

66401-8

66401-8

No. 66401-8-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION,  
a Washington nonprofit association,  
Petitioner,

v.

PORT OF SEATTLE, a municipal corporation; AIRPORT JOINT  
VENTURE RESPONSE PARTNERSHIP, LLC, an unincorporated entity;  
CHECKER CAB OF SEATAC CORPORATION, a Washington  
corporation; ORANGE CAB COMPANY, a Washington corporation;  
PUGET SOUND DISPATCH, LLC, dba Yellow Taxi Association, a  
Washington limited liability company; and RAINIER DISPATCH LLC, a  
Washington limited liability company,  
Respondents.

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OPENING BRIEF OF  
RESPONDENT PORT OF SEATTLE

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## I. INTRODUCTION

The Port of Seattle (“Port”) was entitled to disbursement of the bond posted by Petitioner Seattle-Tacoma International Taxi Association (“STITA”) in partial compensation for damages arising from the injunctive relief entered pursuant to RAP 8.3 in this case. That injunction prevented the Port and Puget Sound Dispatch LLC (“Yellow Cab”) from signing a concession agreement for on-demand taxi service at Seattle-Tacoma International Airport (“Airport”). The injunction bond was required by this Court to compensate the Port for the lost revenue it suffered as a result of the injunction. Thereafter, this Court denied STITA relief, held STITA’s claims to be without merit, and dissolved the injunction following Supreme Court denial of a petition for review. The injunction in fact delayed the signing of the concession agreement, causing damages in excess of the bond amount. The disbursement of the bond was appropriate.

STITA’s current appeal ignores the finality of this Court’s prior decision, the completeness with which its claims were dismissed, and the damages the Port suffered as a result of the injunction. This Court should affirm the trial court’s disbursement of the bond and entry of final judgment for the Port.

## II. STATEMENT OF THE CASE

### A. Factual Background

The background facts related to the lawsuit between STITA and the Port were set forth in this Court's opinion in *Seattle-Tacoma Int'l Taxi Ass'n v. Port of Seattle*, No. 64857-8-I, 2010 WL 2283621 (June 7, 2010) (hereafter "*STITA*"). Those facts will not be repeated here. The pertinent facts for this appeal are as follows.

This appeal arises from the Port's decision to award its taxi concession contract through a request for proposal ("RFP") process. The Port issued the RFP on September 25, 2009, almost a full year before the current contract expiration date of August 31, 2010. CP 292. The Port did so in recognition of the substantial ramp-up time that would be required for a successful transition. CP 298. For example, the RFP required the successful proposer to operate at least 105 of the 210 Airport taxis as "green" vehicles on day one of the contract. CP 298. Any new concessionaire needed significant time to acquire and outfit these vehicles, most of which were not available from a dealer but must be specially ordered and retrofitted. CP 298. The ramp-up time also recognized that any new concessionaire would require substantial time to organize its Airport operations while continuing to service its existing clients. CP 298. Airport taxis must be licensed and uniquely branded. CP 298. Because

taxis are operated by independent contractors, any new concessionaire required time to contract for these services. CP 298. Finally, the ramp-up period was necessary to avoid significant disruption in the larger Seattle/King County taxi market. CP 298. Accordingly, the Port's RFP schedule provided nearly seven months from contract formation to commencement of operations at the Airport. CP 298.

In December 2009, the Port Commission voted to award the on-demand taxi concession to Yellow Cab. CP 292. As part of its proposal, Yellow Cab agreed to a minimum guarantee of \$3,670,778 in annual revenue to the Port. CP 1367. Yellow Cab's revenue guarantee represented a significant increase in guaranteed revenue compared to the prior concession agreement with STITA. CP 650-651; 1367-1368.

## **B. Procedural History**

### **1. The Trial Court Denies STITA's Motion for Injunctive Relief.**

On January 29, 2010, STITA filed this action to prevent the Port and Yellow Cab from entering into the concession agreement for taxi services at the Airport. CP 1-16. STITA alleged that the Port's award to Yellow Cab violated King County's taxi rate ordinance, King County Code 6.64.760, and the Revised Airport Act, chapter 14.08 RCW. CP 1-16. The complaint sought declaratory and injunctive relief for these

alleged violations. CP 1-16. The same day it filed its complaint, STITA moved for a temporary restraining order seeking to prevent the Port from entering into a contract with Yellow Cab. CP 212-215. On February 8, 2010, the trial court denied STITA's motion for a preliminary injunction, ruling that STITA waived any right it had to challenge the validity of the RFP when it submitted a proposal. CP 458.

**2. Commissioner Neel Requires a Supersedeas Bond for any Damages the Port May Incur as a Result of STITA's Request for a Stay on Appeal**

STITA immediately appealed the trial court's ruling and requested injunctive relief from this Court pursuant to RAP 8.3. CP 456-457. STITA's Notice of Appeal asserted that it was appealing the denial of its motion for preliminary injunction pursuant to RAP 2.2(a)(3), which applies to appeals of decisions that "determine[] the action" or "discontinue[] the action." CP 456-457. This Court granted an emergency stay pending further proceedings. *STITA* at \*3.

On February 22, 2010, this Court granted STITA's Motion for Stay pending appeal and requested supplemental briefing regarding requiring a supersedeas bond as a condition of the stay. On March 29, 2010, Commissioner Mary Neel of Division One ordered STITA to post a supersedeas bond of \$144,000. CP 761-762. Commissioner Neel's notation ruling made clear that the bond was to protect the Port from

damages it might suffer as a result of the stay delaying implementation of the concession agreement. CP 761-762. Commissioner Neel calculated the amount of the bond based on the difference in payments owed to the Port under the existing STITA concession<sup>1</sup> and the proposed new Yellow Cab concession, assuming a 30-day delay in contract implementation from the stay. CP 761-762.

**3. This Court Holds That All of STITA's Claims are Without Merit**

This Court received full briefing on the merits of STITA's claims and heard oral argument on April 27, 2010. CP 476. On June 7, 2010, this Court issued its opinion affirming the trial court's denial of a preliminary injunction. *STITA* at \*1. Recognizing that the case was "time sensitive," this Court also addressed and rejected the merits of all of STITA's claims.<sup>2</sup> *Id.* at \*1 n. 1. In doing so, this Court held that "none of

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<sup>1</sup> In its prior briefing on the bond issue to this Court, the Port used a 2009 per-trip fee of \$3.05 in arguing the amount of an appropriate bond. *See, e.g.,* Port of Seattle's Supplemental Brief Regarding Injunction Bond Submitted to Division One of the Court of Appeals (for the Court's convenience, the Port attaches relevant pages from the prior briefing as Appendix A). STITA had paid this per-trip fee in 2009 and did not dispute using \$3.05 for the bond calculation. Based on the terms of STITA's contract, the per-trip fee was actually recalculated in 2010 and reduced to \$1.98 per trip. The Port filed its brief requesting a bond on March 4, 2010, approximately three weeks before the 2010 trip fee was implemented on April 1, 2010. The Port does not believe that this deviation is material to the determination of this appeal, as using a \$1.98 trip fee would have resulted in larger potential damages to the Port and potentially a larger bond. The Port brings this to the Court's attention in the interest of full disclosure and accuracy.

the legal bases STITA relie[d] upon” supported the relief requested. *Id.* at \*11.

