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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

MEMORANDUM IN SUPPORT OF
PETITION FOR REVIEW OF
INTERLOCUTORY ORDER

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COMES NOW Respondent Bremerton-Kitsap Airporter, Inc. and respectfully submits the following in support of its Petition for Review of Order Denying Petition to Withdraw Rate Filing.

FACTUAL BACKGROUND: Bremerton-Kitsap Airporter (“BKA”) is a regulated auto transportation company that holds WUTC Certificate C-903. On November 27, 2000, BKA filed proposed tariff revisions designed to effect an increase in rates for passenger and express service. BKA was not represented by counsel at that time, but rather relied on its CPA to assist with the filing. The Commission suspended the tariff revisions pending hearing.

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A prehearing conference was held on April 3, 2001, and a prehearing conference order was entered on April 4, 2001. BKA had not yet formally retained counsel, but its President Richard Asche did contact Mr. Sells by telephone from the prehearing conference to verify availability on proposed dates for hearings and the like.

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MEMORANDUM IN SUPPORT OF PETITION FOR
REVIEW OF INTERLOCUTORY ORDER - 1
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1 Thereafter, both Mr. Sells and David Wiley were retained to represent BKA in this
2 matter. By that time preliminary discovery on behalf of BKA and commission staff had
3 commenced.

4 After counsel had the opportunity to thoroughly review the filing and deal with
5 preliminary discovery, the decision was made to withdraw the proposed tariff revisions.
6 Accordingly, on May 14, 2001 BKA filed an application for voluntary withdrawal of its rate
7 request. Staff opposed the request, and on July 25, 2001, Administrative Law Judge Marjorie
8 R. Schaer issued an Order Denying Petition to Withdraw Rate Filing, which is the order BKA
9 asks the Commission to review and reverse.

8 REASONS WHY THE ORDER IS IN ERROR:

9 1. The Commission Has Discretion to Grant BKA's Petition for Withdrawal.

10 There is no clear Commission position regarding withdrawal of rate increase filings
11 after the prehearing conference has been held. The allowance of withdrawal after a prehearing
12 order is discretionary with the Commission. Order M.V. No. 135801, In Re F. Allen Forler
13 d/b/a A. F. Excavating, App. P-70777 (Apr. 1987).

14 This is the kind of situation in which the Commission should exercise its discretion and
15 not force BKA to proceed with a rate filing it now wishes to abandon. Although a prehearing
16 conference order has been entered, that order is of little if any effect, because a second
17 prehearing conference is scheduled for August 9, 2001. (See Notice of Second Prehearing
18 Conference, Docket TC-001846 (July 25, 2001). The schedules and dates in the first order are
19 now moot, as a new revised schedule must be set. Thus, the parties are in the same position as
20 if this Petition were filed prior to that first order.

21 2. The Commission Should Look to the Civil Rules for the Superior Court for
22 Guidance.

23 Judge Schaer's order places BKA in a truly unique and highly untenable situation. It is
24 akin to a Superior Court Judge forcing a plaintiff in a civil action to proceed with its case, after
25 it has decided to voluntarily dismiss the lawsuit.

 Civil Rule 41(a)(1) provides that a plaintiff has the absolute right to dismiss its action
on its own motion "at any time before plaintiff rests at the conclusion of his opening case." CR
41(a)(1)(B). This is an absolute right. King County Council v. King County Personnel Board,

1 43 Wn.App. 317, 318 (1986); Goin v. Goin, 8 Wn.App. 801, 802 (1973). The rationale is
2 obvious; one who initiates an action then discovers early on (hopefully after consultation with
3 counsel) that he does not want to prosecute the action, should not, and cannot, be forced to do
4 so.

5 Commission staff appears to argue that its actions thus far constitute a “quasi-
6 counterclaim,” and thus the petition should be denied pursuant to CR 41(3), which
7 provides that if a counterclaim exists the action should not be dismissed “unless the
8 counterclaim can remain pending for independent adjudication by the court”. The rule makes
9 good sense, particularly when, for example, there is a statute of limitations problem for the
10 counterclaimant if the action is dismissed. However, staff’s analogy fails for two reasons:

11 First, there is no such thing as a “counterclaim” or “quasi-counterclaim” in this type of
12 proceeding.

13 Secondly, dismissal does not deprive the Commission of any ongoing jurisdiction or
14 authority over BKA’s operations and rates and charges.

15 If, as the staff asserts, the Commission should review BKA’s operations relative to its
16 rates and executive compensation, it has full power to do so pursuant to RCW 81.04.110 and
17 81.68.030. There is, however, no legal or practical reason to allow staff to piggyback what
18 should be an independent complaint procedure onto a tariff filing with attendant burden of
19 proof problems, which the applicant does not wish to pursue.

20 CONCLUSION: Staff seeks to force a regulated company to prosecute an
21 administrative proceeding against both its own wishes, and the advice of counsel. This leaves
22 BKA in an entirely untenable and completely unfair position. What would staff have it do,
23 ignore the action and risk sanctions and imperil the viability of its permit? Or should it make a
24 half-hearted effort to achieve something it does not want, against the advice of counsel and
25 spending substantial amounts of money just to go through the motions?

This simply makes no sense. If the staff wishes to examine this company’s rates (the
same rates that were approved by the Commission some ten years ago), it has the authority to
do so on its own petition. We do not have to create “quasi-counterclaims” and “unique
procedural and process issues” to get from here to there.

Respectfully submitted this 2nd day of August, 2001.

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