

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

WASHINGTON UTILITES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

BREMERTON-KITSAP AIRPORTER,
INC., C-903,

Respondent.

DOCKET NO. TC-001846

MOTION TO QUASH SUBPOENA
TO EUGENE ECKHARDT

I. Relief Requested

The Commission Staff moves for an order quashing the subpoena served by Bremerton-Kitsap Airporter, Inc. on Eugene Eckhardt on December 5, 2001.

II. Statement of Facts

This case is a complaint proceeding in which the Staff of the Washington Utilities and Transportation Commission is seeking a reduction in the fares charged by Bremerton-Kitsap Airporter, Inc.

The case is governed by prehearing conference orders issued on September 19, 2001, and April 4, 2001. The September 19 order contains a schedule for the pre-filing of written testimony by the parties to this proceeding. As the complainant, Staff was afforded the opportunity to file both direct and rebuttal testimony. The schedule set out in the September 19 order provided that Bremerton Kitsap Airporter's deadline for filing testimony in response to Staff's case was November 9, 2001. The company timely filed testimony from Weldon Burton and Richard Asche on that date.

Staff witness Robert Colbo filed testimony on October 3, 2001 and rebuttal testimony on November 27, 2001, as required by the September 19 Order. No other witness is sponsoring testimony in this case on behalf of Staff besides Mr. Colbo.

The cross-examination hearing in this matter is scheduled for Wednesday, December 12-14, 2001.

On Wednesday, December 5, 2001, Bremerton-Kitsap Airporter served the Staff with a subpoena for the attendance of Eugene Eckhardt of the Staff of the Washington Utilities and Transportation Commission to testify on behalf of Bremerton Kitsap Airporter on December 13, 2001. (Declaration of Thompson).

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Staff now moves to quash the subpoena on the grounds that (1) Bremerton-Kitsap Airporter has not demonstrated an extraordinary need to examine a Staff member who is not sponsoring testimony in this case, and (2) the company's attempt to offer additional testimony through examination of Mr. Eckhardt is untimely and inconsistent with the prehearing order order in this matter.

III. Legal Authority

In adjudicative proceedings under the APA, the presiding officer regulates the course of the proceedings in conformity with applicable rules and the prehearing order. RCW 34.05.449. The prehearing order in this case required Bremerton-Kitsap to pre-file its testimony in writing by November 9, 2001.

The subpoena issued by James Sells on behalf of Bremerton-Kitsap on December 5, 2001, directed "Gene Eckhart" [sic.] to appear at the WUTC hearing room or such other place as assigned by the ALJ, on December 13, 2001 "to give testimony . . . on the part of Respondent Bremerton-Kitsap Airporter, Inc." Mr. Gene Eckhardt is the Commission's Assistant Director of Water and Transportation. He heads the Commission's Water and Transportation sections and is Mr. Colbo's supervisor. While Mr. Eckhardt is to some degree familiar with this case, he is not sponsoring any testimony. (Declaration of Thompson).

Staff has chosen to speak solely through Mr. Colbo in this case. Mr. Colbo's testimony represents the entirety of expert opinion testimony on which Staff relies in its case. (Declaration of Thompson). As such it is hard to conceive of a reason why Bremerton-Kitsap's case could be advanced in any legitimate and non-duplicative way through questioning of Mr. Eckhardt. The Commission's discovery rule is instructive on this issue where it limits the taking of depositions (in those cases where depositions have even been allowed by the ALJ in the Prehearing Order) to "witnesses who have been identified by a party as a prospective witness." WAC 480-09-480(6)(b). The rationale for this rule was addressed in a prehearing conference order in a case in which US WEST sought to depose someone other than Staff's designated witness:

US WEST asked Commission Staff for the opportunity to depose persons not designated as witnesses in the proceeding, specifically the person or persons who prepared the first attachment to Dr. Selwyn's [Staff's expert witness] prefiled direct testimony. Commission Staff refused, and the parties asked the ALJs to state a decision on the issue.

The request was denied. Commission Rule, WAC 480-12-480, provides the opportunity to depose a person designated as a witness in the proceeding. Under exceptional circumstances, the Commission could use its power to prevent injustice to allow such a deposition. Here, no grounds were stated for the request other than the opinion that Dr. Selwyn is not the sole author of the paper.

The threshold for granting such a request should be exceptionally high. At the hearing, witnesses must testify that such exhibits are their own work, or have been prepared under their supervision or direction, and that they represent the witness's views. Witness credibility may be challenged through cross examination.

It is unclear what benefit U S WEST would obtain in this proceeding from the deposition of a non-witness. Such depositions could substantially increase the time and cost of Commission proceedings. Without an exceptionally clear showing of need to prevent severe harm, which is not demonstrated here, we see no reason to require the deposition.

Eighth Supplemental Order; Prehearing Conference Order, *In Re US WEST Communications, Inc.* (Yellow Pages Imputation Case), Docket No. UT-980948 (March 1999). While this analysis concerned a request to take a deposition, the rationale for denying the request should apply equally to subpoenas to present testimony at a cross-examination hearing.

Regardless of whether Bremerton-Kitsap might have been able to demonstrate a need to examine Mr. Eckhardt, the attempt at this late stage in the case is untimely under prehearing order, which provided a deadline of November 9, 2001 by which the company was required to pre-file, in writing, its testimony in the case. Please see also, WAC 480-09-736(6) through (11) (discussing procedures related to predistribution of evidence). This week's hearing is for cross-examination of witnesses who have pre-filed written testimony. Perhaps more fundamentally, because Mr. Eckhardt has not filed testimony in the case, there is nothing on which to cross-examine.

Staff respectfully asks the Commission to quash Bremerton-Kitsap Airporter, Inc.'s subpoena of Mr. Eckhardt.

DATED this 11th day of December, 2001.

CHRISTINE O. GREGOIRE
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