

**Docket Nos. TG-200650 and TG-200651 (Consolidated) -
Vol. II**

**Murrey's Disposal Co. Inc. v. Waste Management of
Washington**

December 18, 2020



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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MURREY'S DISPOSAL CO, INC.,) DOCKETS TG-200650 and) TG-200651 (Consolidated)

Complainant,)

vs.)

WASTE MGMT. OF WASH., INC.,) WASTE MGMT. DISPOSAL SERVICES) OF OR., AND MJ TRUCKING AND) CONTRACTING,)

Respondents.) *Caption Continued*

VIRTUAL PREHEARING CONFERENCE, VOLUME II

Pages 78-115

ADMINISTRATIVE LAW JUDGE ANDREW J. O'CONNELL

December 18, 2020

9:30 a.m.

Washington Utilities and Transportation Commission 621 Woodland Square Loop Southeast Lacey, Washington 98503

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1 MURREY'S DISPOSAL CO, INC.,)

2 Complainant,)

3 vs.)

4 WASTE MGMT. OF WASH., INC.,) WASTE MGMT. DISPOSAL SERVICES) OF OR., AND DANIEL ANDERSON) TRUCKING AND EXCAVATION, LLC,)

5 Respondents.)

1 LACEY, WASHINGTON; DECEMBER 18, 2020 2 9:30 A.M.

3 --o0o-- 4 P R O C E E D I N G S 5

6 JUDGE O'CONNELL: Okay. Let's be on the 7 record. Good morning. The time is approximately 9:30 8 a.m. on Friday, December 18, 2020.

9 My name is Andrew O'Connell. I'm an 10 administrative law judge with the Washington Utilities 11 and Transportation Commission, and I will be presiding 12 in these matters along with the Commissioners.

13 We're here today for a virtual prehearing 14 conference in consolidated Dockets TG-200650 and 15 TG-200651, which concern complaints filed with the 16 Commission on July 15, 2020, by Murrey's Disposal 17 Company Incorporated against respondents Waste 18 Management of Washington Incorporated, Waste Management 19 Disposal Services of Oregon Incorporated, MJ Trucking 20 and Contracting Incorporated, and Daniel Anderson 21 Trucking and Excavation LLC.

22 The complaints allege in general that the 23 respondents are operating as solid waste collection 24 companies without the necessary authority from the 25 Commission.

1 We're conducting this prehearing conference
2 virtually with audio and video through computer software
3 and via telephone. The benefits of this is that it
4 allows me and the parties and any intervenors the
5 ability to see and hear each other even though we are
6 not physically in the Commission's hearing room.
7 Okay. Let's -- let's move forward with
8 short appearances. Let's begin with Murrey's Disposal.
9 MR. FASSBURG: Good morning, Your Honor.
10 Blair Fassburg and Dave Wiley via telephone of Williams
11 Kastner here on behalf of Murrey's Disposal Company.
12 JUDGE O'CONNELL: Thank you.
13 And for respondents?
14 MR. KENEFICK: Good morning, Your Honor.
15 This is Andrew Kenefick, in-house counsel on behalf of
16 Waste Management of Washington and Waste Management
17 Disposal Services of Oregon.
18 JUDGE O'CONNELL: Thank you.
19 MS. GOLDMAN: And good morning, Your Honor.
20 This is Jessica Goldman on behalf of all of the
21 respondents of Summit Law Group.
22 JUDGE O'CONNELL: Okay. Thank you. It was
23 very garbled, so for the court reporter, I heard that it
24 was Jessica Goldman on behalf of the respondents from
25 Summit Law Group; is that correct, Ms. Goldman?

1 me as soon as possible. And I'm aware that the parties
2 already have my email address, but for the record, it is
3 Andrew.j.oconnell, that's O-C-o-n-n-e-l, @utc.wa.gov.
4 Also, if anyone would like to add names and email
5 addresses of other representatives or support staff who
6 should receive electronic courtesy copies of all
7 documents filed in this proceeding, please email that to
8 me as well and I will include that information as an
9 appendix to the prehearing conference order so that all
10 of the parties have it.
11 Next I want to address whether there is a
12 need for a protective order in this case. There hasn't
13 been a motion filed for a protective order from either
14 party, either side. But do the parties anticipate a
15 need for a protective order in this case?
16 MR. FASSBURG: So for Murrey's counsel, I
17 would say at this moment the answer is possibly yes but
18 not yet yes. It depends upon ultimately what types of
19 information we need to exchange. And -- and I don't
20 want to get out too far ahead of ourselves, but we
21 discussed this week the possibility of exchanging some
22 information informally as opposed to through discovery,
23 and I don't yet know if any of that information that
24 would be exchanged informally would be something for
25 which Waste Management or the respondents would want a

1 MS. GOLDMAN: Yes, it is. I'm here on
2 behalf of all of the respondents. There are additional
3 respondents beside Waste Management.
4 JUDGE O'CONNELL: Okay. So you're here on
5 behalf of all of them?
6 MS. GOLDMAN: Yes, thank you, Your Honor.
7 JUDGE O'CONNELL: Okay. Thank you.
8 Let me first address whether there are any
9 petitions for intervention. None have been filed with
10 the Commission to this point. Is there anyone on the
11 telephone or on Teams who intends to intervene in these
12 matters? Okay. And I'm just taking a breath because
13 the nature of the technology, sometimes it takes a
14 little bit for people to unmute themselves, and I've
15 learned to take a breath.
16 Okay. Hearing none, let's proceed with the
17 rest of the prehearing conference. So the Commission
18 requires all filing and service to be done
19 electronically now according to Commission rule, and the
20 Commission will serve the parties electronically as
21 well. However, in this case, the Commission will also
22 require the filing of an original and three paper copies
23 for internal distributions.
24 If any party has not yet designated a lead
25 representative for service, please do so via an email to

1 protective order, but we would certainly be willing to
2 enter one should they feel the need for that.
3 JUDGE O'CONNELL: Okay. Well, before I turn
4 to the respondents, we can always enter one in the
5 future if we need to. I wanted to touch base now
6 because if the parties foresaw it, we could go ahead and
7 do it. But I understand the -- the possibility for the
8 parties wanting to maybe just wait and see.
9 So let me ask the respondents, are you
10 anticipating the need for a protective order?
11 MR. KENEFICK: Your Honor, it's Andrew
12 Kenefick. I -- kind of similar to what Mr. Fassburg
13 said, we would wait and see. We will kind of lay out
14 for you sort of how we see a possibility of moving this
15 forward, and I think you may see that in light of that,
16 if that does work out, then it may be utterly
17 unnecessary. But I think we can -- it's something that
18 can be deferred in the event that our -- our sort of
19 proposed path forward doesn't work or doesn't make
20 sense.
21 JUDGE O'CONNELL: Okay. Then we will -- we
22 will wait and see. And I think you are both hinting at
23 the procedural schedule, which I -- or how we're going
24 to move forward from here, and that's what I wanted to
25 talk about next. I'm hearing that perhaps the parties

Page 86

1 might have a different idea than I had, which is fine.
2 I'd like to hear from the parties. Prior to this
3 hearing, I had sent a message to the parties with some
4 general expectations of a schedule, which were
5 admittedly based on certain assumptions that may or may
6 not have been correct.
7 To summarize for the record, my review of
8 the pleadings in this case and the procedure of similar
9 cases held at the Commission indicated to me that the
10 parties in this case may likely be wanting to move for a
11 summary judgment at some point. And if that were to be
12 the case, my suggestion was that the parties agree to a
13 specified period for discovery and a date on which both
14 sides would file motions for summary judgment and a date
15 on which both sides would submit responses to each
16 other's motions.
17 At that point, if the Commission was still
18 unable to grant summary judgment for either side, the
19 procedure would -- could have been to reconvene a second
20 prehearing conference to establish the procedure going
21 forward from there. But I am open certainly to the
22 ideas from the parties of how they think it might be
23 best to move forward.
24 So with that background and -- and -- and in
25 anticipation that perhaps the parties have had a chance

Page 87

1 to discuss, let me turn to Murrey's Disposal and ask if
2 you've had a chance to discuss how to move forward with
3 the respondents and maybe what that looks like.
4 MR. FASSBURG: Absolutely. And I -- I think
5 I'd prefer to let them describe the process that they
6 had in mind that they had raised with us this week. I
7 will say first, your ideas in terms of a procedural
8 schedule do make sense were it not for the proposal and
9 I think perhaps could be part of the procedural schedule
10 as part of contingency or fallback plans. But I'll let
11 Ms. Goldman and Mr. Kenefick address their proposal,
12 because I believe in the process that would come first,
13 and if it doesn't work or -- or if it's not something
14 the Commission wants to entertain, then what you
15 proposed could come next.
16 JUDGE O'CONNELL: Okay. That makes sense.
17 Let me turn to Mr. Kenefick and Ms. Goldman.
18 Go ahead.
19 MR. KENEFICK: Yeah, Your Honor, the --
20 procedurally, as you know, we filed motions to dismiss.
21 Those motions were denied by yourself. We filed a
22 petition for review with -- of that decision with the
23 Commissioners themselves and they denied that or they I
24 guess affirmed your -- your decision.
25 We look at this case as being one that is --

