply to determine if it's in the public interest to do so.
20 You and I both know there are arguments to be made to put a
21 company out of business, and there's arguments to be made to
22 ensure future compliance.

23 And the Commission, in its enforcement arm, has
24 chosen apparently the later by not being here and not filing
25 their own. And I could read into it what you like, or I

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1 could read nothing into it as the Commission has other
2 orders that suggest the fact that they're not bringing an
3 enforcement action might be for multiple reasons including
4 staffing or other priorities.

5 So at this point there's no record in front of me.
6 If you want to try to subpoena one of them as a witness,
7 more power to you, to make your case.

8 MR. LAUVER: Okay.

9 JUDGE ADAM TOREM: But we're not going to make it
10 today. What I think the issue is being limited here, and I
11 agree with Mr. Harlow that the application is the issue, the
12 removal of the language is the issue. As a subset of that
13 issue if you want to show that essentially what we've talked
14 about today that this is conforming the certificate to their
15 past practice, which as you point out if that's true would
16 be outside the scope of their authority, make that a brief
17 factual presentation of the case and let me be the ultimate
18 decider of whether that's a finding of fact I can make or
19 need to make and whether it affects any conclusion of law,
20 whether this certificate modification application can be
21 granted, or by law because they're not in good standing of
22 some sort can't be granted.

23 There are doctrines that involve perhaps an
24 equitable doctrine, when you say unclean hands is I guess
25 the informal use of it, that someone can't seek a remedy

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1 from a Court when they've already got prior violations.
2 That's something that you might want to look into as a legal
3 theory. I'm not sure if it would be directly applicable or
4 even at all applicable to this case. But if there are
5 certain theories that are out there that might be depending
6 on the facts that you can present.

7 MR. LAUVER: I do believe that in the application
8 process the phrase willing and able applies here.

9 JUDGE ADAM TOREM: That's also true.

10 MR. LAUVER: And we're questioning the fitness of
11 Shuttle Express to provide this service in light of their
12 history.

13 JUDGE ADAM TOREM: And, again, within that limited
14 scope I'm allowing you to bring this up, but I don't want to
15 spend an entire treatise--whether in today's transcript or
16 when we get to it at the end of November or beginning of
17 December--going into it. That's one factor, fitness,
18 willingness and ability. And I think that Mr. Harlow's
19 client carries the burden to demonstrate both. If you want
20 to cross-exam, in a limited fashion, on this fitness
21 question about whether they know how to stay within their
22 authority I'll allow it but only up until a certain point.
23 That's one issue within this larger issue of should the
24 language be removed and is it in the public interest.

25 Mr. Harlow, anything else on issues?

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1 MR. HARLOW: No, Your Honor, I think you
2 appreciate what we're talking about, and I don't know if you
3 want to include limiting language in the prehearing
4 conference order, or we'll just deal with it at the hearing
5 in the form of objections if things get a little bit too far
6 afield.

7 JUDGE ADAM TOREM: I think I'll try to do both and
8 give a little bit more direction in writing. But I do want
9 to respect that Mr. Solin and Mr. Lauver do have potentially
10 a good issue as to the character of the company and its
11 ability to be fit to observe its limitations. But, again,
12 that's one sub issue and I don't want that to take over the
13 hearing.

14 I clearly will realize this is an issue before me,
15 and will look at the quality and the quantity of the
16 evidence. But I don't want to stress quantity. I just want
17 the evidence to be clear from Mr. Solin and Mr. Lauver's
18 part and presentation so it becomes part of the record and
19 then I can give it what weight I think is relevant given the
20 rest of the governing regulations. So I'll try to reduce
21 that to writing.

22 MR. HARLOW: Thank you, Your Honor.

23 JUDGE ADAM TOREM: Anything else on the issues of
24 the case?

25 MR. LAUVER: No, I think that pretty well

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1 summarizes it.

2 JUDGE ADAM TOREM: All right. Now giving that
3 witnesses -- Mr. Harlow, you are waiting to hear back on
4 witness availability. How many witnesses did you think you
5 were going to present?

6 MR. HARLOW: I think we will have probably one
7 company witness and one or two public witnesses.

8 JUDGE ADAM TOREM: Mr. Solin and Mr. Lauver, how
9 many witnesses?

10 MR. LAUVER: Two company witnesses and perhaps one
11 outside witness publicly.

12 JUDGE ADAM TOREM: All right. So do you think we
13 will be able to get all five or six of those witnesses in
14 one day?