After disposing of STITA’s claims, this Court lifted the stay 30 days following the filing of its opinion unless STITA filed a petition for review, in which case the injunction would extend until the petition was rejected or further order of the Supreme Court. *Id.* at \*12. STITA filed a petition for review with the Supreme Court on July 6, 2010. CP 510-553.

In July 2010, in light of the fast approaching contract expiration date of August 31, and the stay’s prohibition on the Port contracting for a new taxi concession, the Port was forced to extend the existing STITA contract by (at least) two months. CP 649. Such an extension was necessary to maintain continuous taxi service at the Airport during September and October 2010. CP 649.

**4. The Supreme Court Denies Review Less than a Month Before the Originally Anticipated Concession Start Date**

STITA’s petition for review was denied on August 5, 2010, terminating the stay less than a month before the RFP originally anticipated the new taxi concession agreement would start. CP 555-556. On August 6, 2010, the Port and Yellow Cab signed the taxi concession

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<sup>2</sup> As an initial matter, this Court found that the trial court did not err in ruling that STITA had waived its right to challenge the Port’s RFP. *STITA* at \*7. Despite this dispositive ruling, this Court also analyzed the merits of STITA’s claims for relief. *Id.* at \*7-\*11.

agreement, but the start date was shifted from the originally planned September 1 to November 1, 2010. CP 649-650; 699-736. The two month delay was consistent with the arguments made to Commissioner Neel that there would be a necessary ramp-up time from when the new contract was signed to implementation of the new service. CP 649. Indeed, the two month delay reflected an effort to mitigate the damage flowing from the injunction, as the Port shortened the ramp-up from the originally planned seven months.

**5. The Trial Court Disburses the Supersedeas Bond to the Port**

On September 24, 2010, the Port moved for disbursement of the supersedeas bond based on the damages it suffered as a result of the stay. CP 743-755. The Port supported its damages claim by using the same method Commissioner Neel used in setting the bond amount. CP 746-747. The Port calculated the difference between (1) the amount of revenue the Port would have received if it had been able to implement the new taxi concession agreement with Yellow Cab absent the stay and (2) the amount of revenue it actually received from STITA during the two months of delay – September and October 2010. CP 746-747.

Under the Port's concession agreement with Yellow Cab, the Port is guaranteed minimum annual revenue of \$3,670,778. CP 1367. But for

the stay, the Port would have received at least \$611,796.33 for September and October 2010 from Yellow Cab.<sup>3</sup> CP 1367. In contrast, under STITA's extended contract for those two months, the Port received revenue from STITA only based on the number of taxi rides STITA provided from the Airport in the time period. CP 1367. As noted above, the fee was \$1.98 per trip. CP 1367. STITA made a total of 101,777 trips in September and October 2010.<sup>4</sup> CP 1367. As a result, the Port received \$201,518.46 in actual revenue from STITA for those two months.<sup>5</sup> CP 1367. Thus, if the Port had been able to implement its taxi concession agreement with Yellow Cab in September and October 2010, it would have received at least \$410,277.87 more in revenue.<sup>6</sup> CP 1368. STITA

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<sup>3</sup> Yellow Cab's annual guarantee of \$3,670,778/year ÷ 12 months/year x 2 months = \$611,796.33.

<sup>4</sup> This number represents the actual number of trips STITA made in the two months at issue. When the Port initially moved for disbursement of the bond in the trial court, the actual number was not known. The Port made a reasonable estimate based on the number of trips in September and October 2009 adjusted by a factor of 10% based on the lower number of trips in 2010 compared to 2009. CP 650. Under this methodology, the Port estimated that there would be 103,908 trips in September and October 2010. STITA did not dispute this methodology in its opposition to the motion. By the time the Port filed its opposition to STITA's Motion for Reconsideration, as discussed below, the actual number of trips was known and provided to the court. CP 1367-1368. This difference did not impact the ultimate calculation of damages, however, because the estimated loss of revenue in the motion was less than the actual loss.

<sup>5</sup> 101,777 trips x \$1.98/trip = \$201,518.46.

<sup>6</sup> This represents the difference in annual guaranteed revenue from Yellow Cab for the two months (\$611,796.33) and the revenue actually received from STITA for the same period (\$201,518.46): \$611,796.33 - \$201,518.46 = \$410,277.87.

did not dispute the Port's method of calculating damages or provide an alternate calculation in its opposition to the Port's motion to disburse the bond.

On October 1, 2010, the trial court granted the Port's motion for disbursement of the supersedeas bond. CP 933-935.

**6. The Trial Court Enters Judgment for the Port and Denies STITA's Motion for Reconsideration on the Bond**

When this Court issued its mandate following denial of STITA's petition for review, it remanded the case to the trial court "for further proceedings in accordance with the attached true copy of the decision." CP 839. Consequently, once the bond was disbursed, and in light of this Court's disposition of all STITA's claims on the merits, the Port presented a proposed judgment to the trial court on October 5, 2010. CP 1032-1034. STITA filed an opposition brief and also filed a Motion for Reconsideration of the trial court's decision to disburse the bond to the Port. CP 1042-1050.

The trial court entered judgment for the Port on October 12, 2010. CP 1344-1345. After considering full briefing on STITA's Motion for Reconsideration, the court denied the Motion on November 17, 2010.

STITA filed its notice of appeal on December 9, 2010 – 58 days after the trial court entered final judgment and 22 days after the court denied the Motion for Reconsideration. CP 1400-1401.

### **III. ARGUMENT**

#### **A. Disbursement of the Bond Compensates the Port for Damages Incurred as a Result of the Stay**

##### **1. The Trial Court’s Decision to Disburse the Bond to the Port Should Be Reviewed for Abuse of Discretion**

This Court should review the trial court’s order disbursing the supersedeas bond to the Port for abuse of discretion. No Washington court has squarely addressed the standard of review for disbursement of a bond. But Washington courts frequently review the terms of an injunction, including whether to require and the amount of a bond, for abuse of discretion. *See, e.g., Kucera v. State Dep’t of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (holding that “[a] trial court’s decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion” in a case where the trial court required the plaintiffs, who sought a preliminary injunction, to post a \$10,000 injunction bond); *Jensen v. Torr*, 44 Wn. App. 207, 213, 721 P.2d 992 (1986) (applying the abuse of discretion standard to a trial court’s denial of the plaintiff’s request to increase the bond amount from \$1,000 to \$100,000). Because a trial court has discretion in requiring and setting

the amount of a bond, it should have similar discretion in deciding whether to disburse the bond. The former decisions occur at the beginning of the process in an injunction proceeding. The latter decision simply concludes that same process. The same standard should apply to both decisions. *See Energy Transfer Fuel, L.P. v. Bryan*, 322 S.W.3d 409, 412 (Tex. App. 2010) (“ETF states in its brief that the trial court’s orders [(including an order refusing to release an injunction bond)] are reviewable for abuse of discretion. We have not located any authority prescribing the standard of review for the precise issue presented here. But typically, the abuse of discretion standard is applied to procedural or other trial management determinations. Consequently, we will review the appealed orders for an abuse of discretion.”) (internal citations omitted).