Page 88

1 that presents a clear legal issue, and granted that when
2 you file a motion to dismiss, you are accepting the
3 facts as alleged by the -- the other side, in this case
4 by the -- by the -- the protestants.
5 I -- I think we look at this as the -- the
6 need to sort of move to summary judgment would be simply
7 a repetition of the briefing that's already been done.
8 I don't know that there are that many facts -- I don't
9 know if there are any material facts that are at issue.
10 What we had thought was -- and certainly looking for
11 input from you as to whether this sort of would work. I
12 have not done it before in the UTC, but the notion would
13 be that the parties would confer and identify the
14 material findings of fact that we could stipulate to.
15 I can't say for sure that we would agree a
16 hundred percent, and if there are material facts that
17 we're in disagreement about, then we might have to
18 revert back to the more typical way of doing it. But
19 assuming that we can agree to the material facts, and I
20 don't think there are that many at issue, then we would
21 certainly -- we would I think propose not having to go
22 through the -- the -- the exercise of filing summary
23 judgment motions when the legal issues have already been
24 explained, and I don't have -- I don't know that it's
25 likely that -- that filing the same papers is going to

Page 89

1 cause yourself or the Commissioners to change their
2 minds. So we would rather get this teed up with a final
3 order so that we could then prosecute the appeal of the
4 case.
5 So we were in effect thinking of coming up
6 with stipulated findings of fact and then it would be a
7 final order issued that we would -- would be a final
8 order. I'm not sure if it would have to be an initial
9 order from you which would then be issued in final by
10 the Commissioners or it would be a final order from you.
11 But in any event, we were -- kind of wanted
12 to get this set up so that we could have a final order
13 that would then be an appealable event based upon the
14 stipulated facts and based upon the -- the written
15 decision of the -- of the Commission on the -- on the
16 affirming your dismissal -- or denial of our motion to
17 dismiss.
18 JUDGE O'CONNELL: So I'm -- I want to repeat
19 it to make sure I understand the proposal. The proposal
20 would be for the parties to collaborate to identify the
21 material facts that they would stipulate to and would
22 submit those material facts to the Commission somehow?
23 MR. KENEFICK: Yes.
24 JUDGE O'CONNELL: Okay. And at that point,
25 the Commission would accept those material facts and

Page 90

1 issue a decision on the -- the legal part of it without
2 the need for agreed amount of discovery or a hearing of
3 really any sort or any motions from the parties?
4 MR. KENEFICK: Well, it would be -- I guess
5 I'd assume that the reasoning in -- in the -- well, in
6 your -- in really the Commission's decision on the
7 petition for review in effect would be the conclusions
8 of law. And I don't know that -- I'd have to look back
9 at that decisions to look at all of the facts that they
10 cited, but in effect, we would just be addressing any --
11 any disagreements we might have on the facts that are
12 positive to support that. And if there are no
13 disagreements, then -- then in effect the -- their
14 decision on the motion to dismiss would end up being the
15 final order.
16 And I don't want to make it sound like there
17 are a lot of disagreements on material facts or on
18 facts. There are certainly facts that were alleged in
19 the complaint that -- that we don't agree with that are,
20 you know, factually incorrect and we might be able to
21 work with Murrey's counsel to explain why those are not
22 quite right. I don't know that they're material, but
23 that in a sense we're -- we're transforming the -- the
24 Commission's decision affirming your denial of the
25 motion to dismiss, we're transforming that into the

Page 91

1 final order of the Commission subject to any sort of
2 tweaking of the facts that -- in order to comply with
3 what -- what truly are the facts.
4 JUDGE O'CONNELL: So what I -- the -- any
5 sort of order that would come from the Commission at
6 this point would be a final order because it would be
7 issued by the Commissioners since they are presiding now
8 in this proceeding along with me. The -- what I'm
9 hearing being proposed is not that there would be an
10 additional order issued by the Commission, but that the
11 most recent order affirming the denial of the motion to
12 dismiss would become in effect the final order; is that
13 correct?
14 MR. KENEFICK: Well, honestly what I had
15 thought would happen would be we would submit the
16 stipulated facts, the -- they would be put into a
17 document as the stipulated facts, the -- then the legal
18 conclusions of law, the legal reasoning in the current
19 den- -- decision from the Commission would then just be
20 copied and pasted into that final order. You know, this
21 is of course subject to, you know, if -- if they felt
22 that something needed to be adjusted here or there and
23 then we could proceed.
24 I didn't -- I didn't envision there sort of
25 being a --

Page 92

1 MR. WILEY: Your Honor?
2 MR. KENEFICK: -- round of briefing. I --
3 I'll defer to Dave. Dave certainly has got some
4 exper- -- or Mr. Wiley certainly has some experience and
5 may have some thoughts. Mr. Wiley?
6 JUDGE O'CONNELL: Mr. Wiley, go ahead.
7 Thank you.
8 MR. WILEY: Your Honor, I -- I just -- I
9 just wanted to add to the process that was described by
10 Mr. Kenefick that I think it would be up to the
11 Commission to determine whether it adopts the -- the
12 Order 03 or adds any additional findings and conclusions
13 that I think it retains the right in its discretion to
14 include in the order.
15 I think our point is that both sides feel
16 that we have pretty well comprehensively exhausted our
17 legal arguments and that this case is a question of law.
18 I agree with Mr. Kenefick that -- that there don't
19 appear to be material facts in dispute. Some of the
20 factual renditions of location of facilities, things
21 like that we need to discuss, and we're amenable on
22 immaterial facts to addressing their concerns about
23 accuracy.
24 But other than that, I just wanted to -- to
25 include that I think that the Commission should retain

Page 93

1 the right to expand upon Order 03 based on the arguments
2 it's received should it so choose, but with the idea
3 that Waste Management is going to -- or the respondents
4 are going to appeal, do an -- an administrative appeal
5 under RCW 34.05.
6 JUDGE O'CONNELL: Okay. Here's the other
7 question I have for the parties, because I think I
8 telegraphed it fairly well in the initial order is that
9 whether it ends up being a question or not, the
10 respondents did not make a commerce clause argument or a
11 dormant commerce clause argument in addition to their
12 federal preemption argument. And that -- that analysis
13 would require a different discussion than what's already
14 been presented, and I'm curious if that is not going to
15 be presented or made as an argument.
16 MR. KENEFICK: I'm not sure -- I'm not sure
17 I'm prepared to answer that. We had -- I guess the --
18 the -- the short answer is -- is no, we hadn't
19 anticipated that. I don't know that there was -- that
20 we have exhausted that research 100 percent, but there
21 certainly is precedent out there where a commerce clause
22 argument such as this in a case like this would -- has
23 not prevailed. I have not honestly looked more -- I
24 haven't looked in the last month or so at those -- at
25 that case or those cases, and if I'm not mistaken, I'm

Page 94

1 thinking the Cleanwell [phonetic] case.
2 MR. WILEY: Your Honor, Dave Wiley again. I
3 did review your initial order, saw your footnote on that
4 and some of the textual references to Pipe -- you know,
5 the Classic Pipe Bruce case et cetera. Clearly that's
6 an issue for the respondents to -- to decide, but I --
7 based on my experience both at the Commission and in
8 court appeal cases in this circuit, I do think that
9 ground has been heavily plowed as Mr. Kenefick suggested
10 at the end.
11 We also have a statutory provision, RCW
12 81.77.100, that addresses that very clearly. The
13 Commission, I've been involved in three or four medical
14 waste cases where the Commission addressed this,
15 Cleanwell being the most prominent one.
16 So that -- again, that's up to them, but it
17 wasn't raised as an argument by them, and I -- I
18 interpreted your footnote and discussion as sort of an
19 aside or dicta more than, you know, a compelling, but
20 you tell us what -- what you intended by that.
21 JUDGE O'CONNELL: To clarify, it wasn't
22 aside or dicta because it wasn't presented, and it was
23 ant- -- it was in anticipation that the case would move
24 forward to -- through discovery to the development of
25 the facts for, you know, a final order at the end of the

Page 95

1 case. And if that was going to be one of the arguments,
2 the reason why that is in that order at all is to
3 foreshadow that the parties should be thinking about
4 what facts, possibly material facts that might be
5 stipulated to, might affect a Pike balancing test.
6 Because I think you're both right, that
7 there has been a lot of case law and decisions around
8 that in this context, but I think all of that case law
9 is dependent upon the facts. And it -- that's why I
10 want to leave it open for the parties to decide
11 whether -- whether the respondents wanted to pursue that
12 argument and whether the parties needed to develop and
13 agree to facts that would permit that sort of balancing
14 test. And that's why it's there and that's why I'm
15 asking.
16 And under the -- the proposed way to go
17 forward, I think it could still be addressed. I don't
18 think it precludes the parties from presenting facts for
19 that or from --
20 MR. KENEFICK: Your Honor, you're frozen up.
21 I don't know if I'm frozen or you are. Looks like --
22 Your Honor, I think you just froze up for the last 20
23 seconds or so.
24 JUDGE O'CONNELL: Hello? Did I just lose
25 connection?

