

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

WASTE CONTROL, INC.,

Respondent.

DOCKET TG-131794

WASTE CONTROL, INC.'S
RESPONSE TO COMMISSION
STAFF'S MOTION TO DISMISS
TARIFF FILING

I. COMPANY RESPONSE

1 Waste Control, Inc. (hereinafter "the Company" or "Waste Control"), by counsel, pursuant to WAC 480-07-380(1)(c), files the following Response to the Staff's Motion to Dismiss in this matter.

II. FACTS SURROUNDING THIS MOTION

2 On February 18, 2014, under the prior Administrative Law Judge's Prehearing Order No. 3 in this matter, and the Errata scheduling letter/order entered by substituted Administrative Law Judge, Marguerite Friedlander on February 12, 2014, WCI filed its direct case in this matter. Included in that filing was an exhibit identified as No. JD-2 which was the Company's September 23, 2013 electronic general rate case filing pursuant to WAC 480-07-520.¹

3 As noted in the prefiled testimony of Jacqueline Davis², this general rate filing has therefore been previously subject to extensive audit, data requests, site visits and review by the Commission Staff since September. Indeed, at the Commission's Open Meeting on

¹ That September filing, after an initial rejection of a previous filing earlier in the month, was duly accepted by the Staff of the Commission for audit and Open Meeting presentation consistent with the June 6, 2013 letter from the Assistant Director of Solid Waste/Water/ Transportation which had recently set forth a standard of two business days for threshold acceptance by the Staff of a solid waste general rate case filing.

² JD-1T, Pages 3-4, lines 24, 25, and JD-1T, Page 4, lines 1-14.

November 27, 2013, the Staff representative was asked by the Commissioners about the rate filing, (which was recommended for suspension), who indicated that only a few issues remained and that the Staff and the Company were hopeful the matter could be resolved expeditiously and return to an Open Meeting Agenda for approval.

4 In short, Exhibit No. JD-2, which will be formally offered into evidence at the hearing on this matter on May 13, 2014, was the Company's originally-filed and subsequently-reviewed general rate case in chief. The whole issue of solid waste general rate cases being procedurally anomalous in terms of their prefiled and subsequent audit status as opposed to utility cases, (the latter of which the Staff and all parties simultaneously see for the first time on the prefiling date), was actually the subject of an email from the Company's counsel to Staff and Intervenor counsel on February 6, 2014 and an express topic of a telephone status conference between the Administrative Law Judge and counsel for the parties on February 10, 2014. In that call, the parties agreed that the rate case as previously filed would be identified as an exhibit and not subsequently paper filed with the rate case prefiled testimony and exhibits to avoid any possible confusion. In that conference, the parties also appeared to acknowledge the fact that solid waste general rate cases under RCW 81.04 and WAC 480-07-520 are quite different procedurally from utility cases such as energy and natural gas cases owing largely to the fact that the prefiling of testimony in the latter cases for the first time includes the Company's proposal for general rate increases and revised tariffs.³

³ Indeed, the Company's recollection of that February 10, 2014 status conference call it had sought includes a discussion of why contested solid waste general rate cases were different vis-à-vis previously-filed and reviewed rate filings, making that filing an exhibit, and the particular evidentiary issues this raised sequentially for presentation by the Company. Staff, through counsel, clearly had an opportunity then to clarify its understanding/concerns about case format in any of the Company's prospective presentation but apparently opted instead to attempt to trigger a subsequent default if that submission failed to match Staff formatting expectations. While the Staff clearly has the right to employ that strategy, that is hardly the standard the Company believes is encouraged by Commission procedural rules and regulatory policy as a whole.

III. LEGAL ARGUMENT

A. Judicial Standards for Review of Motions for Dismissal/Judgment on the Pleadings are Highly Favorable to a Respondent.