STITA claims that the appropriate standard of review in this case is *de novo*. STITA admits, however, that the cases it cites for this proposition refer to the standard of review applicable to “[q]uestions of law and conclusions of law” and “[s]ummary dismissals and judgments.” STITA’s Br. at 12-13 (citing cases related to questions of law and CR 12(b)(6) and summary judgment rulings). These cases are inapposite as none even involve disbursement of a bond. A summary dismissal of STITA’s claims in this action is not on appeal before this Court. This Court should reject STITA’s contention that *de novo* review applies to the

trial court's order disbursing the bond, and hold that an abuse of discretion standard applies. Regardless of the standard of review, however, the trial court's decision to disburse the bond to the Port should be affirmed.

**2. The Stay was Wrongful in That It Would Not Have Been Ordered if the Court Was Presented with All of the Facts**

“The purpose of [an] injunction bond is to ensure that the adverse party affected thereby will be able to recover all damages and costs which might accrue ‘by reason of’ the injunction or the restraining order, and that the fund shall be readily available.” *Cheney v. City of Mountlake Terrace*, 20 Wn. App. 854, 857, 583 P.2d 1242 (1978). In an action for wrongful injunction, recovery is limited to the amount of the bond plus interest from the date that the action is brought. *Jensen v. Torr*, 44 Wn. App. 207, 211, 721 P.2d 992 (1986). This is the only remedy available to a defendant where, as here, it is subsequently found to have been wrongfully restrained. *Swiss Baco Skyline Logging Co. v. Haliewicz*, 14 Wn. App. 343, 347, 541 P.2d 1014 (1975).

The test for whether an injunction is wrongful “is not whether the injunction was erroneous on its face, but whether it is later determined that the restraint was erroneous in the sense that it would not have been ordered had the court been presented with all of the facts.” *Knappet v. Locke*, 92 Wn.2d 643, 647, 600 P.2d 1257 (1979). An injunction is

wrongful if it is dissolved after a full hearing. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154 (1997). In sum, the purpose of a bond such as that posted by STITA is to protect an enjoined party from damages arising from an injunction wrongfully issued.

Here, this Court granted the stay based on limited briefing and pending full briefing and argument on the merits of the appeal. The stay was entered to preserve the status quo and not because of the merits of STITA's appeal. When this Court was presented with full briefing and oral argument, it held unanimously: "As a matter of law, none of the legal bases STITA relies upon support a preliminary injunction. STITA has not demonstrated a clear legal or equitable right." *STITA* at \*11. In other words, when fully presented with the facts and the law at a hearing, this Court determined on the merits that STITA had no valid claims and that a stay was not appropriate. Indeed, the Court lifted the stay.<sup>7</sup> *STITA* at \*12. Accordingly, the stay was "wrongful" in that it would not have been issued had the court been presented with and considered on the merits all of the facts and claims in the case. The Port is entitled to damages up to the amount of the supersedeas bond.

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<sup>7</sup> This Court allowed a limited extension of the stay to provide STITA an opportunity to file a petition for review with the Supreme Court. *Id.* The Supreme Court ultimately denied STITA's petition and also issued an order lifting the stay.

STITA ignores the established standards for recovery on a bond in its briefing. STITA asserts, without citation to any authority, that recovery on the bond is only possible if this Court or the Supreme Court “determined that the procedural basis of the stay imposed by Commissioner Neel was in any way wrongful.” STITA’s Br. at 16. But that is not the proper standard. The purpose of a supersedeas bond posted to support a stay on appeal is to compensate the wrongfully enjoined party for the “harm occasioned by the appellate delay.” *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 292, 716 P.2d 956 (1986). The standard to determine wrongfully issued injunctive relief comes from *Knappet* as articulated above. 92 Wn.2d at 647. STITA fails to explain why this standard does not apply here. Instead, STITA suggests that a different standard applies because injunctive relief was ordered on appeal rather than by the trial court. But such a distinction makes no sense. The damage from a wrongfully issued stay is the same whether before the trial court or before the appellate court. Indeed, Commissioner Neel applied a very lenient standard for issuing the stay (preserving the fruits of an appeal), more lenient than for the preliminary injunction denied below, making the potential that a stay pending appeal was wrongfully issued greater than before the trial court.

Further, STITA's argument concerning RAP 8.3 is inapposite. RAP 8.3 allows appellate courts to issue orders "to insure effective and equitable review, including authority to grant injunctive or other relief to a party." RAP 8.3. The rule specifically contemplates that bonds typically be issued as a condition for a party to preserve the fruits of a successful appeal. *Id.*, CP 1066. But the rule does not set out the standard for recovery on a bond posted as a condition of a RAP 8.3 order. Rather, as described above, the traditional standard for recovery on a bond – that the injunction was wrongfully issued – should apply. There is nothing in RAP 8.3 to suggest otherwise. And there is no other reason that a bond on appeal should be treated differently than a preliminary injunction bond at trial. This Court should hold that the stay was wrongfully issued, and that the bond disbursement was appropriate.

**3. The Purpose of the Bond was to Compensate the Port for Any Loss of Revenue Caused by the Stay**

STITA's argument that the well-established standards for recovery on a bond do not apply is also contrary to Commissioner Neel's ruling on the bond. Recovery on the bond was premised on whether the stay would result in lost revenue to the Port due to a delay in implementation of the concession agreement. In setting the bond amount at \$144,000, Commissioner Neel recognized that the Port's request for a bond was

based on the “damages [the Port] may incur as a result of the possible delay of the September 1, 2010 date for the new contract....” CP 761

(emphasis added). The Port squarely framed the delay issue in its supplemental brief to this Court on the bond issue:

As explained in the Grace Declaration submitted to the trial court, the decision to provide seven months from award to commencement of operations under the new contract was based on the “amount of time...absolutely necessary for a smooth transition.” Airport taxis must be separately licensed and branded, a process which will require significant time and resources from Yellow. The new concession agreement also requires Yellow to undertake significant alteration of its fleet to meet the Port’s “green” requirements, including the purchase and/or retrofitting of green vehicles and the construction of two new fueling stations. Moreover, Yellow must identify and secure contracts with 210 driver, many of whom have not yet been hired. Numerous of these activities are expected to take in excess of 260 days. In sum, ... implementing the new on-demand taxi service contract is a major undertaking. STITA has presented no evidence that implementation of the contract will take less time than that envisioned by the Port and Yellow. ... Given the briefing and expected argument schedule in this appeal, the Port and Yellow Cab will have less than four months (at best) to implement the numerous operational changes necessary to being service. Accordingly, it is certainly possible, if not likely, that the contract will not be implemented on time....