Page 96

1 MR. KENEFICK: We can -- I can hear you now.
2 We lost you for about the last 20 or 30 seconds.
3 JUDGE O'CONNELL: Okay. Thank you for
4 staying with me, and I apologize. Sometimes the nature
5 of the technology that we use, sometimes we have blips.
6 What I was explaining was that part of it is
7 in the order to make clear that if that is going to be
8 an argument going forward by respondents, there -- the
9 parties may need to address other material that could be
10 in -- in the proposed way going forward stipulated to I
11 suppose. So I don't think that is at this point
12 precluded by the parties' proposal going forward. I'm
13 just seeking some clarity, I guess, of what to expect.
14 So if the parties' proposal can work for the
15 Commission, it sounds very similar to the way that the
16 Commission's proceeded in prior proceedings, where the
17 facts are pretty much agreed and the Commission applies
18 those facts to the law and issues a decision.
19 Now, whether that ends up being a repeat of
20 the order to dismiss or whether it includes additional
21 reasoning, I think will be up to the Commissioners
22 whether they think they need to have more in there.
23 What -- well, before I -- before I ask what
24 timeline the parties had in mind, let me ask for
25 feedback before we go forward.

Page 97

1 Mr. Kenefick, do you -- do you have any
2 feedback at this point?
3 MR. KENEFICK: You said a number of things
4 that I'm trying to digest, and Dave made mention of the
5 AGG case. I don't know if that's what -- I can't
6 remember if that's a case you had cited or -- in your
7 footnote. But the AGG case as background was a case
8 that was -- Waste Management was involved in, and we
9 were on the side of the County, and we were -- you know,
10 we -- we -- we -- we were on the side of arguing that in
11 that case the F4A did apply to the -- the collection of
12 transportation of solid waste. As we've briefed in this
13 case, we don't view the F4A as being relevant. We
14 believe that the ICCTA is the relevant statute to be
15 looking that.
16 That being said, I -- I -- I guess I'm --
17 I'm curious to know if -- if this sort of process we're
18 envisioning puts the Commission in an uncomfortable
19 position because they would be in effect adopting their
20 reasoning from a motion to dismiss, and I think we all
21 recognize that, you know, a motion to dismiss, you know,
22 doesn't end the case if it's denied, I mean, the case
23 goes forward.
24 Would they feel that, you know, a motion for
25 summary judgment would in effect tee up their -- you

Page 98

1 know, their drafting up a final decision that they know
2 is sort of the -- the -- the end-all of -- of the case
3 is to -- as opposed to simply a motion to dismiss, which
4 said well, no, it's -- you know, we're not going to --
5 we're going to keep jurisdiction, we're going to keep
6 moving forward.
7 We -- I think we had envisioned that the
8 motion to dismiss, other than the fact that there might
9 be some nuances in the fact that the motion to dismiss
10 was really not much different than a motion for summary
11 judgment, in which case we didn't know whether it made
12 sense to have to go through the process of briefing
13 summary judgment all over again on the same pleadings.
14 We certainly could if that makes it more comfortable for
15 the Commission to -- to then issue a final decision as
16 opposed to just relying on what's been filed on the
17 motion to dismiss.
18 JUDGE O'CONNELL: Before I -- before I get
19 to Murrey's Disposal, I appreciate the efficiency in
20 what's being proposed, because what I'm hearing from the
21 parties is that there isn't going to be much difference
22 in the legal arguments presented given the material
23 facts that will be agreed to. But I -- I'm expecting
24 the Commissioners to want to issue another order that
25 applies the facts -- or the law to the facts that are

Page 99

1 agreed upon.
2 And I -- I hear your proposal and the way
3 I -- it's possible that it needs to be explained one
4 more time. The way I hear it is that it is essentially
5 asking for a determine -- a final determination from the
6 Commission that -- of the kind that would come from a
7 summary judgment motion but without the -- without the
8 need to repeat all the legal arguments that have already
9 been made in a motion for a summary judgment. And it's
10 that efficiency that I see as being savings to the
11 parties and to the Commission as far as resources and
12 time, and I can appreciate that.
13 While maybe you're thinking about how I'm
14 understanding this, Mr. Kenefick, let me -- let me turn
15 to the respondents to see what it is they might have to
16 say.
17 MR. FASSBURG: Thank you, Your Honor. I
18 believe the description that's been given today is
19 pretty fair, and I -- there's not a whole lot I have to
20 add to that other than that I wanted to say I think
21 procedurally if the Commission is interested in a motion
22 to present this as opposed to it just being a
23 stipulation with an understanding of what the parties
24 are requesting, I think a pretty simple request could be
25 made that the parties ask the Commission to enter a

Page 100

1 final order reaching summary determination on a
2 stipulated record incorporating our arguments from the
3 motion to dismiss on the legal issues into the motion.
4 If -- if you agree no motions are required
5 and that the parties can simply present this for final
6 order, I would think that it would be simple enough if
7 what we did was offer a proposed order for the
8 Commissioners to consider. It would expressly state
9 that the respondents have not waived the right to
10 appeal, they do not waive any objection or error. It
11 simply provides a mechanism by which the Commissioners
12 can reach the final rulings.
13 So if -- again, if it needs to be via a
14 motion, we can make that really simple, but I think the
15 parties just envision this wouldn't even require that so
16 long as we explain what it is we were asking for,
17 because I think both sides agree the dispositive issue
18 is whether or not their service is granted. And I don't
19 think any other legal arguments were intended to be
20 presented for additional findings or conclusions.
21 So unless I'm overreaching in making that
22 statement, I -- I think a proposed order would look a
23 lot like a combination of Order 02 and Order 03 based on
24 the stipulation of facts.
25 JUDGE O'CONNELL: Okay. Mr. Kenefick,

Page 101

1 Ms. Goldman?
2 MR. KENEFICK: Well, if I'm -- if I'm sort
3 of getting the sense from you, Your Honor, I -- it -- it
4 sounds a little like it might be more comfortable to
5 proceed a little more traditionally. I've not talked
6 with Mr. Fassburg or Ms. Goldman about this, I'm sort of
7 going off the hip here. But if -- to proceed more
8 traditionally, maybe it does make sense to simply have
9 Murrey's file a motion for summary judgment. We would
10 then, you know, respond and, you know, do it that way.
11 If -- if -- if there is some concern
12 about -- about teeing this up in a way that -- that is
13 more comfortable to the Commissioners, and I don't know
14 that it's necessarily that much more work. I mean,
15 we've all done the briefing two or three times already.
16 I just -- I just get the sense from -- I'm getting the
17 sense from you that there's a little -- there might be a
18 little bit of discomfort in -- in -- in the -- the
19 process that we set up.
20 JUDGE O'CONNELL: Discomfort, I mean, I
21 would just express that it's a little unfamiliar, and I
22 can see the appeal of it and why -- why the parties
23 might be in favor of it. It's something that I had not
24 anticipated, and having heard it and -- and not
25 considered this as an option, I'm unaware of how the

Page 102

1 Commissioners might react as far as their comfort level.
2 So I would intend to -- before I told you yes, I'm
3 comfortable with that procedure, I would discuss it with
4 the Commissioners before saying that the Commission is
5 comfortable going forward that way.
6 I'm also hearing that the parties might also
7 be amenable to some form of a more traditional procedure
8 as Mr. Fassburg and Mr. Kenefick, you've outlined in
9 general, that there be something presented that would
10 contain some outline of the agreed material facts and
11 some sort of a motion either restating the previous
12 legal arguments in a motion for summary judgment or
13 perhaps a joint motion that would adopt the prior legal
14 arguments.
15 If I was to consider two options, one being
16 that to -- just to accept a stipulation of facts from
17 the parties and issue a decision on that or issue an
18 order saying that the previous decision applies or to do
19 something else, I guess I'd like to hear from the
20 parties what that something else might be, because I
21 think there's a little -- a little bit of difference
22 between, Mr. Kenefick, what you're -- what you just
23 proposed and what Mr. Fassburg was proposing. So --
24 Yes, Mr. Fassburg, Mr. Wiley?
25 MR. WILEY: Hi, Your Honor. I did want to

Page 103

1 say in my experience, which has been a long time at the
2 Commission, I've never seen a motion for -- a motion to
3 dismiss reach this substantive stage so early. And the
4 reason I think -- and the explanation for that is
5 interlocutory review is rarely granted as you are aware,
6 and in granting interlocutory review here at the
7 Commission provided dispositive legal analysis that
8 basically preempted, in our view at least, the, you
9 know, further argument, formal argument.
10 I did want to respond as well to
11 Mr. Kenefick's statement about the process, the more
12 traditional process. I could see a stipulated motion
13 for summary determination where each side set forth
14 their argument if we come to that. I don't think we
15 would need cross-motions, which seems redundant to me
16 based on what you're hearing from us. But the
17 vehicle -- you know, I think we're all amenable to a
18 vehicle that -- that makes the Commission the most
19 comfortable knowing that Waste Management intends to
20 take this to superior court.
21 So I just -- you know, we want to cooperate
22 in that, but we want to expedite, and as you say, we
23 also want to avoid protraction and resource expense that
24 we don't think is necessary.
25 MR. KENEFICK: Can I maybe make a suggestion

Page 104

1 just for consideration here? And that is one of the
2 prerequisites sort of moving forward on any of these
3 grounds is to establish a stipulated set of facts. I'm
4 almost thinking that what we do is we -- we set another
5 prehearing conference for, you know, mid January or
6 whatever, the 15th or somewhere in there. In advance of
7 that, the parties would work out and prepare and see if
8 we can stipulate to a set of facts. Then we -- once we
9 know that, we could reconvene.
10 You can -- and we -- at that point, we could
11 decide whether the -- to proceed sort of on this more
12 expedited means or if instead we just say we just set a
13 schedule for -- for filing a, you know, motion for
14 summary judgment. And I -- I don't know if -- I assume
15 that that would be -- I think cross-motions doesn't make
16 sense, but -- but -- because we've already done the
17 briefing, but maybe then we could set it up in a more
18 traditional way, and we wouldn't be arguing about well,
19 they're genuine issues in material fact. Really we'd be
20 arguing about the legal merits, and that would tee it up
21 in a more traditional way for the Commissioners to then
22 decide and issue a final order.
23 JUDGE O'CONNELL: Mr. Wiley, Mr. Fassburg?
24 MR. FASSBURG: I think that makes sense. I
25 think I heard two different alternatives there. In

