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BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

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BREMERTON-KITSAP AIRPORTER, )  
 INC., )  
 Complainant, )  
 vs. ) DOCKET TC-110230  
 SHUTTLE EXPRESS, INC. ) ORDER 02  
 Respondent. )

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TELEPHONIC STATUS CONFERENCE, VOLUME I

Pages 1 - 16

ADMINISTRATIVE LAW JUDGE PATRICIA CLARK

9:30 a.m.

OCTOBER 25, 2011

Washington Utilities and Transportation Commission  
1300 South Evergreen Park Drive Southwest  
Olympia, Washington 98504-7250

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0002

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0003

1                   JUDGE CLARK: Good morning. It is  
2 approximately 9:30 a.m. on October 25th, 2011, in the  
3 Commission's hearing room in Olympia, Washington.  
4 This is the time and the place set for a telephonic  
5 status conference in the matter of Bremerton-Kitsap  
6 Airporter, Incorporated, versus Shuttle Express,  
7 Incorporated, given Docket No. TC-110230. Patricia  
8 Clark, Administrative Law Judge for the Commission  
9 presiding.

10                   This matter came before the Commission on  
11 February 2nd, 2011, when Bremerton-Kitsap Airporter  
12 filed a formal complaint against Shuttle Express.

13                   On February 23rd, 2011, Shuttle Express filed  
14 an answer to the complaint. This matter was delayed  
15 twice at the request of the parties, because they were  
16 attempting to resolve the issues in the complaint  
17 through settlement negotiations. The parties were  
18 unable to resolve the dispute, and Bremerton-Kitsap  
19 Airporter filed a motion to amend complaint and  
20 complaint. Shuttle Express opposed the motion.

21                   By Order 02, entered on September 27th, 2011,  
22 the Commission granted the motion to amend complaint,  
23 provided Shuttle Express with the opportunity to file  
24 an amended answer by October 17th, 2011, and scheduled  
25 a telephonic status conference for this date and time.

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1 Shuttle Express did not file an amended answer.

2 At this time, I will take appearances on  
3 behalf of the parties.

4 Appearing on behalf of Bremerton-Kitsap  
5 Airporter?

6 MR. WILEY: Hi, Your Honor. David W.  
7 Wiley, I'm the attorney for the complainant. My  
8 address is 601 Union Street, Suite 4100, Seattle,  
9 Washington 98101.

10 JUDGE CLARK: And appearing on behalf of  
11 Shuttle Express?

12 MR. HARLOW: Good morning, Your Honor.  
13 This is Brooks Harlow with Lukas, Nace, Gutierrez &  
14 Sachs, LLC.

15 Do you need our address again for the record,  
16 or is that on file?

17 JUDGE CLARK: We have it on file, that's  
18 fine.

19 MR. HARLOW: Okay.

20 JUDGE CLARK: The purpose of this  
21 morning's status conference is to determine how to  
22 proceed to resolve the disputed issues in this case.  
23 I have read the complaint, the amended complaint and  
24 the answer, and there do not appear to be any disputed  
25 issues of material fact.

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1           In essence, Bremerton-Kitsap asserts that  
2    Tariff 7, approved by the Commission in Docket  
3    TC-102067, and the authority granted in the  
4    certificate, is in conflict with Bremerton-Kitsap's  
5    certificate and thus, illegal. Shuttle Express agrees  
6    that it is providing service under its approved tariff  
7    and certificate and denies that such service is  
8    illegal.

9           Bremerton-Kitsap Airporter requests that  
10   Tariff No. 7, and the ZIP code rate design, be  
11   reformed and revised to conform more specifically with  
12   WAC 480-30-411(1), and that any tariff publication  
13   found by the Commission to exceed the permissible  
14   geographic, interpretive and operational scope of the  
15   certificate be suspended, and Shuttle Express be  
16   ordered to comply with the terms of its certificate  
17   authority.