Appendix A at 2-3 (citations omitted).

STITA did not dispute the validity of the Port’s timeline in its briefing to Commissioner Neel, in opposition to the bond disbursement motion, or in its Opening Brief to this Court in the current appeal.<sup>8</sup>

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<sup>8</sup> STITA has waived its ability to assert any argument to the contrary at this late point in

Further, Commissioner Neel adopted the Port's method of calculating the bond amount in her ruling. The Port made very clear that substantial ramp up time was required to implement the transition. The Port suggested it would suffer \$5,000 in lost revenue every day that contract implementation was delayed. The Port conservatively based its request for a \$150,000 bond<sup>9</sup> on a hypothetical 30 day delay (\$5,000/day x 30 days = \$150,000). Commissioner Neel accepted this logic, but slightly reduced the estimated per day loss in revenue to \$4,800. Commissioner Neel further noted that "[t]here may be more than 30 days delay in commencing the new contract, and there may be no delay...setting the bond amount based on a potential delay of 30 days is reasonable." CP 761 (emphasis added). Consequently, Commissioner Neel set the bond amount at \$144,000 (\$4,800/day x 30 days) to compensate the Port for any delay the stay caused in "commencing the new contract." CP 761.

**4. The Port Suffered an Actual Loss of at Least \$410,277 as a Result of the Stay**

The Port suffered actual damages that were proximately caused by the stay. "Proximate causation means a cause which, in a direct sequence unbroken by any new independent cause, produces the injury complained

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the litigation.

<sup>9</sup> The Port also requested an additional bond for attorney's fees. Commissioner Neel denied that request and it is not part of this appeal.

of, and without which such injury would not have happened.” *Fisher v. Parkview Props., Inc.*, 71 Wn. App. 468, 476, 859 P.2d 77 (1993). In *Fisher*, the court held that recovery on a bond was proper where the wrongful issuance prevented plaintiffs from completing a fence, and the noncompletion of the fence delayed sale of a property. *Id.* Here, absent the stay, the Port and Yellow Cab would have signed the taxi concession agreement in early 2010. Doing so would have allowed adequate ramp-up time to begin the new taxi service on September 1, 2010. The Port’s RFP schedule allowed seven months between contract formation and commencement. CP 298. Absent this transition period, as explained above, a new taxi concessionaire would not be prepared to start with full operations on day one of the concession. The stay prevented the Port and Yellow Cab from signing the taxi concession agreement until August 6, 2010 – less than a month before the originally anticipated start date. CP 649-650. As a result of the stay, the earliest the Port and Yellow Cab practically could implement new service was November 1, 2010.<sup>10</sup> CP 650.

Damages suffered by the Port as a result of the stay exceeded the amount of the supersedeas bond. The Port realized \$201,518.46 in actual

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<sup>10</sup> The Port and Yellow Cab were able to start service on November 1, 2010 on a compressed timeline. Some requirements of the RFP that took a longer ramp-up period,

revenue from STITA for taxi service at the Airport for the months of September and October 2010. CP 1367. Under the terms of the Yellow Cab taxi concession agreement, the Port would have received a minimum of \$611,796.33 for the same months. CP 1367. Thus, the two-month delay in contract implementation caused the Port to lose at least \$410,277.87 in revenue – the difference between the revenue under the Yellow Cab and STITA taxi concessions. CP 1368. Because the damages suffered exceeded the bond, the Port is entitled to the full amount of the bond.

STITA did not preserve its right to object to the Port's calculation of damages. STITA did not dispute the Port's calculation of damages in the trial court proceedings or its Opening Brief to this Court. Consequently, any argument STITA presents against the Port's calculation of damages in its reply brief has been waived. *See Dykstra v. Skagit County*, 97 Wn. App. 670, 676, 985 P.2d 424 (1999), *rev. den'd*, 140 Wn.2d 1016, 5 P.3d 8 (2000) (Court of Appeals declining to consider issues and arguments raised for first time in reply brief).

While STITA claims (incorrectly) that discovery is necessary to determine the amount of damages, STITA did not serve any such discovery below. Nor did it affirmatively move for allowing discovery on

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however, were further delayed.

the issue.<sup>11</sup> Allowing for additional discovery on this issue is unnecessary and would only serve to needlessly prolong an already drawn-out dispute, which was ultimately decided in the Port's favor. Moreover, discovery is not necessary because a party is "not required to prove his damages with precision." *V.C. Edwards Contracting Co. v. Port of Tacoma*, 7 Wn.App. 883, 888, 503 P.2d 1133 (1972). Rather, a party need only prove a reasonable basis for its damages calculation. *Id.* at 889. (emphasis added). STITA cites *Blakiston v. Osgood Panel & Veneer Co.*, 173 Wash. 435, 23 P.2d 397 (1933) in support of its argument. But *Blakiston* does not suggest a different standard. Rather, *Blakiston* supports the Port's position. In *Blakiston*, the Supreme Court affirmed a trial court's disbursement of a bond where the plaintiff's action for injunctive relief was denied. *Id.* In doing so, the Court held that "the damages for loss of anticipated profits of a business, while recoverable in any proper case, must be shown with a reasonable degree of accuracy." *Id.* at 440 (emphasis added). Here, the Port has provided a reasonable damages calculation. Nothing more is required to prove the Port's damages.

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<sup>11</sup> STITA stated its desire to serve discovery in its opposition to the Port's Motion for Disbursement. Such statements of intent, absent any other affirmative action, are insufficient to preserve the issue for appeal. *See* RAP 2.5(a); *DeHaven v. Gant*, 42 Wn. App. 666, 671-72, 713 P.2d 149 (1986) (failure to make specific objection to trial court did not preserve issue for appellate review).

**5. The Port Did Not Waive Its Right to the Bond Proceeds**

STITA's argument that the Port waived its right to damages because Yellow Cab's service at the Airport did not start until November 1, 2010 is without merit.

First, STITA asserts that because the stay was lifted three weeks prior to September 1, Yellow Cab could have started service on September 1. The Port has explained the necessity of, and provided the reasons for, a ramp-up period repeatedly. STITA has never disputed these assertions. Moreover, the argument ignores the rationale behind Commission Neel's ruling. The bond was imposed specifically to protect against a delay in "commencing the new contract" based on the Port's assertion that adequate ramp-up time was required. The issue was never whether the contract would be signed before September 1.

STITA's suggestion that the Port and Yellow Cab should have taken all of the steps necessary for contract implementation when they were prohibited by court order from entering into the contract defies logic. To do so, the Port would have had to enter August 2010 with no taxi service under contract beyond the end of the month. Such a decision would have been irresponsible in light of the Port's commitment to provide the traveling public with reliable transportation from the Airport. This is particularly true given the uncertainty as to the timing and outcome

of the Supreme Court's decision on STITA's petition for review. Further, Yellow Cab would have had to invest in purchasing or retrofitting taxis, contracting with drivers and shifting its entire operation without the assurance of a contract. The only reason that the Port and Yellow Cab could not take these steps earlier is because of the stay. The purpose of the bond was to compensate for these precise delays, which is exactly what the trial court ruled should occur.