- 5 WAC 480-07-380(1)(a) expressly notes the Commission’s consideration of “... the standards applicable to a motion made under CR 12(b)(6) and 12(c) of the Washington Superior court’s civil rules in ruling on a motion made under this subsection.” A CR 12(b)(6) motion is a motion to dismiss for failure to state a claim upon which relief can be granted while a CR 12(c) motion is one for judgment on the pleadings. “[A]lthough generally raised at different times,” the two motions “generally raise identical issues.” *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712 (1987); *see also Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 128 P.3d 627 (2006) (citing *Suleiman* for this proposition).
- 6 For purposes of CR 12(b)(6) and 12(c), Washington courts “should grant a motion to dismiss . . . only if it appears beyond doubt that the plaintiff cannot prove any set of facts, consistent with the complaint, justifying recovery.” *Hipple v. McFaddin*, 161 Wn. App. 550, 556, 255 P.3d 730 (2011). “A CR 12(b)(6) motion should be granted ‘sparingly and with care’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’” *Holiday Resort Cmty. Ass’n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 218, 135 P.3d 499 (2006) (quoting *Tenore v. AT&T Wireless Srvs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). “For the purposes of this analysis, a plaintiff’s allegations are presumed to be true and a court may consider hypothetical facts not included in the record.” *Hipple*, 161 Wn. App. at 557.
- 7 “On a 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff’s allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint,

would entitle the plaintiff to relief on the claim.” *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). “This weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy.” *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010). “Because the legal standard is whether any state of facts supporting a valid claim can be conceived, there can be no prejudice or unfairness to a defendant if a court considers specific allegations of the plaintiff to aid in the evaluation of the legal sufficiency of plaintiff’s claim.” *Halvorson*, 89 Wn.2d at 675. Further, “[i]n considering a CR 12(b)(6) motion, [a] court may take judicial notice of matters of public record.” *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977).⁴

8 Here, again, the Company has prefiled its September 23 general rate case, identified same as an exhibit and focused its prefiled testimony in support of its understanding of the present disputed items in this filing. Under the standards articulated above by Washington courts and the Commission, it would be error to grant a motion to dismiss and, as discussed *infra*, would only unnecessarily compound and extenuate the time and financial circumstances and other adverse factors the Company believes it and its ratepayers are both incurring through this process.

B. Commission Authorities Opposing Dismissal.

9 The Commission has had previous occasion to reject Staff Motions to Dismiss where prima facie showings have been made and to distinguish the favorable standard against which a respondent’s rate case is evaluated under a motion to dismiss standard from that of the burden of proof at the subsequent rate case hearing. *See, i.e., WUTC v. Verizon Northwest*,

⁴ In the context of this general rate case, that means the entire TG-131794 rate case file, meaning all data request responses and workpaper submissions and all other data, which the Commission Staff has recently reminded and admonished the industry as wholly subject to public records requests under present RCW 42.56, could be considered, on offer of the Company, in weighing the sufficiency of the Company’s necessary showing at this stage of the case.

Inc., Docket No. UT-040788, Order No. 5 (July, 2004). (“Our ruling is that Verizon has demonstrated enough of a *prima facie* case to allow it to proceed to hearing – sufficient evidence that, if true in the perspective most favorable to Verizon, the facts could support some level of interim rates. If Verizon fails to carry its burden fully at hearing, it may receive less than the requested amount, or no relief at all.”).⁵

10 The single case cited by Staff in support of its motion here is inapposite factually:

Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc., Docket No.: UE-011163 and UE-011170, Order No. 6 (Oct., 2001). There, PSE filed for interim rate relief, and apparently did not follow the general rate case rules at WAC 480-07-510, provided no formal results of operations and sought an expedited hearing due to alleged financial urgency, pledging it would file a general rate case within three months. That Order not only focuses on the showing required for emergency rate relief but occurred in an apparent factual vacuum not present here. In the instant case as noted, there has been a general rate case filed consistent with applicable rule (WAC 480-07-520) and there has been extensive discovery, audit review, notice to all affected customers, a cost of service study (not required by current rule), and now prefiled direct testimony concentrating on the Company’s perception of disputed accounting adjustments, none of which were apparently provided in the 2001 PSE cited case by the Staff.

11 While Staff objects to the form of the Company’s prefiled testimony, it cannot here rely on the cited *Puget Sound Energy* Order to discredit the substantive sufficiency of that evidence in a preemptory motion to dismiss and, by so doing, misapplies both the judicial and agency case law in supporting its summary dismissal effort.

⁵ Order No. 5, UT-040788, at 6.

IV. ADDITIONAL ARGUMENT IN OPPOSITION TO THE MOTION TO DISMISS

A. The Staff Fails to Cite to a Procedural Rule Mandating a Testimonial Support Requirement for Previously-Filed and Staff-Reviewed Solid Waste General Rate Cases.