Page 105

1 terms of -- or it's possible I misheard Mr. Kenefick.
2 But in terms of setting another prehearing conference to
3 deal with what we would need to do if this does not work
4 out in terms of the stipulation of facts makes sense.
5 And I think a deadline for filing motions for summary
6 determination might be premature if it's going to be
7 joint. And I like to think through contingency plans.
8 And so my thinking is if we're going to
9 reach a stipulation of fact, we're going to be able to
10 file a joint motion for summary determination without a
11 deadline specifically for that. If we need a deadline
12 for dueling motions, it would only because -- it would
13 only be because we felt like we couldn't reach a deal
14 and we're going to file them in the more traditional
15 sense.
16 JUDGE O'CONNELL: Okay. So what I'm hearing
17 is that that might be dependent upon whether the parties
18 can agree to a stipulation of the materials facts; is
19 that correct?
20 MR. FASSBURG: Yes, yes. And I -- and I
21 think we will. I'm just thinking give us 30 days to
22 reach this stipulation and file a stipulated motion, and
23 if in that 30 days we're unable to reach an agreement,
24 then we would have a next prehearing conference to
25 schedule the remaining deadlines, which might include a

Page 106

1 deadline for motions for summary determination.
2 MR. KENEFICK: Although, I am a little
3 confused by the notion of a stipulated motion for
4 summary determination. I don't think there -- I don't
5 think that that would be the case because we might
6 stipulate to the facts, but we're not going to stipulate
7 to the arguments. So it can't really be a joint motion
8 if that's what you're thinking.
9 MR. FASSBURG: No, that -- I can articulate
10 the thought there. None of this is conventional,
11 especially not at the Commission. But if -- if we're
12 looking for avoiding repetition of the argument, a
13 stipulated motion might just simply state the parties
14 are requesting the Commission rule on summary
15 determination on the same legal question raised in the
16 motion to dismiss and incorporate by reference the
17 arguments each party set forth therein. Therefore, we
18 wouldn't need to file pages of briefing that essentially
19 repeat everything we've already said.
20 MR. KENEFICK: Thank you.
21 JUDGE O'CONNELL: Yeah. So what -- what I'm
22 hearing would be -- I'm finding this much more
23 appealing, that we give the parties some time to reach a
24 stipulated set of material facts and then reconvene to
25 determine exactly how we want to go forward at that

Page 107

1 point. And the parties can discuss whether such a -- I
2 don't think the joint motion, if it is a joint motion,
3 would be one for necessarily summary determination. It
4 might be a motion that's somewhat new that would
5 preserve the parties' arguments that they've already
6 made legally.
7 I'm -- I -- at this point, I'm -- I'm
8 leaning towards this -- the idea of giving the parties
9 more time to establish the stipulation of facts and then
10 we can reconvene and have a more -- have -- have further
11 discussion about how we're going to tee this up for the
12 Commission's final determination.
13 MR. FASSBURG: Can I suggest that in the
14 interim if -- if you or the Commissioners have your own
15 ideas of how you think this works procedurally, we may
16 not need a -- an additional prehearing conference for
17 counsel and you to schedule a conference call to discuss
18 what you prefer for moving forward.
19 JUDGE O'CONNELL: Yes, well, let me ask how
20 long the parties would anticipate that they would need
21 to be able to determine whether they can agree on the
22 stipulated facts or not.
23 MR. WILEY: Your Honor, I -- I feel pretty
24 strongly that we can do it by the second week in January
25 I would think.

Page 108

1 MR. KENEFICK: I would think so as well. I
2 think we're kind of dead time between now and the start
3 of the year, but that would give us roughly two weeks to
4 pull something together.
5 JUDGE O'CONNELL: Okay. And that second
6 week, I have pulled up a calendar, I believe you're
7 referring to the second week being between the January
8 11 and January 15, 2021. What I'm --
9 MR. WILEY: The week before too.
10 JUDGE O'CONNELL: Oh, the week even before.
11 MR. KENEFICK: I was -- I was assuming
12 January 15th would be sort of our target.
13 JUDGE O'CONNELL: Well, let me -- let me put
14 this out there. I -- from hearing from the parties, I
15 think it's prudent to give you time to come up with
16 stipulation of facts and then for us to have another
17 conference. To me it sounds like that conference will
18 be more of a status conference to decide how we're going
19 forward from there, in particular what the immediate
20 next step from there will be. I'm tempted to set a
21 deadline for the parties to file a stipulated set of
22 facts of January 15 and then for us to reconvene that
23 next week either via conference call or -- or here on
24 Teams.
25 MR. WILEY: Fair enough.

Page 109

1 JUDGE O'CONNELL: What -- what is the
2 parties' -- what are the parties' availability for a
3 half hour or an expected half or hour conference in that
4 following week of January 18 to 22nd after I've had a
5 chance to see the stipulated facts and kind of digest
6 what next step we might be comfortable taking?
7 MR. KENEFICK: I know the 18th is Martin
8 Luther King Day, so I'm not going to -- otherwise my
9 availability looks good.
10 MR. FASSBURG: Mine does too.
11 MR. WILEY: Yes.
12 JUDGE O'CONNELL: Okay.
13 MS. GOLDMAN: Your Honor, can you hear me?
14 JUDGE O'CONNELL: Yes, Ms. Goldman. You're
15 breaking up a little bit, but I can hear you.
16 MS. GOLDMAN: Okay. My availability other
17 than January 18th, which is Martin Luther King, I can be
18 available any day other than January 22nd. I have a
19 hearing in the morning.
20 JUDGE O'CONNELL: Okay. What I heard,
21 Ms. Goldman, was that you're available any of the days,
22 not the 18th and not the 22nd. If that's -- if that's
23 correct, that means you're available the 19th, 20th, and
24 21st and --
25 MS. GOLDMAN: That's correct.

Page 110

1 JUDGE O'CONNELL: Okay. And in looking at
2 the -- my calendar and the Commission's availability, it
3 appears that the -- perhaps the afternoon of the 20th
4 would be available for all parties and for the
5 Commission. Would --
6 MR. KENEFICK: Other than 2:00 p.m., 2:00 to
7 3:00 p.m., I could do it.
8 JUDGE O'CONNELL: Okay. Well, in that case,
9 I would -- I would recommend that we convene after that
10 conflict between 2:00 and 3:00 p.m. I don't anticipate
11 it being longer than a half hour or an hour-long
12 conference. So my intent, then, would be that I
13 schedule it for 3:30 p.m. on the 20th. Does that avoid
14 conflicts for the other representatives?
15 MR. WILEY: Yes.
16 JUDGE O'CONNELL: Okay. Okay. Let me --
17 let's -- so the plan going forward will be I will set a
18 deadline of January 18th for the parties to submit in
19 the docket a stipulation of material facts or a letter
20 indicating that you're unable to reach a stipulation of
21 the facts. And I will -- I will set a --
22 [Teams interference.]
23 MR. KENEFICK: You said I will set a
24 conference I think you were...
25 JUDGE O'CONNELL: Okay. I'm back.

Page 111

1 Apologies again to the parties. I will set a conference
2 for January 20th at 3:30 p.m.
3 MR. KENEFICK: Okay.
4 JUDGE O'CONNELL: And I will memorialize
5 that by -- well, let me talk about typically the
6 Commission issues a prehearing conference order that
7 outlines the scope of the proceeding, outlines the
8 discovery, sets procedural schedule, addresses any
9 petitions to intervene. It sounds to me like a lot of
10 the elements that we typically include in our prehearing
11 conference orders are unnecessary in this case. In
12 particular, the -- the details surrounding discovery and
13 the extensiveness that we typically have as far as a
14 procedural schedule.
15 So I intend to still issue a prehearing
16 conference order that addresses the fact that there's no
17 petitions to intervene, and in that order, I will lay
18 out the -- the brief process that we've described and
19 agreed to here in this conference.
20 In addition, I will include all of the
21 relevant contact information that we typically include
22 for the benefit of the parties and for the Commission's
23 use in making sure that we have distribution to everyone
24 who needs to get everything in the docket. So my
25 intention is that I will memorialize the -- the dates

Page 112

1 that we've outlined here in that prehearing conference
2 order.
3 Is there anything else that we need to
4 discuss today to move forward or that I will -- I need
5 to be aware of as something that I need to address in
6 that prehearing conference order? And let's turn to
7 Murrey's Disposal first.
8 Mr. Fassburg, Mr. Wiley?
9 MR. FASSBURG: I actually -- I don't know if
10 it was obvious to everyone else, I lost my signal for a
11 good 90 seconds or so, and so I'm not able to respond
12 based on what you described. But I checked with
13 Mr. Wiley who did hear, so I will just defer to him.
14 JUDGE O'CONNELL: Mr. Wiley?
15 MR. WILEY: No, I -- I think you summarized
16 what the next steps are, Your Honor, and I did note that
17 you said the stipulation should be filed by the 18th. I
18 believe that's MLK Day I think.
19 JUDGE O'CONNELL: I apologize.
20 MR. WILEY: That's okay.
21 JUDGE O'CONNELL: So my intention was the
22 Friday before MLK Day, and obviously I'm getting that
23 confused with today being the 18th and a Friday. I
24 apologize. My intention was that the parties should
25 file their stipulation of facts by the close of business