18           So I guess my first question to the parties is  
19   whether you see any disputed issues of material fact.

20           I will turn to you first, Mr. Wiley.

21           MR. WILEY: No, Your Honor, I think you  
22   framed the issue quite well. The only thing I would  
23   add is that the Commission's approval of the tariff  
24   was on, as the complaint references -- the amended  
25   complaint references it at Paragraph 7, was on a

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1 one-day provision, which allows tariffs to go  
2 automatically into effect on one day's notice, under a  
3 premise of no change by the proponent. That one-day  
4 filing should not be viewed as giving an imprimatur by  
5 the Commission to any substantive review of the  
6 tariff.

7 So that remains one of the important legal  
8 issues. I don't believe there are any factual issues  
9 in dispute as you framed the matter.

10 JUDGE CLARK: All right.

11 Mr. Harlow?

12 MR. HARLOW: Well, certainly, we have  
13 struggled with this complaint and the vagaries of it.  
14 But I guess, as I understand it, at this point, the  
15 complaint is based on the permits of both the parties,  
16 the tariff filed by Shuttle Express, perhaps other  
17 documents and records, the official records of the  
18 Commission. And so to the extent that's the  
19 limitation of the basis of the complaint, we would  
20 agree there are no issues of fact, and it's simply a  
21 matter of applying a legal analysis to documents on  
22 file with the Commission, and the Commission's  
23 official documents of the parties, certificates and  
24 tariffs.

25 JUDGE CLARK: All right.

0007

1           Well, if there are now disputed issues of  
2 material fact, it seems to me that the issues in this  
3 proceeding would probably be better resolved through  
4 legal briefing, rather than conducting an evidentiary  
5 hearing.

6           MR. WILEY: Your Honor, could I ask  
7 when --

8           JUDGE CLARK: Okay, Mr. Wiley?

9           MR. WILEY: I agree with that, but my  
10 only concern is, I assume that we would be allowed to  
11 submit declarations which would put into issue the  
12 operative documents so that you would have them in  
13 front of you as you make a decision. Meaning the  
14 tariff filings, the notice, you know, those sorts  
15 of -- they are official records, so I assume you can  
16 take official notice, but I just want to make sure we  
17 frame up the correct documents for your review.

18           JUDGE CLARK: All right. I don't have  
19 any problem with the parties putting forth those  
20 documents. As you indicated, those documents are  
21 already on file with the Commission, they are already  
22 documents that are available in the public record, and  
23 they are certainly documents for which I can take  
24 official notice. It would be helpful if the parties  
25 simply provided those, rather than having me search

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1 the Commission's records to obtain those documents.

2 So I don't think that that's any kind of  
3 problem, but I would like to hear from Mr. Harlow.

4 MR. HARLOW: I guess my question is:  
5 Are we going beyond any of the documents that have  
6 already been referenced or attached to the complaint?

7 JUDGE CLARK: Mr. Wiley?

8 MR. WILEY: Well, when you say "been  
9 referenced," I think that the amended complaint lists  
10 a number of dockets that are the first time they have  
11 been referenced. So I think -- I think the answer is  
12 no, but I want -- I just want to make sure that the  
13 arguments and facts that are alleged in the complaint  
14 can be supported by appropriate filings. I don't see  
15 an issue there, but if something should arise which  
16 hasn't been cited, I assume we can deal with that on a  
17 procedural basis.

18 JUDGE CLARK: Mr. Harlow?

19 MR. HARLOW: I think we can deal with  
20 that, as long as this would apply to any document,  
21 including the ones disclosed in the complaint. But I  
22 just -- you know, based on my recollection of the  
23 complaint, I didn't -- I don't recall any references  
24 or documents attached that we would challenge the  
25 official notice procedure.



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1           The only reason I mentioned my question is if  
2 something new came in, and if we are clearly against  
3 something that would be subject to proper official  
4 notice, we would have no objection. But if something  
5 new came in that we didn't feel you could take  
6 official notice of, we simply would want the  
7 opportunity to address that procedurally.

8           JUDGE CLARK: And I think that would be  
9 appropriate, Mr. Harlow. But by proposing that, we  
10 resolve the issues in this complaint through a legal  
11 briefing process, rather than an evidentiary hearing.  
12 It's not my intent to expand the scope of the amended  
13 complaint.

