BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. BREMERTON-KITSAP AIRPORTER, INC., C-903, Respondent.	DOCKET NO. TC-001846 COMMISSION STAFF'S RESPONSE TO BREMERTON-KITSAP AIRPORTER, INC.'S, PETITION FOR ADMINISTRATIVE REVIEW

The Staff of the Washington Utilities and Transportation Commission submits the following brief in response to Bremerton-Kitsap Airporter, Inc.'s ("Bremerton-Kitsap" or "Company") Petition for Administrative Review.

I. ISSUES PRESENTED

Bremerton-Kitsap's Petition raises only two narrow issues that have any real bearing on the fares recommended by the initial order. The issues are straightforward and do not warrant the additional time and expense of oral argument.

First: Should the Commission adopt the initial order's five year amortization of the Company's rate case costs on the basis that this proceeding represents an unusual event in

the company's history that likely will not soon be repeated and reject the two or three year amortization now advocated by the Company?

Second: Should the Commission adopt the initial order's finding that the officer salary amount advocated by Staff was appropriate and reject Bremerton-Kitsap's argument that the initial order should have included the value of a benefits package, even though Bremerton-Kitsap does not provide benefits to its employees, including the executive?

Bremerton-Kitsap posits a third issue that, unlike those above, does not have an impact on the initial order's recommended fares: Should the Commission bill the Company for a portion of the Commission's costs as directed by RCW 81.20.020 and as provided by the initial order?

As argued below, the initial order represents an appropriate resolution of each of these issues and should be adopted by the Commission.

II. ARGUMENT

1. The initial order's five year amortization of the expenses incurred by the Company in this rate case is far more realistic than the Company's proposed two or three year amortization.

A five year amortization of the Company's rate case cost is reasonable because this kind of expense has not, and should not, occur at the frequency of once every two, three, or even four years for a company of this size and type. The Commission should recognize that the recommended five year amortization is appropriate regardless of whether one concludes that the Company's legal fees were excessive in this case.[1]

Bremerton-Kitsap's fervent defense of the number of billed hours its advocates spent and the fees they charged for those hours is understandable, but it is ultimately irrelevant and

[1] Staff has never argued that its own time on this case was less than the Company's or that Bremerton-Kitsap's lawyers' hourly fees are excessive. Litigation is expensive. The expense is particularly troubling when it turns out to be so large in comparison with the amounts at stake. Staff is shocked not only at the Company's expense, but at

misplaced. The Company clearly takes umbrage at arguments made by Staff before ALJ Schaer in support of Staff's position that the Company should have no pro forma adjustment to capture its expense in this case. But Staff lost on that argument and does not advance it here. The initial order allows recovery of the Company's rate case expense in rates. As ALJ Schaer explained in paragraphs 18 and 19 of the Fourth Supplemental Order, the fares recommended by the initial order contain some headroom as a result of the rate design practice of rounding fares—up in this case—to the nearest quarter of a dollar. If the Commission adopts the initial order's five year amortization of the Company's case costs, it is immaterial whether the total amount to be amortized is reflected as $62,805 (as provided in the initial order) or $101,756 (as the Company would prefer). Accepting the Company's larger figure would not change the resulting fares.[2] Because the fares set by the initial order are sufficient to provide for full recovery of the Company's $101,756 in case costs—albeit over a longer period than the Company would like—the Company's arguments about its total expenditure are ultimately not germane to whether the Commission should adopt the initial order's recommended fares.

As the Commission stated in *WUTC v. Rosario Utilities, LLC*, Docket No. UW-951483 (1996 Wash. UTC Lexis 43) p. 16 (Nov. 25, 1996), the proper mode of recovery of rate case expenses is to amortize them over the period between expected occurrences or over a reasonable period. While three years is not an uncommon period for the Commission to amortize the expense of prosecuting a rate case, the Commission has never suggested that it represents an outer limit. The objective is to choose a period that will normalize the level of legal and accounting expenses that are to be embedded in permanent rates.

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its own costs that it had to incur to ensure that Bremerton-Kitsap's rates accurately reflect costs of service and are fair, just, reasonable and sufficient.

Let's be clear—this is not a rate case. The ALJ allowed Bremerton-Kitsap to withdraw its proposed tariff and converted the proceeding to a complaint. As the Company itself argues, a rate complaint proceeding to lower a company's existing rates is relatively rare variety of proceeding for the Commission. As a complaint to reduce rates, this is the only case in Staff's memory and, for the Company, it is an expense that should not, and likely will not, ever be repeated.