Page 113

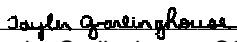
1 on January 15th --
2 MR. WILEY: Okay.
3 JUDGE O'CONNELL: -- 2021, and thank you for
4 catching my misspeak. And then we will convene again on
5 January 20th at 3:30 p.m.
6 MR. KENEFICK: Your Honor, I assume on the
7 filing of that at the beginning you mentioned having to
8 file paper copies. That would not be necessary for that
9 filing, right?
10 JUDGE O'CONNELL: Correct. With the
11 modifications we've talked about, I don't think a lot of
12 our traditional requirements are going to apply and
13 that's one of them. So I would expect it to be filed
14 electronically only.
15 And, Mr. Kenefick, Ms. Goldman, is there --
16 is there anything else that you believe we need to
17 discuss today or that I'm going to need to address in a
18 prehearing conference order?
19 MR. KENEFICK: Not that I can think of other
20 than thanking you for your flexibility in considering
21 maybe a nontraditional approach to this. I hope I
22 didn't make it more complicated than the more
23 traditional approach, but thank you.
24 JUDGE O'CONNELL: Okay.
25 MS. GOLDMAN: Nothing further.

1 JUDGE O'CONNELL: Okay. Thank you.
2 MR. FASSBURG: Nothing from Murrey's.
3 JUDGE O'CONNELL: Okay. Well, then, I
4 will -- I plan to issue an order shortly, within the --
5 you know, the very beginning of next week at the latest
6 and containing the procedural process that we have
7 outlined in our discussion today. And if there's
8 nothing else, then we will be adjourned and we will
9 reconvene on January 20th. Thank you.
10 (Adjourned at 10:25 a.m.)
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1 CERTIFICATE

2
3 STATE OF WASHINGTON
4 COUNTY OF THURSTON
5

6 I, Tayler Garlinghouse, a Certified Shorthand
7 Reporter in and for the State of Washington, do hereby
8 certify that the foregoing transcript is true and
9 accurate to the best of my knowledge, skill and ability.
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A			B	
a.m 78:16 81:2,8 114:10	agree 86:12 88:15 88:19 90:19 92:18 95:13 100:4,17 105:18 107:21	appear 92:19	back 88:18 90:8 110:25	86:8,10,12 87:25 88:3 89:4 92:17 93:22,25 94:1,5 94:23 95:1,7,8 97:5,6,7,7,11,13 97:22,22 98:2,11 106:5 110:8 111:11
ability 82:5 115:9	agreed 90:2 96:17 98:23 99:1 102:10 111:19	appearances 82:8	background 86:24 97:7	cases 86:9 93:25 94:8,14
able 90:20 105:9 107:21 112:11	agreement 105:23	appears 110:3	balancing 95:5,13	catching 113:4
Absolutely 87:4	ahead 84:20 85:6 87:18 92:6	applies 96:17 98:25 102:18	base 85:5	cause 89:1
accept 89:25 102:16	akenefick@wm.c... 80:15	apply 97:11 113:12	based 86:5 89:13 89:14 93:1 94:7 100:23 103:16 112:12	CCR 78:21 115:15
accepting 88:2	allege 81:22	appreciate 98:19 99:12	basically 103:8	certain 86:5
accuracy 92:23	alleged 88:3 90:18	approach 113:21 113:23	beginning 113:7 114:5	certainly 85:1 86:21 88:10,21 90:18 92:3,4 93:21 98:14
accurate 115:9	allows 82:4	approximately 81:7	behalf 82:11,15,20 82:24 83:2,5	certified 115:6
add 84:4 92:9 99:20	alternatives 104:25	arguing 97:10 104:18,20	believe 87:12 97:14 99:18 108:6 112:18 113:16	certify 115:8
addition 93:11 111:20	amenable 92:21 102:7 103:17	argument 93:10,11 93:12,15,22 94:17 95:12 96:8 103:9 103:9,14 106:12	benefit 111:22	cetera 94:5
additional 83:2 91:10 92:12 96:20 100:20 107:16	analysis 93:12 103:7	arguments 92:17 93:1 95:1 98:22 99:8 100:2,19 102:12,14 106:7 106:17 107:5	benefits 82:3	chance 86:25 87:2 109:5
address 83:8 84:2 84:11 87:11 96:9 112:5 113:17	Anderson 79:5 81:20	articulate 106:9	best 86:23 115:9	change 89:1
addressed 94:14 95:17	Andrew 78:13 80:3 80:13 81:9 82:15 85:11	aside 94:19,22	bfassburg@willi... 80:9	checked 112:12
addresses 84:5 94:12 111:8,16	Andrew.j.oconnell 84:3	asking 95:15 99:5 100:16	bit 83:14 101:18 102:21 109:15	choose 93:2
addressing 90:10 92:22	answer 84:17 93:17 93:18	assume 90:5 104:14 113:6	Blair 80:6 82:10	circuit 94:8
adds 92:12	ant- 94:23	assuming 88:19 108:11	blips 96:5	cited 90:10 97:6
adjourned 114:8 114:10	anticipate 84:14 107:20 110:10	assumptions 86:5	breaking 109:15	clarify 94:21
adjusted 91:22	anticipated 93:19 101:24	audio 82:2	breath 83:12,15	clarity 96:13
administrative 78:13 80:2 81:10 93:4	anticipating 85:10	authority 81:24	brief 111:18	Classic 94:5
admittedly 86:5	anticipation 86:25 94:23	availability 109:2,9 109:16 110:2	briefed 97:12	clause 93:10,11,21
adopt 102:13	Apologies 111:1	available 109:18,21 109:23 110:4	briefing 88:7 92:2 98:12 101:15 104:17 106:18	Cleanwell 94:1,15
adopting 97:19	apologize 96:4 112:19,24	Avenue 78:22 80:13,19	Bruce 94:5	clear 88:1 96:7
adopts 92:11	appeal 89:3 93:4,4 94:8 100:10 101:22	avoid 103:23 110:13	Buell 78:22	clearly 94:5,12
advance 104:6	appealable 89:13	avoiding 106:12	business 112:25	close 112:25
affect 95:5	appealing 106:23	aware 84:1 103:5 112:5	C	collaborate 89:20
affirmed 87:24			C 80:1 81:4 115:1,1	collection 81:23 97:11
affirming 89:16 90:24 91:11			calendar 108:6 110:2	combination 100:23
afternoon 110:3			call 107:17 108:23	come 87:12,15 91:5 99:6 103:14 108:15
AGG 97:5,7			Caption 78:9	comfort 102:1
			case 83:21 84:12,15	comfortable 98:14

<p>101:4,13 102:3,5 103:19 109:6 coming 89:5 commerce 93:10 93:11,21 Commission 78:2 78:18 81:11,16,25 83:10,17,19,20,21 86:9,17 87:14 89:15,22,25 91:1 91:5,10,19 92:11 92:25 94:7,13,14 96:15,17 97:18 98:15 99:6,11,21 99:25 102:4 103:2 103:7,18 106:11 106:14 110:5 111:6 Commission's 82:6 90:6,24 96:16 107:12 110:2 111:22 Commissioners 81:12 87:23 89:1 89:10 91:7 96:21 98:24 100:8,11 101:13 102:1,4 104:21 107:14 companies 81:24 Company 81:17 82:11 compelling 94:19 Complainant 78:5 79:2 complaint 90:19 complaints 81:15 81:22 complicated 113:22 comply 91:2 comprehensively 92:16 computer 82:2 concern 81:15 101:11 concerns 92:22</p>	<p>conclusions 90:7 91:18 92:12 100:20 conducting 82:1 confer 88:13 conference 78:11 81:14 82:1 83:17 84:9 86:20 104:5 105:2,24 107:16 107:17 108:17,17 108:18,23 109:3 110:12,24 111:1,6 111:11,16,19 112:1,6 113:18 conflict 110:10 conflicts 110:14 confused 106:3 112:23 connection 95:25 consider 100:8 102:15 consideration 104:1 considered 101:25 considering 113:20 consolidated 78:4 81:14 contact 111:21 contain 102:10 containing 114:6 context 95:8 contingency 87:10 105:7 Continued 78:9 Contracting 78:8 81:20 convene 110:9 113:4 conventional 106:10 cooperate 103:21 copied 91:20 copies 83:22 84:6 113:8 correct 82:25 86:6 91:13 105:19</p>	<p>109:23,25 113:10 counsel 82:15 84:16 90:21 107:17 County 97:9 115:4 course 91:21 court 82:23 94:8 103:20 courtesy 84:6 cross-motions 103:15 104:15 curious 93:14 97:17 current 91:18</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 81:4 Daniel 79:5 81:20 date 86:13,14 dates 111:25 Dave 80:7 82:10 92:3,3 94:2 97:4 day 109:8,18 112:18,22 days 105:21,23 109:21 dead 108:2 deadline 105:5,11 105:11 106:1 108:21 110:18 deadlines 105:25 deal 105:3,13 December 78:15 81:1,8 decide 94:6 95:10 104:11,22 108:18 decision 87:22,24 89:15 90:1,6,14 90:24 91:19 96:18 98:1,15 102:17,18 decisions 90:9 95:7 defer 92:3 112:13 deferred 85:18 den- 91:19 denial 89:16 90:24 91:11</p>	<p>denied 87:21,23 97:22 dependent 95:9 105:17 depends 84:18 describe 87:5 described 92:9 111:18 112:12 description 99:18 designated 83:24 details 111:12 determination 99:5 100:1 103:13 105:6,10 106:1,4 106:15 107:3,12 determine 92:11 99:5 106:25 107:21 develop 95:12 development 94:24 dicta 94:19,22 difference 98:21 102:21 different 86:1 93:13 98:10 104:25 digest 97:4 109:5 disagreement 88:17 disagreements 90:11,13,17 discomfort 101:18 101:20 discovery 84:22 86:13 90:2 94:24 111:8,12 discretion 92:13 discuss 87:1,2 92:21 102:3 107:1 107:17 112:4 113:17 discussed 84:21 discussion 93:13 94:18 107:11 114:7 dismiss 87:20 88:2</p>	<p>89:17 90:14,25 91:12 96:20 97:20 97:21 98:3,8,9,17 100:3 103:3 106:16 dismissal 89:16 Disposal 78:4,7 79:1,4 80:5 81:16 81:19 82:8,11,17 87:1 98:19 112:7 dispositive 100:17 103:7 dispute 92:19 distribution 111:23 distributions 83:23 docket 110:19 111:24 Dockets 78:4 81:14 document 91:17 documents 84:7 doing 88:18 dormant 93:11 drafting 98:1 dueling 105:12 dwiley@williams... 80:10</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 80:1,1 81:4,4 115:1,1 early 103:3 effect 89:5 90:7,10 90:13 91:12 97:19 97:25 efficiency 98:19 99:10 either 84:13,14 86:18 102:11 108:23 electronic 84:6 electronically 83:19,20 113:14 elements 111:10 email 83:25 84:2,4 84:7 end-all 98:2</p>
--	--	--	--	--