14           MR. HARLOW: Correct.

15           JUDGE CLARK: So if those issues should  
16 arise, we will address those as they come up.  
17 Hopefully, there won't be any of those.

18           So I guess the only other thing I would like  
19 to do this morning is to establish a schedule for that  
20 briefing. And I would anticipate having an initial  
21 brief filed by Bremerton-Kitsap, and a reply brief  
22 filed by Shuttle Express.

23           I am going to turn to you first, Mr. Wiley,  
24 and ask how much time you need to prepare that initial  
25 brief.

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1                   MR. WILEY: Well, Your Honor, there's  
2 one other issue, and it is very pertinent to  
3 scheduling. And that is, there's one other elephant  
4 in the room that you may -- I assume you are aware of,  
5 but you may not know about, Mr. Harlow and I are  
6 certainly aware of it, and that is that the Agency has  
7 requested legislation for the 2012 legislative  
8 session, that, in my opinion, if it passes, would moot  
9 these issues. And I do think that we ought to  
10 consider that in our scheduling, because we don't want  
11 to be spending your time and all the clients' money  
12 for naught.

13                   And thus I believe it probably would be -- it  
14 is going to be a short legislative session, and we --  
15 because it is an election year, and we should be able  
16 to see whether it is going to get out of committee,  
17 et cetera, probably into early -- early to  
18 mid-February.

19                   So having been through this, Your Honor, in  
20 1994 on trucking preemption, and having application  
21 cases in the fall of 1994, I would like to avoid an  
22 exercise in futility if that bill passes.

23                   MR. ASCHE: Can I say something here?  
24 This is Richard Asche.

25                   JUDGE CLARK: Mr. Asche?

0011

1                   MR. ASCHE: I think this whole matter  
2 could be put to bed if -- I have one simple request,  
3 that the -- that the Gig Harbor and the Purdy ZIP code  
4 would be withdrawn from their tariff filing, and then  
5 I would be happy to go away. I discussed this matter  
6 with John Rowley briefly, from Shuttle Express, a  
7 couple weeks ago in San Jose, California. He said he  
8 was going to look into it, but so far I have heard  
9 nothing from him.

10                   JUDGE CLARK: Well, Mr. Asche, I would  
11 probably interpret your comment regarding this as  
12 something that would be akin to a settlement option  
13 that you should pursue through your counsel, and have  
14 Mr. Wiley discuss that particular issue with  
15 Mr. Harlow.

16                   MR. ASCHE: Okay.

17                   MR. HARLOW: Your Honor, we would agree  
18 that --

19                   JUDGE CLARK: Mr. Harlow --

20                   MR. HARLOW: Yes. We would agree that  
21 is not a matter to take up at the prehearing  
22 conference. And I would agree with Mr. Wiley, that  
23 the Agency legislation would likely moot this case.  
24 As to how you want to handle that scheduling-wise, I  
25 don't really have any opinion or direction.

0012

1 JUDGE CLARK: Well --

2 MR. HARLOW: I think we would be  
3 amenable to postponing this case indefinitely, so if  
4 you are so inclined, I don't think we would have any  
5 objection.

6 JUDGE CLARK: Well, postponing a case  
7 indefinitely is not an option that I have under the  
8 Commission's rules. I can certainly grant a  
9 continuance, but it has to be to a date certain. So I  
10 am thinking rather than waste everybody's time today,  
11 my suggestion would be -- of course, the Commission  
12 does not want to undertake a procedural action that  
13 will simply increase the cost and inconvenience to  
14 either of the parties or the Commission. And it  
15 sounds like scheduling briefing prior to the  
16 conclusion of the upcoming legislative session would  
17 do that; would basically waste the time and resources  
18 of both the parties and the Commission.