Second, contrary to STITA's self-serving assertions, the Port did not "voluntarily" extend its contract with STITA.<sup>12</sup> Rather, the Port had no choice but to delay the implementation of the Yellow Cab contract because of the stay in proceedings obtained by STITA. The Port's letter to STITA extending the contract made clear the reason for extension: "As a result of the litigation between the Port and STITA, the Port has been prevented from executing a new agreement for taxicab service at the Airport." CP 923. Given that STITA's stay was not dissolved by the

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<sup>12</sup> STITA asserts this in its Issues Pertaining to Assignments of Error. STITA's Br. at 2. But STITA fails to present any argument or support for its position that the extension is relevant to the damages question in its brief. Its failure to do so results in waiver of the argument. See *Griffin v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 616, 625 n.1, 590 P.2d 816 (1979) ("We will not consider an assertion on appeal if it is not supported by citation of authority unless well taken on its face"); see also *Pappas v. Hershberger*, 85 Wn.2d 152, 153, 530 P.2d 642 (1975) (assignment of error not argued in brief was properly deemed abandoned).

Supreme Court until August 5, 2010, it was impossible for the Port to implement the Yellow Cab agreement on September 1, 2010 as planned.

The argument that the Port would have voluntarily extended STITA's contract is contrary to the facts of this case and common sense. The Port and Yellow Cab have been doing everything in their power to oppose STITA's efforts. They have resisted STITA's effort to obtain an injunction at every turn and consistently pressed for prompt resolution.<sup>13</sup>

Nor does STITA's citation to *Bowman v. Webster*, 44 Wn.2d 667, 269 P.2d 960 (1954), require a different result. *Bowman* stands for the proposition that:

[W]aiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. ... The one against whom waiver is claimed...must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

*Id.* at 669. Nothing in the Port's actions indicate intent to waive its rights to recover for lost revenue. Rather, the Port expressly asserted that "[b]y

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<sup>13</sup> STITA's argument mirrors the disfavored "independent judgment rule," which states that a party's wrongful act is not the proximate cause of the damages suffered where the party seeking damages has elected not to unceasingly pursue available remedies. The "independent judgment rule" was abandoned in *City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997), where the Court rejected the rule and "rel[ied] instead on traditional principles of proximate causation to determine whether the defendant [was] responsible for the injuries and damages suffered." *Id.* at 252. Following *Blume*, STITA may not argue that the Port's election to extend STITA's contract -- which election the Port was forced to make by STITA's injunction -- somehow acts as a defense to the current damages claim. STITA's injunction was the proximate cause of the Port's damages.

so extending the Concession Agreement, the Port is not waiving any of its rights or claims, including claims for damages and attorneys fees, in conjunction with the ongoing litigation between the Port and STITA.” CP 924 (emphasis added). The Port’s negotiation for continued service while reserving its rights to damages as a result of the on-going litigation does not constitute waiver. *See Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 391-92, 78 P.3d 161 (2003) (“waiver by conduct requires *unequivocal* acts of conduct evidencing an intent to waive” and holding that Spokane County did not waive its contractual rights where it asserted in correspondence that it did not intend a “a waiver of any claim or defense”) (emphasis in original) (internal quotations and citations omitted).

Simply put, the Port would have preferred to terminate STITA’s contract on September 1, 2010 and to allow Yellow Cab to operate at the Airport thereafter. STITA’s legal maneuvers prevented this. The Port resisted STITA’s attempts to delay the contract consistently and vigorously. Accordingly, this Court should affirm the trial court’s disbursement of the bond to cover the resulting loss in revenue.

**6. STITA's Claims in the Rainier Dispatch Litigation are Irrelevant to Disbursement of the Bond**

After this Court issued its opinion holding that all of STITA's claims in this case were without merit, and long after Commissioner Neel imposed the bond at issue, STITA raised cross-claims against the Port in a different case filed by another disappointed proposer: Rainier Dispatch, LLC. STITA attempts to evade disbursement of the bond by arguing that its cross-claims in the Rainier Dispatch litigation impact the decision on whether to disburse the bond in this case. This argument obfuscates the issue here. The bond was required because of the stay STITA obtained in this litigation. The trial court, this Court, and the Supreme Court have all ruled that STITA's claims in this case were without merit. That a different taxi association might have initiated its own lawsuit in the matter against both the Port and STITA has no bearing on the stay granted in this case, nor does it have any impact on the disbursement of the bond.<sup>14</sup>

Further, STITA's argument is based on an inaccurate assumption that is fatal to its position. STITA assumes that if it prevails on its unadjudicated cross-claims in the Rainier Dispatch litigation then the Port

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<sup>14</sup> That the Rainier Dispatch litigation and this case are entirely separate was reinforced by King County Superior Court Presiding Judge Bruce Hilyer's denial of STITA's Motion for Consolidation of the two cases. CP 1346-1348. That decision is not on appeal before this Court. But it is noteworthy that the Motion for Consolidation, STITA's Motion for Reconsideration of the Bond Disbursement and the Port's Proposed

cannot have suffered any damages based on the stay. This is not accurate. It was the injunction in this case that gave rise to the Port's damages. No injunction was entered in the Rainier Dispatch litigation. But for the injunction in this case, the contract with Yellow Cab would have started on time, and the Port would have received the consideration contractually promised by Yellow Cab for September and October 2010. Moreover, the amount of revenue Yellow Cab pays the Port is not at issue in the Rainier Dispatch litigation. Thus, the unadjudicated cross-claims are irrelevant to whether the Port is entitled to the increased revenues of the Yellow Cab contract for the two months at issue.

The Port is entitled to disbursement of the bond for its lost revenues caused by the stay. STITA's arguments to the contrary fail. This Court should affirm the trial court's disbursement of the bond to the Port.

**B. The Port was Entitled to Entry of Judgment Because All of STITA's Claims Had Been Adjudicated**

STITA's argument that the trial court erred in its entry of judgment was not timely appealed and is directly contrary to the final decision on the merits of STITA's case by this Court, principles of judicial efficiency and STITA's own previous arguments in this case. Additionally, STITA

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Entry of Judgment were all pending in King County Superior Court at the same time.

did nothing to affirmatively preserve its rights in the trial court. The trial court properly entered judgment for the Port.

**1. STITA Did Not Timely Appeal the Entry of Judgment**

As an initial matter, STITA's arguments related to the entry of judgment are barred because STITA did not timely appeal the final judgment. A party must file its notice of appeal within 30 days after entry of the decision. RAP 5.2(a). The trial court entered judgment for the Port on October 12, 2010. CP 1344-1345. But STITA did not file its notice of appeal until 58 days later, on December 9, 2010. CP 1400-1401.

Consequently, this Court should disregard STITA's arguments related to entry of judgment.