<p>ends 93:9 96:19 enter 85:2,4 99:25 entertain 87:14 envision 91:24 100:15 envisioned 98:7 envisioning 97:18 error 100:10 especially 106:11 essentially 99:4 106:18 establish 86:20 104:3 107:9 et 94:5 event 85:18 89:11 89:13 exactly 106:25 Excavation 79:5 81:21 exchange 84:19 exchanged 84:24 exchanging 84:21 exercise 88:22 exhausted 92:16 93:20 expand 93:1 expect 96:13 113:13 expectations 86:4 expected 109:3 expecting 98:23 expedite 103:22 expedited 104:12 expense 103:23 exper- 92:4 experience 92:4 94:7 103:1 explain 90:21 100:16 explained 88:24 99:3 explaining 96:6 explanation 103:4 express 101:21 expressly 100:8 extensiveness</p>	<p>111:13 <hr/> <p style="text-align: center;">F</p> <hr/> <p>F 115:1 F4A 97:11,13 facilities 92:20 fact 88:14 89:6 98:8,9 104:19 105:9 111:16 facts 88:3,8,9,16,19 89:14,21,22,25 90:9,11,17,18,18 91:2,3,16,17 92:19,22 94:25 95:4,4,9,13,18 96:17,18 98:23,25 98:25 100:24 102:10,16 104:3,8 105:4,18 106:6,24 107:9,22 108:16 108:22 109:5 110:19,21 112:25 factual 92:20 factually 90:20 fair 99:19 108:25 fairly 93:8 fallback 87:10 far 84:20 99:11 102:1 111:13 Fassburg 80:6 82:9 82:10 84:16 85:12 87:4 99:17 101:6 102:8,23,24 104:23,24 105:20 106:9 107:13 109:10 112:8,9 114:2 favor 101:23 federal 93:12 feedback 96:25 97:2 feel 85:2 92:15 97:24 107:23 felt 91:21 105:13 Fifth 80:19 file 86:14 88:2</p> </p>	<p>101:9 105:10,14 105:22 106:18 108:21 112:25 113:8 filed 81:15 83:9 84:7,13 87:20,21 98:16 112:17 113:13 filing 83:18,22 88:22,25 104:13 105:5 113:7,9 final 89:2,7,7,9,10 89:12 90:15 91:1 91:6,12,20 94:25 98:1,15 99:5 100:1,5,12 104:22 107:12 finding 106:22 findings 88:14 89:6 92:12 100:20 fine 86:1 first 83:8 87:7,12 112:7 flexibility 113:20 following 109:4 footnote 94:3,18 97:7 foregoing 115:8 foresaw 85:6 foreshadow 95:3 form 102:7 formal 103:9 forth 103:13 106:17 forward 82:7 85:15 85:19,24 86:21,23 87:2 94:24 95:17 96:8,10,12,25 97:23 98:6 102:5 104:2 106:25 107:18 108:19 110:17 112:4 four 94:13 Fourth 80:13 Friday 81:8 112:22 112:23</p>	<p>froze 95:22 frozen 95:20,21 further 103:9 107:10 113:25 future 85:5 <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 81:4 garbled 82:23 Garlinghouse 78:21 115:6,15 general 81:22 86:4 102:9 genuine 104:19 getting 101:3,16 112:22 give 105:21 106:23 108:3,15 given 98:22 99:18 giving 107:8 go 85:6 87:18 88:21 92:6 95:16 96:25 98:12 106:25 goes 97:23 going 85:23 86:20 88:25 93:3,4,14 95:1 96:7,8,10,12 98:4,5,5,21 101:7 102:5 105:6,8,9 105:14 106:6 107:11 108:18 109:8 110:17 113:12,17 Goldman 80:18 82:19,20,24,25 83:1,6 87:11,17 101:1,6 109:13,14 109:16,21,25 113:15,25 good 81:7 82:9,14 82:19 109:9 112:11 grant 86:18 granted 88:1 100:18 103:5 granting 103:6</p> </p>	<p>ground 94:9 grounds 104:3 Group 80:19 82:21 82:25 guess 87:24 90:4 93:17 96:13 97:16 102:19 <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 109:3,3 110:11 happen 91:15 hear 82:5 86:2 96:1 99:2,4 102:19 109:13,15 112:13 heard 82:23 101:24 104:25 109:20 hearing 82:6 83:16 85:25 86:3 90:2 91:9 98:20 102:6 103:16 105:16 106:22 108:14 109:19 heavily 94:9 held 86:9 Hello 95:24 Hi 102:25 hinting 85:22 hip 101:7 honestly 91:14 93:23 Honor 82:9,14,19 83:6 85:11 87:19 92:1,8 94:2 95:20 95:22 99:17 101:3 102:25 107:23 109:13 112:16 113:6 hope 113:21 hour 109:3,3 110:11 hour-long 110:11 hundred 88:16 <hr/> <p style="text-align: center;">I</p> <hr/> <p>ICCTA 97:14 idea 86:1 93:2</p> </p></p>
--	--	---	---	---