By all indications, in the history of this Company, this $101,756 expense represents a particularly large "spike" in the Company's cost of determining rates before the Commission. The Company has had only two litigated rate filings in its twenty three years—one in 1985 and another in 1988.[3] Its present rates were set eleven years ago, in 1991, after negotiations with Staff.

Since 1991, the Company has made three filings for fare increases that it has subsequently withdrawn. Despite the Company's protests that the merits of those filings was never determined, Staff offered undisputed evidence in this case that the company was in fact over earning during the period in which it filed at least the last two of these tariff amendments, both in 1988. Ex. 1T (Colbo Direct) p. 28; Ex. 15, p. 1. It is a matter of record in this case that those filings and the one that prompted the Staff complaint in this case were ill-advised in light of any realistic officer salary allowance and the 93 percent operating ratio ratemaking method. *Id.*

Bremerton-Kitsap criticizes the notion that a Company's history of infrequent contested rate filings should bear on the rate case amortization decision. But the Company fails to suggest

[3] Staff's brief, and therefore the initial order, is in error on this point—the last litigated case was not in 1991. It was in 1988. See page 9 of Ex. 9 and Exhibits 10 and 11. Nonetheless, the point about the infrequency of contested rate proceedings is even further underscored.

any better means of predicting the recurrence of costs such as these. Indeed, the initial order states that it may be reasonable to amortize over ten or eleven years.

This Company's history with rate case litigation is not the only reason for a five year amortization of the costs of this case. Another reason is that the expense of this case is particularly large in relation to the company's overall revenues and the amounts actually at issue.[4] It is therefore reasonable to amortize this cost over a somewhat longer period than usual to reduce the risk of over recovery in future years. The whole point of this case, from Staff's perspective, has been to put an end to this Company's long-standing over earning.

The danger of too short an amortization period is that the company may again, in the near future, have fares in place that produce revenues substantially in excess of the Company's requirements. A longer amortization period reduces that risk, while still allowing recovery. If the Company experiences a contested rate case before the cost of this case has been fully amortized, the Company will be free to argue that the Commission should consider that fact in deciding on an appropriate normalized level of rate case expenses going forward.

The Commission should adopt the initial order's five year amortization of this unusual rate complaint case expense.

2. The Commission should bill the company one percent of its gross operating revenues ($16,634), as directed by statute, to help defray the Commission's costs in this proceeding.

The Company suggests the Commission should somehow punish or censure its Staff by refusing to adopt the initial order's recommendation that the Company be billed for a portion of the Commission's costs pursuant to RCW 81.20.020. Besides being a curious argument, the Company's suggestion that the Commission should "disallow" its *own* expenses lacks any basis

in the language of the statute. The Company does not, and cannot, argue that the Commission's costs in this proceeding have not greatly exceeded the ordinary regulatory fees the Company paid in the preceding year—the trigger for application of the statute. The decision as to how, or to what extent a company should recover its rate case costs through fares paid by its customers involves the exercise of discretion and judgment by the Commission. By contrast, the legislature has left little to the Commission's discretion in the application of RCW 81.20.020. The language of the statute is mandatory.[5] Moreover, Bremerton-Kitsap mischaracterizes RCW 81.20.020 as a means for *Staff* to recover *its* case costs in the same manner that a regulated company recovers its case costs. RCW 81.20.020 speaks of the *Commission's* costs and the statute serves the principle, reflected in RCW 81.24.050, that the regulatory fees collected from each respective company should approximate the reasonable cost of supervising and regulating that company. To help preserve the integrity of this system, RCW 81.20.020 provides a way to "true up" regulatory fees when the cost of investigating a particular company exceeds the regulatory fees paid by that company. It is in no way equivalent to the process for determining a company's normalized level of rate case expense.

Staff urges the Commission to assess Bremerton-Kitsap the maximum allowable portion of the Commission's costs in this proceeding pursuant to RCW 81.20.020, as recommended by the initial order.

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[4] The Company's rate case expense was $101,000. The company originally filed for $230,000, or 14.2 percent increase in revenues. Staff advocated a $257,047 or 15.5 percent reduction. The initial order recommends a $150,052, or 9.15 percent, reduction.

[5] ". . . such public service company *shall* pay the expenses reasonably attributable and allocable to such investigation, valuation, appraisal or services." [emphasis added]

3. The Commission should adopt the initial order's allowance of $66,000 for executive officer compensation.

Staff's research and testimony on the issue of executive compensation was thorough, detailed, and fair. It also stands out in stark contrast against the lack of any credible evidence on the part of the Company as to what would constitute an appropriate level of executive compensation for inclusion in rates.

