

File

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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05-35153

Joseph A. Pakootas,
Donald R. Michel,
and
State of Washington,

Plaintiffs-Appellees,

v.

Teck Cominco Metals, Ltd.,

Defendant-Appellant.

Appeal from the U.S. District Court for the Eastern District of Washington
in Case No. CV-04-0256-AAM

**REPLY OF THE CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA TO THE STATE OF WASHINGTON'S
OPPOSITION TO MOTIONS FILED BY *AMICUS CURIAE***

Pursuant to Federal Rule of Appellate Procedure 27, the Chamber of Commerce of the United States of America ("Chamber") files this reply to the State of Washington's response in opposition to the Chamber's motion seeking leave to file an *amicus curiae* brief in support of Defendant-Appellant's petition for rehearing. The State of Washington's opposition to the Chamber's motion is entirely unfounded. The sole basis on which the State of Washington opposes the

Chamber's motion is its contention that the Chamber's motion and accompanying brief are untimely under Federal Rule of Appellate Procedure 29. Washington's Opp'n to Amicus Mots. at 2. Rule 29(e) provides that "[a]n amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed."¹ The Chamber's filing satisfied this requirement.

In determining how to calculate the seven-day time period, it is necessary to refer to Federal Rule of Appellate Procedure 26, which applies "in computing *any period of time* specified in these rules or in any local rule, court order, or applicable statute." Fed. R. App. Proc. 26(a) (emphasis added). Rule 26(a) provides as follows:

- (1) Exclude the day of the act, event, or default that begins the period.

¹ There is some question as to whether the seven-day time period in Rule 29(e) even applies to the current situation because a petition for rehearing is not technically a "principal brief." The 1998 Advisory Committee Notes to Rule 29(e) state as follows: "A court may grant permission to file an amicus brief in a context in which the party does not file a 'principal brief'; for example, an amicus may be permitted to file in support of a party's petition for rehearing. In such instances the court will establish the filing time for the amicus." Because there is no local rule governing the time limit for filing amicus briefs in support of petitions for rehearing, the Chamber in an abundance of caution filed its brief and accompanying motion within Rule 29's seven-day time period. Given the ambiguity in the rule and the importance of the underlying issue, it would, if necessary, be appropriate for the Court to exercise its discretion under Rule 26(b) to allow *amici* to submit briefs outside Rule 29's seven-day period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or--if the act to be done is filing a paper in court--a day on which the weather or other conditions make the clerk's office inaccessible.

Id.

The petition for rehearing of Defendant-Appellant Teck Cominco Metals Ltd. was filed on Monday, July 17, 2006. Using Rule 26's method for computing the seven-day time period in Rule 29 (which excludes the day the petition was filed and the intermediate Saturday and Sunday because the period is less than eleven days and because Rule 29 does not state the time period is in calendar days) sets the date for filing the *amicus* brief at Wednesday, July 26—not Monday, July 24, as the State of Washington contends. The Chamber timely filed its *amicus* brief and accompanying motion on Tuesday, July 25. *See* Fed. R. App. Proc. 25(a)(2)(B) (brief is timely if mailed via commercial carrier on the due date); *see also* 1998 Advisory Committee Notes to Fed. R. App. Proc. 29 (“A party or *amicus* can send its brief to a court for filing and, under Rule 25, the brief is timely if mailed within the filing period.”).²

² Even if Rule 25(a)(2)(B)'s provision that briefs are timely if mailed within the filing deadline were not to apply, the Chamber's brief was *received* by the clerk on July 26, 2006, and therefore was also filed within the seven-day period pursuant to Rule 25(a)(2)(A).

Accordingly, the Chamber's *amicus* brief and accompanying motion were timely filed and the Chamber's motion should be granted.

Respectfully submitted,

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Dated August 1, 2006

CERTIFICATE OF SERVICE

I, Matthew B. Archer-Beck, hereby certify that, on August 1, 2006, I served the foregoing Response of the Chamber of Commerce of the United States of America to the State of Washington's Opposition to the Untimely Motions Filed by *Amicus Curiae* on counsel for Teck Cominco Metals, Ltd., counsel for Joseph A. Pakootas and Donald R. Michel, and counsel for the State of Washington by causing one true copy to be delivered via Federal Express for next business day delivery to the following:

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