**2. This Court Ruled on the Merits of Each of STITA's Claims**

Notwithstanding STITA's failure to timely appeal the entry of judgment, STITA's arguments on the issue are without merit. The sole issue in this case – whether STITA was entitled to equitable relief that would prevent the Port and Yellow Cab from signing a taxi concession agreement – was disposed of in its entirety by this Court in its June 7, 2010 Opinion. STITA's Complaint alleged three causes of action against the Port. In its Opinion, this Court recognized that the case was “time

sensitive” and therefore addressed and rejected the merits of all of these claims. *STITA* at \*1 n. 1.

First, this Court held that STITA’s challenge to the RFP based on the King County Code was without merit. *STITA* at \*7. Second, this Court held that STITA’s “assertion that the RFP creates nonuniform charges within a class of service lacks merit.” *Id.* at \*8. Third, this Court rejected STITA’s final argument, holding that “the Port’s receipt of fees in excess of its costs is not a violation of the “due regard” provision of the RAA.” *Id.* at \*11. Accordingly, “none of the legal bases STITA relie[d] upon” supported the relief requested. *Id.* Once the Supreme Court denied review, STITA’s complaint was conclusively disposed of in its entirety.

This Court’s mandate remanded the case to the trial court “for further proceedings in accordance with the attached true copy of the decision.” CP 839. Because no claims remained to be litigated in this case, once the bond was disbursed there were no outstanding issues for the trial court to decide. Thus, the trial court’s entry of judgment was consistent with this Court’s mandate.

STITA does not argue, nor could it, that any of its claims were left unadjudicated by this Court. Instead, STITA attempts to create a procedural hoop for the Port to jump through by asserting that the Port was required to bring a Rule 12, Rule 55 or Rule 56 motion on remand.

The Rules STITA cites are procedural mechanisms for parties to dispose of substantive claims still in a case. Requiring such a motion when there are no claims left to adjudicate is not supported by the language of the rules, makes no sense, and goes against the principle of judicial efficiency. Civil Rule 1 requires that the Civil Rules be interpreted to ensure the “just, speedy, and inexpensive determination of every action.” STITA’s argument would have the entirely opposite effect in a case that has already been drawn-out and litigated at great expense. The Port sought a judgment based on this Court’s final decision on the merits of each of STITA’s claims. There is simply nothing left to litigate, and no reason to require the parties and court commit additional time and resources in bringing a meaningless procedural motion. The only thing left under this Court’s mandate was to enter judgment, not to require a filing of a summary judgment motion or to hold a trial where no claims are left to adjudicate.<sup>15</sup>

**3. STITA Has Acknowledged That This Case Would Be Over Once the Contract with Yellow Cab Was Signed**

STITA’s argument against the trial court’s entry of judgment ignores its previous argument that the denial of its claim for an injunction

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<sup>15</sup> To the extent STITA asserts that entry of judgment was improper based on a claim that the Rainier Dispatch cross-claims may affect the disbursement of the bond, that claim is irrelevant and without merit for the reasons argued above.

was a final decision, and that this case would be moot upon the signing of the contract with Yellow Cab.

STITA's Notice of Appeal asserted that it was appealing the denial of its motion for preliminary injunction pursuant to RAP 2.2(a)(3), which applies to appeals of decisions that "determine[] the action" or "discontinue[] the action." In bringing its appeal pursuant to this rule, STITA asked this Court to accept review based on the premise that the denial of the injunction "determine[d]" or "discontinue[d]" the action. STITA cannot now in good faith argue that the case has not been "determine[d]" or "discontinue[d]". This Court should not give any weight to STITA's inconsistent and self-serving arguments.

Further, STITA has acknowledged to this Court that it would lose standing to challenge the Port's action once the contract with Yellow Cab was signed. For example, in STITA's Amended Reply in Support of Emergency Motion for Injunctive Relief, STITA stated that if the Port signed the contract with Yellow Cab it would "foreclose[] any further action in this case[.]" (relevant pages attached for the Court's convenience at Appendix B). Similarly, in its Opening Brief in its first appeal to this Court, STITA noted that "if STITA had not sought an injunction and the Port had signed the contract with Yellow Taxi, then STITA would be without standing to seek a remedy." *See* Appendix C. *See also* STITA's

Reply Brief at 1-2 (“STITA would be deprived of any court remedy whatsoever if a preliminary injunction did not issue...[and] STITA has no remedy and no recourse once the contract is signed.”). *See* Appendix D.

The Port and Yellow Cab executed the taxi concession agreement on August 6, 2010. As STITA has previously acknowledged, this left it with no further recourse.

**4. STITA Did Not Take Affirmative Legal Steps to Prevent Entry of Judgment**

STITA argues that the trial court should have entertained either a stay or permitted amendment. But STITA made no effort to amend its complaint to add additional causes of action or move for a stay. In fact, STITA made no affirmative motions after its initial motion for a preliminary injunction was denied except for its Motion for Reconsideration of the bond disbursement. STITA did not file motions to amend its complaint, for a continuance, a hearing, discovery, or a stay. Instead, STITA simply stated it would like those things in its opposition briefing to the Port’s motions. Such statements without action are insufficient.

This Court should affirm the trial court’s entry of judgment for the Port.

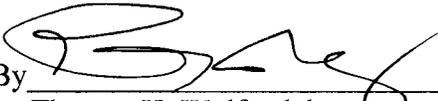
#### IV. CONCLUSION

The Port suffered damages as a result of the wrongfully-issued injunctive relief in this case. Those damages were proximately caused by the stay. The Port's damages exceeded the amount of the supersedeas bond, which this Court required as a means to compensate the Port for the lost revenues that the Port now claims as damages. Further, STITA's claims were entirely and completely adjudicated by this Court. For these reasons, this Court should affirm the trial court's disbursement of the bond to the Port and the entry of judgment.

DATED this 18th day of April, 2011.

Respectfully submitted,

K&L GATES LLP

By   
Thomas H. Wolfendale, WSBA # 03776  
Gregory J. Wong, WSBA # 39329

PACIFICA LAW GROUP LLP

Paul J. Lawrence, WSBA # 13557

Attorneys for Respondent Port of Seattle

# **APPENDIX A**

No. 64857-8-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION, a  
Washington nonprofit association,  
Petitioner,

v.

PORT OF SEATTLE, a municipal corporation; AIRPORT JOINT  
VENTURE RESPONSE PARTNERSHIP, LLC, an unincorporated entity;  
CHECKER CAB OF SEATAC CORPORATION, a Washington  
corporation; ORANGE CAB COMPANY, a Washington corporation;  
PUGET SOUND DISPATCH, LLC, dba Yellow Taxi Association, a  
Washington limited liability company; and RAINIER DISPATCH LLC, a  
Washington limited liability company,  
Respondents.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. STEPHEN C. GONZALEZ)

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RESPONDENT PORT OF SEATTLE'S SUPPLEMENTAL BRIEF  
REGARDING INJUNCTION BOND

K & L GATES LLP

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Thomas H. Wolfendale, WSBA # 03776  
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## II. FACTUAL SUMMARY

The facts behind this dispute are set forth in the Port's prior pleadings and the Commissioner's Ruling Granting a Stay Pending Appeal. Only the facts pertinent to the setting of a bond are set forth herein.