The Company's argument regarding executive compensation repeats many arguments Staff has already addressed in post-hearing briefing. Staff therefore commends pages 9-16 of its post hearing brief to the Commission's attention. The Commission should adopt the initial order's acceptance of Staff's recommended executive salary amount.

Bremerton-Kitsap argues that Staff's salary survey does not represent an "apples to apples" comparison of salaries paid to executives of comparable regulated airporter services because it does not include consideration of bonuses or other types of unofficial compensation that might be paid to those executives. In fact, it would have been an error on Staff's part to have considered such unofficial remuneration. As Mr. Colbo testified, the executive pay figures that Staff collected with respect to other regulated airporters is the amount that is presently included in the rates of each of those companies. Ex. 1T (Colbo Direct), p. 14, ll. 14-15. Staff does not deny that it is possible that those executives receive bonuses or salary in addition to the amounts reflected on page 10 of Ex. 9—though the Company offers no evidence in support of this contention. Even if the executives of these other airporters receive additional compensation, that extra pay is irrelevant because it is not specifically allowed for in rates. The inquiry, after all, is what compensation amount should be provided *in rates*.

Bonuses are a slippery issue with respect to the closely held, owner-operated ventures that prevail in the airporter business. As this case proves, there is every incentive from a tax

avoidance standpoint for a company to label what would otherwise be distribution of earnings to the owner as additional compensation (or as a "bonus") to the owner-as-employee. The fallacy of the Company's argument is demonstrated by the fact that if one of these other companies had surveyed Mr. Asche's "total compensation" (including bonuses) prior to this case, it would have wrongly concluded that appropriate executive pay for a relatively small airporter service is in the range of $421,000.

The Company also argues that Staff's analysis is faulty because it fails to provide something extra to represent the value of a benefits package. However, it would not have been appropriate for the initial order to have adopted a higher salary amount for Bremerton-Kitsap's executive on the basis that other public and regulated sector executives surveyed by Staff may receive benefits in addition to cash compensation. As the initial order properly concluded, Bremerton-Kitsap does not provide its executive, or any other employee with benefits, and there is no reason to impute such a cost to Bremerton-Kitsap.

Additionally, Staff's analysis of the salaries of public transit agency executives demonstrates that Bremerton-Kitsap, with its 15 vans and two routes is a much smaller and less complex operation than those managed by the transit agency executives in Staff's survey. See pp. 11 and 12 of Staff's post hearing brief. Staff used an extraordinarily generous cutoff of $10 million in revenues (as compared to Bremerton-Kitsap's $1.6 million) to define Bremerton-Kitsap's "peer" enterprises in the public sector. All of this militates against allowing Bremerton-Kitsap any additional amount above that recommended by Staff for executive compensation.

Finally, the Company argues that the initial order punishes the company's owner/executive Richard Asche for admitting that he does other than "chief executive" type work. But the fact that Mr.Asche performs "chief bottle washer" work (the Company's own

characterization) is simply anecdotal evidence—in case any was really needed—that this is, after all, a small, privately owned company with 15 vans and only 22 part time employees. As such, large company executive officer compensation would simply not be realistic for this company.

4. The Commission should deny the Company's request for oral argument.

Oral argument is unnecessary in this case and should be denied. The Company's arguments on administrative review are either largely irrelevant (i.e., the reasonableness of time spent on the case and the fees charged by the lawyers) or a repetition of arguments already made below. While the Company complains it did not have an opportunity to respond to questions about rate case costs because Staff raised the issue for the first time in simultaneous post hearing briefing, the Company has now submitted two sizeable briefs on the issue, one in support of the Company's motion for reconsideration and now another on administrative review. Oral argument would do nothing more than exacerbate the problem of the high costs already incurred by both the Company and the Commission in this case.

III. CONCLUSION

There is no material issue at this stage as to the total amount of rate case expense to be attributed to this proceeding in the pro forma results of operations. The only material issue with respect to rate case cost recovery is the proper period of amortization. The initial order adopts a reasonable five year amortization for the large and unusual expense that this case represents for the Company. The Commission should adopt the initial order's five year amortization of rate case costs.

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Staff's analysis of an appropriate executive compensation amount for this company is thorough, fair, and produces a realistic level of executive compensation expense for inclusion in rates. The Company offers no alternative that is based on any objective considerations. The Commission should adopt the initial order's allowance of $66,000 for executive compensation.

DATED this 20th day of June, 2002.

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