12 Order No. 3, as revised on February 12, 2014, addressed the overall distribution of evidence and various scheduling matters in this proceeding. While Prehearing Conference Order No. 3 referenced WAC 480-07-460, that provision, in relevant part provides:

(1) **Predistribution of evidence.** The commission may require parties to distribute their proposed evidence to other parties before the start of the evidentiary hearing. In general rate proceedings for electric, natural gas, pipeline, and telecommunications companies, the petitioner must prefile its proposed direct testimony and exhibits at the time it files its rate increase request, in accordance with WAC 480-07-510...

13 Clearly, the Commission's procedural rules recognize the rather anomalous present position by noting where and when all but solid waste and transportation companies file their case in chief: at the point of filing exhibits and prefiled testimony. Indeed, WAC 480-07-460(1) omits any reference to solid waste at all as subject to these generalized requirements. While Order No. 3 references submitting exhibits pursuant to the rule, that implicitly referred to technical formatting, exhibit distributions and other such requirements in the rule and could not, in fact, engraft an additional Title 81 industry's applicability onto the current rule. Indeed, while pipeline companies regulated under Title 81.88 RCW are referenced in the language cited above, there is no reference to solid waste, commercial ferry or any other

transportation industry companies economically regulated by the Commission under Title 81 RCW.⁶

14 The above is not to suggest the Company, in submitting its prefiled evidence, ignored or disregarded the Commission's existing procedural rules, but simply to note that the existing rules do not appear to govern the substantive nature of what must be filed when a solid waste company files its testimonial direct case. Moreover, the Company identified its originally-filed rate case in chief as a prospective exhibit and fully intends to refer to and develop foundational testimony on that Exhibit at hearing. In addition, despite the contrary reference in Staff's argument at ¶ 5, page 2 of its Motion, the Company did not assume that the Staff "will not or cannot oppose any adjustment Staff has not opposed earlier in its review of this filing..."⁷ Indeed, it expressly alluded in that testimony to the Staff's prospective filed case where it allowed for other potential accounting adjustments or disputes not referred to in the Company's filed rate case which could well be addressed or developed in Staff's March 28 filing.⁸

⁶ In fact, the agency tradition in non-pipeline transportation adjudications such as complaint, certificate and rate cases has historically not relied upon prefiled evidence, but instead, evidence presented live at hearing. While, since preemption of motor carrier regulation in August, 1994, the Commission has trended more toward prefiled evidence in Title 81 cases, there have never been express promulgations by rule which address the presentation of prefiled testimonial evidence in solid waste rate cases and in which the "cases in chief" continue to be filed without prefiled testimony, under WAC 480-07-520. Thus, solid waste rate cases subject to adjudication are procedurally anomalous from a "before and after" evaluation standpoint, and the Company, in filing its original case as an Exhibit and in focusing on disputed issues in its prefiled testimony, sought to cover the procedural landscape accordingly with absolutely no intent to preclude either the Staff or Commission's comprehensive review of the filing. While it may have presented the filing in this fashion in the interest of judicial, company (and in turn), ratepayer economy, it had no intent to evade, manipulate or obfuscate either its burden of proof or responsibilities for developing a full adjudicative record in the process. Staff's suggestions in its Motion to the contrary are unfortunate and unfounded.

⁷ Commission Staff's Motion to Dismiss ¶ 5 at 2.

⁸ See JD-1T § 6, lines 10-14.

B. The Company is Not Overlooking its Statutory and Regulatory Burden in Formatting its General Rate Case in this Fashion, nor is it Foreclosing Staff or the Commission from an Exhaustive *de novo* Review of its Case.

15 Waste Control is well aware of the Staff-cited burden assessed under RCW 81.04.130 and WAC 480-07-540, and does not overlook, minimize or obfuscate that obligation. Here, however, recall we are still at a relatively preliminary stage of the proceeding where the Company has incorporated by reference its original filed rate case and articulated the issues that it understands are the reason for this matter proceeding to hearing.⁹ In so doing, again, it never assumed other issues could not be raised by the Staff, nor is it asking the Staff to respond to unarticulated accounting issues. The rate case the Company filed is designated as an exhibit of record, the Commission Staff has previously fully reviewed that rate case, conducted extensive discovery thereon, and the Company has put forth its understanding of the original rate case issues that it believes continue to divide the parties.