<p>107:8 ideas 86:22 87:7 107:15 identify 88:13 89:20 II 78:11 immaterial 92:22 immediate 108:19 in-house 82:15 include 84:8 92:14 92:25 105:25 111:10,20,21 includes 96:20 incorporate 106:16 Incorporated 81:17,18,19,20 incorporating 100:2 incorrect 90:20 indicated 86:9 indicating 110:20 informally 84:22 84:24 information 84:8 84:19,22,23 111:21 initial 89:8 93:8 94:3 input 88:11 intend 102:2 111:15 intended 94:20 100:19 intends 83:11 103:19 intent 110:12 intention 111:25 112:21,24 interested 99:21 interference 110:22 interim 107:14 interlocutory 103:5 103:6 internal 83:23 interpreted 94:18</p>	<p>intervene 83:11 111:9,17 intervenor 82:4 intervention 83:9 involved 94:13 97:8 issue 88:1,9,20 90:1 94:6 98:15,24 100:17 102:17,17 104:22 111:15 114:4 issued 89:7,9 91:7 91:10 issues 88:23 96:18 100:3 104:19 111:6</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J 78:13 80:3 January 104:5 107:24 108:7,8,12 108:22 109:4,17 109:18 110:18 111:2 113:1,5 114:9 Jessica 80:18 82:20 82:24 jessicag@summi... 80:21 joint 102:13 105:7 105:10 106:7 107:2,2 judge 78:13 80:2 81:6,10 82:12,18 82:22 83:4,7 85:3 85:21 87:16 89:18 89:24 91:4 92:6 93:6 94:21 95:24 96:3 98:18 100:25 101:20 104:23 105:16 106:21 107:19 108:5,10 108:13 109:1,12 109:14,20 110:1,8 110:16,25 111:4 112:14,19,21</p>	<p>113:3,10,24 114:1 114:3 judgment 86:11,14 86:18 88:6,23 97:25 98:11,13 99:7,9 101:9 102:12 104:14 July 81:16 jurisdiction 98:5</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kastner 80:7 82:11 keep 98:5,5 Kenefick 80:13 82:14,15 85:11,12 87:11,17,19 89:23 90:4 91:14 92:2 92:10,18 93:16 94:9 95:20 96:1 97:1,3 99:14 100:25 101:2 102:8,22 103:25 105:1 106:2,20 108:1,11 109:7 110:6,23 111:3 113:6,15,19 Kenefick's 103:11 kind 85:12,13 89:11 99:6 108:2 109:5 King 109:8,17 Kirkland 80:14 know 84:23 87:20 88:8,9,24 90:8,20 90:22 91:20,21 93:19 94:4,19,25 95:21 97:5,9,17 97:21,21,24 98:1 98:1,4,11 101:10 101:10,13 103:9 103:17,21 104:5,9 104:13,14 109:7 112:9 114:5 knowing 103:19 knowledge 115:9</p>	<p style="text-align: center;">L</p> <hr/> <p>Lacey 78:19 81:1 latest 114:5 law 78:13 80:2,19 81:10 82:21,25 90:8 91:18 92:17 95:7,8 96:18 98:25 lay 85:13 111:17 lead 83:24 leaning 107:8 learned 83:15 leave 95:10 legal 88:1,23 90:1 91:17,18 92:17 98:22 99:8 100:3 100:19 102:12,13 103:7 104:20 106:15 legally 107:6 let's 81:6 82:7,7,8 83:16 110:17 112:6 letter 110:19 level 102:1 light 85:15 little 83:14 101:4,5 101:17,18,21 102:21,21 106:2 109:15 LLC 78:22 79:5 81:21 location 92:20 long 100:16 103:1 107:20 longer 110:11 look 87:25 88:5 90:8,9 100:22 looked 93:23,24 looking 88:10 97:15 106:12 110:1 looks 87:3 95:21 109:9 Loop 78:18 lose 95:24</p>	<p>lost 96:2 112:10 lot 90:17 95:7 99:19 100:23 111:9 113:11 Luther 109:8,17</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>making 100:21 111:23 Management 80:12 81:18,18 82:16,16 83:3 84:25 93:3 97:8 103:19 Martin 109:7,17 material 88:9,14,16 88:19 89:21,22,25 90:17,22 92:19 95:4 96:9 98:22 102:10 104:19 106:24 110:19 materials 105:18 matters 81:12 83:12 mean 97:22 101:14 101:20 means 104:12 109:23 mechanism 100:11 medical 94:13 memorialize 111:4 111:25 mention 97:4 mentioned 113:7 merits 104:20 message 86:3 MGMT 78:7,7 79:4 79:4 mid 104:5 mind 87:6 96:24 minds 89:2 Mine 109:10 misheard 105:1 misspeak 113:4 mistaken 93:25 MJ 78:8 81:19 MLK 112:18,22</p>
--	---	--	---	--

<p>modifications 113:11 moment 84:17 month 93:24 morning 81:7 82:9 82:14,19 109:19 motion 84:13 88:2 89:16 90:14,25 91:11 97:20,21,24 98:3,8,9,10,17 99:7,9,21 100:3,3 100:14 101:9 102:11,12,13 103:2,2,12 104:13 105:10,22 106:3,7 106:13,16 107:2,2 107:4 motions 86:14,16 87:20,21 88:23 90:3 100:4 105:5 105:12 106:1 move 82:7 85:24 86:10,23 87:2 88:6 94:23 112:4 moving 85:14 98:6 104:2 107:18 Murrey's 78:4 79:1 80:5 81:16 82:8 82:11 84:16 87:1 90:21 98:19 101:9 112:7 114:2</p> <hr/> <p style="text-align: center;">N</p> <p>N 80:1 81:4 name 81:9 names 84:4 National 78:24 nature 83:13 96:4 necessarily 101:14 107:3 necessary 81:24 103:24 113:8 need 84:12,15,19 85:2,5,10 88:6 90:2 92:21 96:9 96:22 99:8 103:15</p>	<p>105:3,11 106:18 107:16,20 112:3,4 112:5 113:16,17 needed 91:22 95:12 needs 99:3 100:13 111:24 never 103:2 new 107:4 nontraditional 113:21 note 112:16 notion 88:12 106:3 nuances 98:9 number 97:3</p> <hr/> <p style="text-align: center;">O</p> <p>O 81:4 O'Connell 78:13 80:3 81:6,9 82:12 82:18,22 83:4,7 85:3,21 87:16 89:18,24 91:4 92:6 93:6 94:21 95:24 96:3 98:18 100:25 101:20 104:23 105:16 106:21 107:19 108:5,10,13 109:1 109:12,14,20 110:1,8,16,25 111:4 112:14,19 112:21 113:3,10 113:24 114:1,3 O-C-o-n-n-e-l-l 84:3 o0o-- 81:3 objection 100:10 obvious 112:10 obviously 112:22 odder 113:18 offer 100:7 Oh 108:10 okay 81:6 82:7,22 83:4,7,12,16 85:3 85:21 87:16 89:24 93:6 96:3 100:25</p>	<p>105:16 108:5 109:12,16,20 110:1,8,16,16,25 111:3 112:20 113:2,24 114:1,3 Olympia 78:24 once 104:8 open 86:21 95:10 operating 81:23 opposed 84:22 98:3 98:16 99:22 option 101:25 options 102:15 order 84:9,12,13 84:15 85:1,10 89:3,7,8,9,10,12 90:15 91:1,2,5,6 91:10,11,12,20 92:12,14 93:1,8 94:3,25 95:2 96:7 96:20 98:24 100:1 100:6,7,22,23,23 102:18 104:22 111:6,16,17 112:2 112:6 114:4 orders 111:11 Oregon 81:19 82:17 original 83:22 other's 86:16 outline 102:10 outlined 102:8 112:1 114:7 outlines 111:7,7 overreaching 100:21</p> <hr/> <p style="text-align: center;">P</p> <p>P 80:1,1 81:4 p.m 110:6,7,10,13 111:2 113:5 pages 78:12 106:18 paper 83:22 113:8 papers 88:25 parities 111:22 part 87:9,10 90:1</p>	<p>96:6 particular 108:19 111:12 parties 82:4 83:20 84:1,10,14 85:6,8 85:25 86:2,3,10 86:12,22,25 88:13 89:20 90:3 93:7 95:3,10,12,18 96:9,24 98:21 99:11,23,25 100:5 100:15 101:22 102:6,17,20 104:7 105:17 106:13,23 107:1,8,20 108:14 108:21 110:4,18 111:1 112:24 parties' 96:12,14 107:5 109:2,2 party 83:24 84:14 106:17 pasted 91:20 path 85:19 people 83:14 percent 88:16 93:20 period 86:13 permit 95:13 petition 87:22 90:7 petitions 83:9 111:9,17 phonetic 94:1 physically 82:6 Pike 95:5 Pipe 94:4,5 plan 110:17 114:4 plans 87:10 105:7 pleadings 86:8 98:13 please 83:25 84:7 PLLC 80:19 plowed 94:9 point 83:10 86:11 86:17 89:24 91:6 92:15 96:11 97:2 104:10 107:1,7</p>	<p>position 97:19 positive 90:12 possibility 84:21 85:7,14 possible 84:1 99:3 105:1 possibly 84:17 95:4 precedent 93:21 precluded 96:12 precludes 95:18 preempted 103:8 preemption 93:12 prefer 87:5 107:18 prehearing 78:11 81:13 82:1 83:17 84:9 86:20 104:5 105:2,24 107:16 111:6,10,15 112:1 112:6 113:18 premature 105:6 prepare 104:7 prepared 93:17 prerequisites 104:2 present 99:22 100:5 presented 93:14,15 94:22 98:22 100:20 102:9 presenting 95:18 presents 88:1 preserve 107:5 presiding 81:11 91:7 pretty 92:16 96:17 99:19,24 107:23 prevailed 93:23 previous 102:11,18 prior 86:2 96:16 102:13 procedural 85:23 87:7,9 111:8,14 114:6 procedurally 87:20 99:21 107:15 procedure 86:8,19 86:20 102:3,7</p>
--	--	---	---	---