19 So my suggestion would be that we schedule  
20 legal briefing in this matter, probably to commence no  
21 earlier than late February, which would hopefully let  
22 us know whether or not legislation had been enacted,  
23 which would render moot the issues in the complaint.  
24 And then, of course, if that legislation is enacted,  
25 we can cancel the legal briefing, because it would be

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1 unnecessary.

2 MR. WILEY: Your Honor, from the  
3 Complainant's standpoint, that sounds reasonable. The  
4 only thing that I would ask be inserted in the  
5 schedule, is that we have a reply option to the  
6 Respondent's response, which is typical in a summary  
7 judgment sort of circumstance. So I would ask you to  
8 build in, since we have the burden of proof, a reply  
9 to their argument.

10 JUDGE CLARK: All right. I don't have a  
11 problem with that.

12 So, Mr. Wiley, do you want to propose a date  
13 at the end of February for an initial brief?

14 MR. WILEY: Yeah, let's -- and I am  
15 thinking that it is going to be a 60-day session, so  
16 we should know what the -- you know, the cutoffs are  
17 going to be towards the end of February for  
18 legislative bills, in terms of anything that could get  
19 resuscitated. So I am looking at a calendar, and I am  
20 saying why don't we have the opening brief Friday,  
21 March 2, which should get us past the legislative read  
22 session.

23 JUDGE CLARK: All right.

24 Mr. Harlow, do you have a proposed date for a  
25 responsive brief?

0014

1                   MR. HARLOW: Excuse me, give me a minute  
2 to advance my calendar.

3                   JUDGE CLARK: Certainly.

4                   MR. HARLOW: I would suggest Friday,  
5 March 23rd.

6                   JUDGE CLARK: Friday, March 23rd; is  
7 that correct?

8                   MR. HARLOW: Yes, your Honor.

9                   JUDGE CLARK: And for a reply brief,  
10 Mr. Wiley?

11                   MR. WILEY: Let's say Wednesday,  
12 April 4th.

13                   JUDGE CLARK: All right. The briefing  
14 schedule proposed by the parties is reasonable, and I  
15 am going to adopt it. The briefing schedule would  
16 require Bremerton-Kitsap's initial brief on Friday,  
17 March 2nd, 2012; Shuttle Express's responsive brief on  
18 Friday, March 23rd, 2012; and Bremerton-Kitsap's reply  
19 brief on Wednesday, April 4th, 2012.

20                   MR. WILEY: Your Honor, could I request  
21 that we be allowed --

22                   JUDGE CLARK: Okay. And you need to  
23 identify yourself when you --

24                   MR. WILEY: Oh, I'm sorry. This is  
25 Mr. Wiley.

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1           Could I request, in addition to that schedule  
2   that you just set forth, that we be allowed to  
3   electronically serve by 5:00 p.m., which, as you know,  
4   is an extension of the Commission's rule of 3:00 p.m.,  
5   but since we are all in this rather concise  
6   proceeding, I would request that.

7           JUDGE CLARK: All right. I  
8   don't have --

9           MR. HARLOW: I would concur.

10          JUDGE CLARK: I don't have any objection  
11   to extending the schedule to allow the parties to  
12   electronically file their briefs by 5:00 p.m. on the  
13   date due. I think that is an appropriate extension,  
14   given the fact that both parties are geographically  
15   separated from the Commission.

16          Is there anything further that should be  
17   considered on this morning's record?

18          MR. WILEY: Not from the Complainant.

19          MR. HARLOW: No, Your Honor.

20          JUDGE CLARK: All right. Thank you very  
21   much for your time this morning. We are adjourned.

22          (Status Conference adjourned 9:48 a.m.)

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C E R T I F I C A T E

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STATE OF WASHINGTON

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COUNTY OF KING

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I, Sherrilyn Smith, a Certified

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Shorthand Reporter and Notary Public in and for the

8

State of Washington, do hereby certify that the

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foregoing transcript is true and accurate to the best

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of my knowledge, skill and ability.

11

IN WITNESS WHEREOF, I have hereunto

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set my hand and seal this 1st day of November, 2011.

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SHERRILYN SMITH

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MY COMMISSION EXPIRES:

24

JUNE 2012