16 The Staff now appears to want to force the Company and its customers to incur substantially more cost and expense simply to lay additional written foundation on those threshold issues which the Company believes it preserves the right to do at hearing on this matter and from which it is not precluded by current Commission rules governing contested solid waste rate cases.

⁹ Admittedly, formal adjudications of solid waste rate cases are exceedingly rare. To the best of counsel's knowledge, the last solid waste general rate case going to formal hearing and subject to a final Commission Order was *In re: WUTC v. Sno-King Garbage Company, Inc. ("Sno-King") et al.*, Docket Nos. TG-900657 and TG-900658 (December, 1991), almost 23 years ago. And *Sno-King* was litigated largely on the pressing issue of adjustments to the then recent Lurito-Gallagher modified operating ratio ratemaking methodology to recognize recycling investments.

Here, no one is suggesting that in the case of a solid waste rate case set for adjudication in 2014, overlaying the general rate case filing rule for solid waste companies at WAC 480-07-520 and the predistribution of exhibits and prefiled testimony rule of WAC 480-07-460, there is absolute certainty as to how the previously-filed and audited general rate case intersects with more conventional general rate case presentation format for Title 80 industries. Indeed, the Company, through counsel, recognized that in a status conference. But for the Staff now to seek outright dismissal of the Company's case after six months of process is hardly reasonable or consistent with the public interest.

C. The Remedy Staff Seeks Here is Premature, Unwarranted and Wasteful.

17 Finally, some practical focus is called for on the dismissal without prejudice remedy Staff here seeks. Indeed, what would a dismissal under WAC 480-07-380(1) accomplish? Objectively: further time delay and a refile, renote of customers, increasing the ongoing Company revenue requirement deficiency, duplication of resources for Company, Staff, the Administrative Law Division and Commissioners alike and, in turn, ever higher rate case costs potentially borne by the Company's customers.

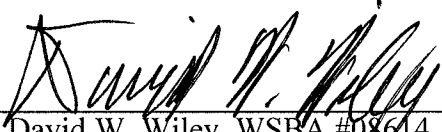
V. CONCLUSION

18 Staff's attempt to put a contested "square peg" solid waste rate case in the "round hole" of energy, telecom and pipeline prefiled case formats fails to acknowledge any of the extensive rate case review by the Commission Staff to date, ignores the identification of the Company's originally filed case in its February, 2014 filing and would sacrifice on the altar of written testimony sponsorship the considerable expense of all parties' time and efforts in the case to date. If Staff felt disadvantaged by the Company's presentation format it had a number of alternative remedies such as a motion for more definite statement, a request for a reconvened prehearing or status conference before the Administrative Law Judge, propounding even more data requests seeking expansion and clarification of the Company's prefiled case, etc. Instead, relying on its subjective reading of burden of proof requirements under Commission statute and rule, it brings this dispositive motion under an analogous general rate case argument for Title 80 companies asserting that the Company's failure to testimonially encapsulate all issues raised in its September 23 general rate case renders the Company's case in chief before hearing fully dismissible.

19 The Company asks that its administrative due process rights at this initial but chronologically advanced stage not be summarily curtailed by granting the Staff Motion and that the parties be allowed to proceed to the administrative hearing on May 13, 2014 as originally scheduled.

DATED this 10th day of March, 2014.

RESPECTFULLY SUBMITTED,
WILLIAMS, KASTNER & GIBBS PLLC

By 
David W. Wiley, WSBA #08614
dwiley@williamskastner.com
Attorneys for Waste Control, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2014, I caused to be served the original and five (5) copies of the foregoing document to the following address via first class mail, postage prepaid to:

Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
Attn.: Records Center
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

I certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to: records@utc.wa.gov

and an electronic copy via email and first class mail, postage prepaid, to:

Steven W. Smith
Office of the Attorney General
Washington Utilities and Transportation Commission
1400 S. Evergreen Park Dr. SW
PO Box 40128
Olympia, WA 98504-0128
Email: ssmith@utc.wa.gov

James K. Sells
Attorney at Law
PMB 22, 3110 Judson St.
Gig Harbor, WA 98335
E-mail: jamessells@comcast.net


Lyndsay Taylor