proceed 83:16 91:23 101:5,7 104:11	RCW 93:5 94:11	requesting 99:24 106:14	111:8,14	simply 88:6 98:3 100:5,11 101:8 106:13
proceeded 96:16	reach 100:12 103:3 105:9,13,22,23	require 83:22 93:13 100:15	scope 111:7	skill 115:9
proceeding 84:7 91:8 111:7	106:23 110:20	required 100:4	Seattle 78:23,23 80:8,20	software 82:2
proceedings 96:16	reaching 100:1	requirements 113:12	second 86:19 107:24 108:5,7	solid 81:23 97:12
process 87:5,12 92:9 97:17 98:12 101:19 103:11,12 111:18 114:6	react 102:1	requires 83:18	seconds 95:23 96:2 112:11	somewhat 107:4
prominent 94:15	really 90:3,6 98:10 100:14 104:19 106:7	research 93:20	see 82:5 85:8,13,14 85:15,22 99:10,15 101:22 103:12 104:7 109:5	soon 84:1
proposal 87:8,11 89:19,19 96:12,14 99:2	Realtime 78:22	resource 103:23	seeking 96:13	sort 85:14,18 88:6 88:11 90:3 91:1,5 91:24 94:18 95:13 97:17 98:2 101:2 101:6 102:11 104:2,11 108:12
propose 88:21	reason 95:2 103:4	resources 99:11	seen 103:2	sound 90:16
proposed 85:19 87:15 91:9 95:16 96:10 98:20 100:7 100:22 102:23	reasoning 90:5 91:18 96:21 97:20	respond 101:10 103:10 112:11	sense 85:20 87:8,16 90:23 98:12 101:3 101:8,16,17 104:16,24 105:4 105:15	sounds 96:15 101:4 108:17 111:9
proposing 102:23	receive 84:6	respondents 78:9 79:6 80:17 81:17 81:23 82:13,21,24 83:2,3 84:25 85:4 85:9 87:3 93:3,10 94:6 95:11 96:8 99:15 100:9	serve 86:3	South 80:19
prosecute 89:3	received 93:2	responses 86:15	service 83:20	Southeast 78:18
protective 84:12,13 84:15 85:1,10	recognize 97:21	rest 83:17	Services 83:18,25 100:18	specifically 105:11
protestants 88:4	recommend 110:9	restating 102:11	set 89:12 101:19 103:13 104:3,4,8 104:12,17 106:17 106:24 108:20,21 110:17,21,23 111:1	specified 86:13
protraction 103:23	reconvene 86:19 104:9 106:24 107:10 108:22 114:9	retain 92:25	serve 83:20	Square 78:18
provided 103:7	record 81:7 84:2 86:7 100:2	retains 92:13	service 83:18,25 100:18	staff 84:5
provides 100:11	redundant 103:15	revert 88:18	Services 78:7 79:4 81:19 82:17	stage 103:3
provision 94:11	reference 106:16	review 86:7 87:22 90:7 94:3 103:5,6	set 89:12 101:19 103:13 104:3,4,8 104:12,17 106:17 106:24 108:20,21 110:17,21,23 111:1	start 108:2
prudent 108:15	references 94:4	right 90:22 92:13 93:1 95:6 100:9 113:9	sets 111:8	state 100:8 106:13 115:3,7
pull 108:4	referring 108:7	roughly 108:3	setting 105:2	statement 100:22 103:11
pulled 108:6	relevant 97:13,14 111:21	round 92:2	short 82:8 93:18	status 108:18
pursue 95:11	relying 98:16	rule 83:19 106:14	Shorthand 115:6	statute 97:14
put 91:16 108:13	remaining 105:25	rulings 100:12	shortly 114:4	statutory 94:11
puts 97:18	remember 97:6		side 84:14 86:18 88:3 97:9,10 103:13	staying 96:4
	renditions 92:20	S	Sides 86:14,15 92:15 100:17	step 108:20 109:6
Q	repeat 89:18 96:19 99:8 106:19	S 80:1 81:4	signal 112:10	steps 112:16
question 92:17 93:7,9 106:15	repetition 88:7 106:12	savings 99:10	similar 85:12 86:8 96:15	stipulate 88:14 89:21 104:8 106:6 106:6
quite 90:22	REPORTED 78:21	saw 94:3	simple 99:24 100:6 100:14	stipulated 89:6,14 91:16,17 95:5 96:10 100:2 103:12 104:3 105:22 106:3,13 106:24 107:22 108:21 109:5
R	reporter 82:23 115:7	saying 102:4,18		stipulation 99:23
R 80:1 81:4 115:1	Reporting 78:22	schedule 85:23 86:4 87:8,9 104:13 105:25 107:17 110:13		
raised 87:6 94:17 106:15	representative 83:25			
rarely 103:5	representatives 84:5 110:14			
	request 99:24			

<p>100:24 102:16 105:4,9,18,22 107:9 108:16 110:19,20 112:17 112:25 Street 80:8 strongly 107:24 subject 91:1,21 submit 86:15 89:22 91:15 110:18 substantive 103:3 suggest 107:13 suggested 94:9 suggestion 86:12 103:25 Suite 78:22 80:8,14 80:20 summarize 86:7 summarized 112:15 summary 86:11,14 86:18 88:6,22 97:25 98:10,13 99:7,9 100:1 101:9 102:12 103:13 104:14 105:5,10 106:1,4 106:14 107:3 Summit 80:19 82:21,25 superior 103:20 support 84:5 90:12 suppose 96:11 sure 88:15 89:8,19 93:16,16 111:23 surrounding 111:12</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 115:1,1 take 83:15 103:20 takes 83:13 talk 85:25 111:5 talked 101:5 113:11 target 108:12</p>	<p>Taylor 78:21 115:6 115:15 Teams 83:11 108:24 110:22 technology 83:13 96:5 tee 97:25 104:20 107:11 teed 89:2 teeing 101:12 telegraphed 93:8 telephone 82:3,10 83:11 tell 94:20 tempted 108:20 terms 87:7 105:1,2 105:4 test 95:5,14 textual 94:4 TG-200650 78:4 81:14 TG-200651 78:4 81:15 thank 82:12,18,22 83:6,7 92:7 96:3 99:17 106:20 113:3,23 114:1,9 thanking 113:20 things 92:20 97:3 think 85:15,17,22 86:22 87:4,9 88:5 88:20,21 92:10,13 92:15,25 93:7 94:8 95:6,8,17,18 95:22 96:11,21,22 97:20 98:7 99:20 99:24 100:6,14,17 100:19,22 102:21 103:4,14,17,24 104:15,24,25 105:5,7,21 106:4 106:5 107:2,15,25 108:1,2,15 110:24 112:15,18 113:11 113:19 thinking 89:5 94:1</p>	<p>95:3 99:13 104:4 105:8,21 106:8 thought 88:10 91:15 106:10 thoughts 92:5 three 83:22 94:13 101:15 THURSTON 115:4 time 81:7 99:4,12 103:1 106:23 107:9 108:2,15 timeline 96:24 times 101:15 today 81:13 99:18 112:4,23 113:17 114:7 told 102:2 touch 85:5 traditional 102:7 103:12 104:18,21 105:14 113:12,23 traditionally 101:5 101:8 transcript 115:8 transforming 90:23,25 transportation 78:2,18 81:11 97:12 Trucking 78:8 79:5 81:19,21 true 115:8 truly 91:3 trying 97:4 turn 85:3 87:1,17 99:14 112:6 tweaking 91:2 two 101:15 102:15 104:25 108:3 types 84:18 typical 88:18 typically 111:5,10 111:13,21</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 84:18</p>	<p>unable 86:18 105:23 110:20 unaware 101:25 uncomfortable 97:18 understand 85:7 89:19 understanding 99:14,23 unfamiliar 101:21 Union 80:8 unmute 83:14 unnecessary 85:17 111:11 use 96:5 111:23 UTC 88:12 utc.wa.gov 84:3 Utilities 78:2,18 81:10 utterly 85:16</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vehicle 103:17,18 video 82:2 view 97:13 103:8 virtual 78:11 81:13 virtually 82:2 VOLUME 78:11 vs 78:6 79:3</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 85:8,13,22 waive 100:10 waived 100:9 want 84:11,20,25 89:18 90:16 95:10 98:24 102:25 103:10,21,22,23 106:25 wanted 85:5,24 89:11 92:9,24 95:11 99:20 wanting 85:8 86:10 wants 87:14 WASH 78:7 79:4 Washington 78:1</p>	<p>78:18,19,23 80:8 80:14,20 81:1,10 81:18 82:16 115:3 115:7 wasn't 94:17,21,22 waste 78:7,7 79:4,4 80:12 81:17,18,23 82:16,16 83:3 84:25 93:3 94:14 97:8,12 103:19 way 88:18 95:16 96:10,15 99:2,4 101:10,12 102:5 104:18,21 we're 81:13 82:1 85:23 88:17 90:23 90:23,25 92:21 97:17 98:4,5,5 103:17 105:8,9,14 105:23 106:6,11 107:11 108:2,18 we've 97:12 101:15 104:16 106:19 111:18 112:1 113:11 week 84:21 87:6 107:24 108:6,7,9 108:10,23 109:4 114:5 weeks 108:3 Wiley 80:7 82:10 92:1,4,5,6,8 94:2 94:2 102:24,25 104:23 107:23 108:9,25 109:11 110:15 112:8,13 112:14,15,20 113:2 Williams 80:7 82:10 willing 85:1 Woodland 78:18 work 85:16,19 87:13 88:11 90:21 96:14 101:14 104:7 105:3</p>
---	---	---	---	--

<p>works 107:15 wouldn't 100:15 104:18 106:18 written 89:14 www.buellrealti... 78:25</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yeah 87:19 106:21 year 108:3</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>02 100:23 03 92:12 93:1 100:23</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>10:25 114:10 100 93:20 1000 80:20 11 108:8 1325 78:22 15 81:16 108:8,22 15th 104:6 108:12 113:1 18 78:15 81:1,8 109:4 1840 78:22 18th 109:7,17,22 110:18 112:17,23 19th 109:23</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2:00 110:6,6,10 20 95:22 96:2 2020 78:15 81:1,8 81:16 2021 108:8 113:3 206 78:23 80:9,21 20th 109:23 110:3 110:13 111:2 113:5 114:9 21st 109:24</p>	<p>22nd 109:4,18,22 287-9066 78:23</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3:00 110:7,10 3:30 110:13 111:2 113:5 30 96:2 105:21,23 315 80:19 3358 78:21 115:15 34.05 93:5 360 78:24</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>400 80:14 4100 80:8 425 80:15 4th 78:22</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>534-9066 78:24</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>601 80:8 621 78:18 628-2772 80:9 676-7000 80:21</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>720 80:13 78-115 78:12</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>800 78:24 81.77.100 94:12 825-2003 80:15 846-6989 78:24</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9:30 78:16 81:2,7 90 112:11 98033 80:14 98101 78:23 80:8 98104 80:20 98503 78:19</p>			
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