STITA filed a motion for a preliminary injunction which the Superior Court denied on February 8, 2010. Had an injunction been entered, the trial court would have been required to set a bond. CR 65(c). STITA filed an immediate appeal and motion for temporary injunctive relief. On February 8, 2010, this Court granted an emergency stay pending further proceedings. On February 22, 2010, this Court granted STITA's Motion for Stay pending appeal of the Court's denial of a preliminary injunction and set an expedited briefing schedule. Argument is likely to be set in April or May 2010. Even assuming a prompt decision from the Court of Appeals, the Port will have been subject to a 75-100 day injunction from this Court preventing the signing of the new taxi contract. That is on top of a voluntary delay through the trial court hearing from December 2009 to February 8, 2010.

As explained in the Grace Declaration submitted to the trial court, the decision to provide seven months from award to commencement of operations under the new contract was based on the "amount of time... absolutely necessary for a smooth transition." Grace Decl. ¶ 25. Airport

taxis must be separately licensed and branded, a process which will require significant time and resources from Yellow. The new concession agreement also requires Yellow to undertake significant alteration of its fleet to meet the Port's "green" requirements, including the purchase and/or retrofitting of green vehicles and the construction of two new fueling stations. Moreover, Yellow must identify and secure contracts with 210 drivers, many of whom have not yet been hired. Numerous of these activities are expected to take in excess of 260 days. *See* Supplemental Declaration of Frank Dowgwilla, Exhibit A (detailed contract implementation schedule demonstrating required time frame for contract readiness). *Id.* In sum, as demonstrated in the Grace and Dowgwilla declarations, implementing the new on-demand taxi service contract is a major undertaking. *See* Grace Decl. ¶ 25; Dowgwilla decl., Ex. A. STITA has presented no evidence that implementation of the contract will take less time than that envisioned by the Port and Yellow.

The new contract benefits the Port and the Public in several ways. First, the contract provides additional revenue to the Port of roughly \$2.15 per trip. (The current per trip fee is \$3.05; the anticipated per trip fee on average is \$5.20 calculated at 13% of an average \$40 trip.) Using a conservative 700,000 trips per year, the new contract results in additional revenue to the Port of over \$6,000 per day. Second, the new contract provides more taxi service to the airport community – 210 taxis instead of

the 166 taxis under the current contract. Third, the new contract has environmental benefits in reducing the number of dead-head trips.

Given the briefing and expected argument schedule in this appeal, the Port and Yellow Cab will have less than four months (at best) to implement the numerous operational changes necessary to begin service. Accordingly, it is certainly possible, if not likely, that the contract will not be implemented on time, or at the very least, will require the expenditure of significant additional resources on the part of the Port and Yellow to facilitate the planned September 1, 2010 start date. If the Court's injunction is dissolved, the Port will be entitled to the damages caused by this delay.

### **III. AUTHORITY AND ARGUMENT**

#### **A. STITA is Required to Post a Bond**

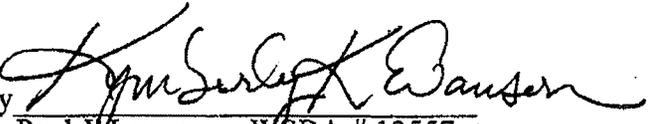
This Court entered a temporary injunction pursuant to RAP 8.3, which states that an appellate court will "ordinarily condition the order [for injunctive relief] on furnishing a bond or other security." An appeal bond is meant to "account for all the various damages [the Respondent] may suffer pending appeal." *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 64 n.4 (1987). STITA presented no persuasive arguments why this Court should deviate from its "ordinary" practice of requiring a bond.

should require STITA to post an injunction bond in the amount of at least \$150,000 plus \$50,000 for attorneys' fees.

DATED this 4th day of March, 2010.

Respectfully submitted,

K&L GATES LLP

By 

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Kymberly K. Evanson, WSBA # 39973  
Attorneys for Respondent  
Port of Seattle

# **APPENDIX B**

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION I

SEATTLE-TACOMA  
INTERNATIONAL TAXI  
ASSOCIATION, a  
Washington nonprofit association,

Petitioner,

v.

PORT OF SEATTLE, a municipal  
corporation; AIRPORT JOINT  
VENTURE RESPONSE  
PARTNERSHIP, LLC, an  
unincorporated entity; CHECKER CAB  
OF SEATAC CORPORATION, a  
Washington corporation; ORANGE  
CAB COMPANY, a Washington  
corporation; PUGET SOUND  
DISPATCH, LLC, dba Yellow Taxi  
Association, a Washington limited  
liability company; and RAINIER  
DISPATCH, LLC, a Washington limited  
liability company,

Respondents.

NO. 64857-8-I

**STITA'S AMENDED REPLY  
IN SUPPORT OF ITS  
AMENDED EMERGENCY  
MOTION FOR  
INJUNCTIVE RELIEF  
PURSUANT TO  
RAP 8.3 AND  
RAP 17.4(b)**

PETITIONER'S AMENDED REPLY  
IN SUPPORT OF ITS  
AMENDED EMERGENCY MOTION  
FOR INJUNCTIVE RELIEF - 0

As argued in the trial court, it was the Port's requirement that bidders submit proposals offering to pay the Port an unlimited amount of gross revenues -- without the Port even looking at its internal costs -- that made the proposed contract violate the Revised Airports Act. When the trial court ruled that at the preliminary stage that the court thought that "petitioner has made a good case that there was not due regard" the Court was saying that the proposed contract appears to be unlawful—i.e., void.

Nonetheless, the Port is still attempting to execute the proposed contract even though it has now been told by the trial judge that its contract is probably illegal, and the Port and Yellow Taxi are arguing that somehow it is in the public's interest that the Port sign an illegal contract with Yellow Taxi.

Second, the equities also heavily favor STITA because without the stay, the Port is expected to rush to sign the probably illegal contract with Yellow Taxi immediately, foreclosing any further action in this case, and meanwhile, STITA most probably will be forced out of business without the opportunity to fully litigate the legality of the contract.

Third, even assuming *arguendo* that there may be some adverse effect to the Port or to Yellow Taxi as a result of the delay of this appeal, those effects would be minimal over the next few months, and any such adverse effect can be measured in terms of a monetary amount. "If the

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of February, 2010.

PETERSON YOUNG PUTRA

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# **APPENDIX C**

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K&L GATES LLP

NO. 64857-8-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

(King County Cause No. 10-2-05263-1 SEA)

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SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION, a  
Washington nonprofit association,

*Plaintiff-Appellant,*

vs.