15 MR. LAUVER: That's our feeling from SeaTac
16 Shuttle's side.

17 MR. HARLOW: Yes, Your Honor.

18 JUDGE ADAM TOREM: Mr. Harlow, as far as the
19 presentation of these witnesses should it all be with a
20 witness and exhibit list turned in? Maybe one or two
21 sentence summary of what each witness might be expected to
22 present as opposed to having it reduced at all to a friendly
23 deposition?

24 MR. HARLOW: I'm sorry, I'm not following what
25 you're asking here.

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1 JUDGE ADAM TOREM: Well, I think you were
2 referencing before we went on the record not having prefiled
3 testimony in writing. You just want to call these witnesses
4 at the hearing, do a direct exam on the record and
5 cross-exam on the record?

6 MR. HARLOW: Yes, live direct and cross I think is
7 the appropriate way to proceed in this kind of a case.

8 JUDGE ADAM TOREM: Okay. Mr. Lauver and
9 Mr. Solin, do you agree to that?

10 MR. LAUVER: We do.

11 MR. SOLIN: Yes.

12 JUDGE ADAM TOREM: Okay. So we're not going to
13 set a deadline for formal testimony to be exchanged, what
14 I'm thinking is a formal witness list maybe three weeks
15 before the hearing date somewhere ahead of Veteran's Day. I
16 can pick a date and you'll each exchange your witness list
17 that will have a name, address, telephone number to contact
18 the witness.

19 And I would appreciate, so I know what to expect
20 from each witness, as well as each of you, two or three
21 sentences telling me the area on which they're going to
22 testify and if they're going to testify on fitness, if
23 they're going to testify on willingness or ability to
24 provide the service--I would expect that might be the
25 company witnesses--that sort of thing. That's all I'm

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1 looking for in the witness list.

2 If a witness is going to sponsor exhibits those
3 should be listed prenumbered by each side, and then
4 exchanged at the same date that we exchange the witness
5 lists. That way everybody has a chance to review those
6 exhibits ahead of time and they are premarked and we don't
7 have to worry about handing them out or having any surprise
8 for cross-examination purposes at the hearing.

9 Now, witnesses that are going to be cross-examined
10 with extensive documents, if there's any detailed data that
11 they need to review that should be exchanged at that time,
12 as well, or at least a week ahead of the hearing. But if
13 you're going to bring, you know, a picture or an article,
14 something that they've clearly seen, as long as it's not a
15 surprise and slows down the hearing process I don't mind a
16 few exhibits being offered directly to the witness, once
17 counsel has seen it, at the hearing. But I certainly don't
18 want a large book or a binder of material handed to a
19 witness and for them to be expected to answer a
20 cross-examination question.

21 So as far as a deadline for submitting those,
22 three weeks ahead would be November the 9th, two weeks out
23 from the hearing date at the earliest would be the 16th. If
24 we split the difference, Friday the 12th, would that work
25 for both of you?

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1 MR. LAUVER: That should be sufficient for SeaTac
2 Shuttle. And will, Your Honor, want copies to the Bench?

3 JUDGE ADAM TOREM: Yes. And I'll specify in the
4 prehearing conference order how many hard copies have to be
5 filed. It doesn't appear that the distribution list here
6 within the Commission is going to be extensive for hard
7 copies, so I'm going to try to limit the number of paper
8 copies that are required. But when I give you the date that
9 will be an electronic submission date, and the next business
10 day, in this case Monday the 15th of November, would be the
11 deadline by noon to file your paper copies with the
12 Commission or ensure that they're delivered hard copy to
13 opposing counsel. So you'll be filing an e-mail that copies
14 me and opposing counsel, as well as our records center. And
15 if you're in the practice of using or web portal that's
16 fantastic as well. But the hard copies would be due the
17 next business day.

18 Mr. Harlow, does that Friday the 12th of November
19 work for you? Mr. Harlow?

20 MR. HARLOW: I'm sorry, I was muted. Yes, Your
21 Honor, the 12th works.

22 JUDGE ADAM TOREM: Okay. So I'm going to set
23 November the 12th, on Friday, as the witness and exhibit
24 list deadlines. And, again, as a courtesy, at least, you
25 know, seven calendar days ahead of the hearing if you know

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1 you have an extensive cross-exam exhibit to get that filed
2 with the other counsel. You don't have to supply that to me
3 necessarily, but make sure that they can get it to their
4 witness so they can review it if needed.

5 MR. HARLOW: Your Honor, is the applicant required
6 to bring copies of the application as an exhibit or is that
7 already considered to be part of the record?

8 JUDGE ADAM TOREM: You know, I have got one copy
9 of the filing, and it doesn't look like it's a real long
10 application. But I think even the copy that I have was
11 making reference to something else that was already there.
12 Is that what you're trying to avoid making extensive copies,
13 Mr. Harlow?

14 MR. HARLOW: Yes, trying to save just a few trees.
15 But for the convenience or necessity of the Bench or the
16 court reporter or the record I would be happy to make
17 copies, but I just don't want to burden you with extra.

18 JUDGE ADAM TOREM: Well, I have the one that's
19 just a photocopy from the original filing, and I think if
20 I'm counting right it's only about 13 pages.

21 MR. HARLOW: I think it's pretty short.

22 JUDGE ADAM TOREM: Why don't we go ahead and have
23 you make copies this time around, that way it's clear--that
24 can be Exhibit 1 or Exhibit 2--and it's referred to, because
25 right now it's not marked as an exhibit. And if you'll send

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1 in whatever the number of copies are that would be
2 fantastic.

3 Speaking of that, if I can have you, Mr. Harlow,
4 use numbers and maybe SeaTac Shuttle use letters so we can
5 tell the difference who is proposing. You'll be Exhibits 1,
6 2 and 3 for Shuttle Express; and SeaTac Shuttle will be A, B
7 and C and so on sequentially.

8 MR. LAUVER: We got it.

9 JUDGE ADAM TOREM: Okay. And, again, the number
10 of copies and the distribution list, I'll put that in the
11 prehearing conference order that goes out in the next couple
12 of days.

13 MR. SOLIN: We would just throw in the same as
14 Mr. Harlow. I know hard copies are required but at the same
15 time rather than send multiple hard copies by mail send a
16 hard copy and have Staff make distribution copies. It saves
17 everybody. Easier to copy down at that end then skip
18 everything and make copies and fill up envelopes. So I like
19 to minimize the number of hard copies that actually get
20 printed.

21 JUDGE ADAM TOREM: Yeah, I appreciate that, and
22 I'm going to give you the lowest number possible. But our
23 rules require that applicants and litigants make the copies,
24 not the Commission. And the wisdom of that is beyond me but
25 that's the way it works here.

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1 MR. LAUVER: Very good.

2 MR. HARLOW: The taxpayers, again, Your Honor.

3 JUDGE ADAM TOREM: Taxpayers are paying one way or
4 the other, I suppose.

5 MR. HARLOW: Not for the copies anyway.

6 JUDGE ADAM TOREM: All right. So we're going to
7 hear from you, Mr. Harlow, on which date, whether Tuesday
8 the 30th of November or Wednesday the 1st of December is
9 best for the hearing. Assuming one of those works you'll
10 get back to me as soon as you hear from your witnesses?

11 MR. HARLOW: Yes, Your Honor.

12 JUDGE ADAM TOREM: Was there any other business we
13 needed to conduct this morning?

14 MR. HARLOW: Let me take a moment to check my
15 notes.

16 MR. LAUVER: SeaTac Shuttle can't think of any
17 right at this moment.

18 MR. HARLOW: No, Your Honor, I think that covers
19 it.

20 JUDGE ADAM TOREM: All right. Then I'll issue a
21 prehearing conference order as soon as I get the
22 confirmation of the date. But we'll, in writing, reduce the
23 witness exhibit list due dates as well as the courtesy date
24 for cross-exam exhibits. We'll also get the limiting
25 language that I talked about for the issue in the hearing,

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1 and I think that's about it. Get the number of copies for
2 the distribution list down as low as it can go.

3 Gentlemen, anything else?

4 MR. LAUVER: Nothing from SeaTac Shuttle.

5 MR. HARLOW: Nothing with Shuttle Express.

6 JUDGE ADAM TOREM: Then we are adjourned here at
7 10:37.

8 (Proceedings ended at 10:37 a.m.)

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I, TAMI LYNN VONDRAN, a Certified Court Reporter,
do hereby certify that I reported in machine shorthand the
foregoing proceedings in the above-entitled cause; that the
foregoing transcript was prepared under my personal
supervision and constitutes a true record of the testimony
of the said witness.

I further certify that I am not an attorney or
counsel of any parties, nor a relative or employee of any
attorney or counsel connected with the action, nor
financially interested in the action.

DATED at Edgewood, Washington this 7th day of
October, 2010.

Tami Lynn Vondran, CCR
Official Court Reporter
License No. 2157