PORT OF SEATTLE, a municipal corporation; AIRPORT JOINT  
VENTURE RESPONSE PARTNERSHIP, LLC, an unincorporated entity;  
CHECKER CAB OF SEATAC CORPORATION, a Washington  
corporation; ORANGE CAB COMPANY, a Washington corporation;  
PUGET SOUND DISPATCH, LLC, dba Yellow Taxi Association, a  
Washington limited liability company; and RAINIER DISPTACH, LLC, a  
Washington limited liability company,

*Defendants-Appellees.*

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**AMENDED OPENING BRIEF OF APPELLANT**

---

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(WSBA No. 13492)  
Anthony A. Todaro  
(WSBA No. 30391)

John R. Ruhl  
(WSBA No. 8558)  
Deidra A. Nguyen  
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*Attorneys for Appellant Seattle-Tacoma International Taxi Association*

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then in this Court). Under *Dick Enterprises, Inc. v. King County*, 83 Wn. App. 566, 571 (1996), if STITA had not sought an injunction and the Port had signed the contract with Yellow Taxi, then STITA would be without standing to seek a remedy. Accordingly, as Commissioner Neel observed, “STITA’s claims effectively become moot once a concession agreement is signed.”<sup>63</sup>

Moreover, the stakes could not be greater for STITA. If the Port signs the proposed concession agreement, STITA will likely soon cease to exist.<sup>64</sup> Thus, the harm is both irreparable and severe.

## V. CONCLUSION

The trial court erred in declining to issue a preliminary injunction on the basis that STITA waived its rights. Particularly where, as here, there has already been a finding that the Port is on the verge of entering into a contract that is likely illegal and STITA will lose its rights and will literally go out of business if the Port is permitted to enter into that contract, the Court should remand the case with an order to enter preliminary injunctive relief barring the Port from signing the proposed taxicab concession agreement until after a full and final determination of STITA’s claims and the Port’s defenses.

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<sup>63</sup> Commissioner’s Ruling Granting a Stay Pending Appeal at p. 10.

<sup>64</sup> See CP 248-251.

STITA commits that it will, upon remand, request expedited adjudication of the matter by the trial court. It is in the interests of all parties to have this matter resolved as quickly as possible.

DATED this 13<sup>th</sup> day of April, 2010.

PETERSON YOUNG PUTRA



Michael A. Goldfarb, WSBA No. 13492  
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# **APPENDIX D**

RECEIVED

APR 13 2010

K&L GATES LLP

NO. 64857-8-I

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

(KING County Cause No. 10-2-05263-1)

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SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION, a  
Washington nonprofit association,

*Plaintiff-Appellant,*

vs.

PORT OF SEATTLE, a municipal corporation; AIRPORT JOINT  
VENTURE RESPONSE PARTNERSHIP, LLC, an unincorporated entity;  
CHECKER CAB OF SEATAC CORPORATION, a Washington  
corporation; ORANGE CAB COMPANY, a Washington corporation;  
PUGET SOUND DISPATCH, LLC, dba Yellow Taxi Association, a  
Washington limited liability company; and RAINIER DISPATCH, LLC, a  
Washington limited liability company,

*Defendants-Respondents.*

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**APPELLANT'S AMENDED BRIEF IN REPLY**

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## I. INTRODUCTION

The Port asks this Court to approve a new methodology for charging user fees that combines the Port's skimming of a percentage of gross revenues with a kickback of an additional potentially unlimited fee for the grant of exclusivity. No court in Washington or throughout the country has addressed, let alone approved, the Port's fee methodology.

The Port concedes that it is acting in a regulatory capacity in connection with the taxi concession.<sup>1</sup> The Port's proposed taxicab contract should be held to be unlawful because the Port's market-based fee would violate the requirements in the Revised Airports Act (the "Act") that the fee be "reasonable," "uniform," and "established with due regard to the property and improvements used and the expense of operation to the municipality."

## II. ARGUMENT IN REPLY

### A. STITA will be deprived of access to any court remedy without a preliminary injunction.

STITA would be deprived of any court remedy whatsoever if a preliminary injunction did not issue. Under *Kucera v. Dep't of Transp.*,

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<sup>1</sup> Br. of Appellee Port of Seattle at 46. The Port's admission that it is acting in a regulatory mode undercuts its reliance on *Branson v. Port of Seattle*, 152 Wn.2d 862 (2004), because there the Court's analysis was premised on the underlying determination that, with regard to rental cars, the Port was acting in a non-governmental proprietary capacity. *Branson*, 152 Wn.2d at 870. Where the Port acts in a regulatory (*i.e.*, governmental) rather than a proprietary capacity, its latitude is far more limited. See *Okeson v. City of Seattle*, 150 Wn.2d 540, 549 (2003).

140 Wn.2d 200, 209 (2000), in making a decision on the issuance of an injunction, the trial court must balance the relative interests of (and harm to) the parties. Here, STITA suffers irreparable harm once the contract is signed. Thus, this Court must view the decision of the trial court through the prism that STITA has no remedy and no recourse once the contract is signed. *See, e.g., Dick Enterprises, Inc. v. King County*, 83 Wn. App. 566, 571 (1996).

**B. The trial court already determined correctly that the Port's RFP likely violates the Revised Airports Act.**

No party has assigned error to the trial court's determination that the Port's proposed contract likely violates the Act's requirement that the fee be set with due regard to the Airport's costs. Accordingly, the Court should decline to examine the issue for the purposes of this appeal. At a minimum, should the Court elect to examine this aspect of the trial court's ruling, it should do so under the abuse of discretion standard.

**C. There is no basis to determine whether the Port's proposed fee was set with due regard for costs.**

The Port now engages in revisionist history and argues that its fee is justified by the Port's costs.<sup>2</sup> But the Port did not calculate a fee, it just put its RFP out to market, and having the public bid is not sufficient to

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<sup>2</sup> Br. of Appellee Port of Seattle at pp. 29-36.

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION I

SEATTLE-TACOMA  
INTERNATIONAL TAXI  
ASSOCIATION, a  
Washington nonprofit  
association,

Petitioner,

v.

PORT OF SEATTLE, a  
municipal corporation;  
AIRPORT JOINT VENTURE  
RESPONSE PARTNERSHIP,  
LLC, an unincorporated entity;  
CHECKER CAB OF  
SEATAC CORPORATION, a  
Washington corporation;  
ORANGE CAB COMPANY,  
a Washington corporation;  
PUGET SOUND DISPATCH,  
LLC, dba Yellow Taxi  
Association, a Washington  
limited liability company; and  
RAINIER DISPATCH, LLC,  
a Washington limited liability  
company,

Respondents.

No. 66401-8-I

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DELIVERY

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The undersigned hereby certifies that copies of the  
Opening Brief of Respondent Port of Seattle were sent as

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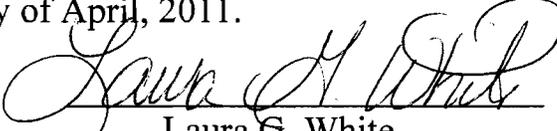
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DATED this 18th day of April, 2011.

  
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