

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET TG-131794
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	ORDER 05
)	
v.)	
)	INITIAL ORDER GRANTING
WASTE CONTROL, INC. (G-101),)	MOTION TO DISMISS AND
)	REJECTING TARIFF FILING
Respondent.)	
)	
.....)	

1 **NATURE OF PROCEEDING.** On September 23, 2013, Waste Control, Inc. (Waste Control or Company) filed with the Washington Utilities and Transportation Commission (Commission) new Tariff No. 15 reflecting a general rate increase of approximately \$392,000 in additional annual revenue. On October 10, 2013, the Commission entered Order 01 in this docket denying Waste Control’s request for exemption from WAC 480-07-520(4)(j), requiring solid waste companies to include certain information in general rate increase filings. On November 27, 2013, the Commission entered Order 02, a complaint and order suspending Waste Control’s revised tariff pending Commission investigation of the proposed rates, and allowing Waste Control’s proposed disposal fees to become effective on a temporary basis, subject to refund.¹

2 **APPEARANCES.** David W. Wiley, Williams, Kastner & Gibbs PLLC, Seattle, represents Waste Control. Steven W. Smith, Assistant Attorney General, Olympia, represents the Commission’s regulatory staff (Staff).²

¹ Due to a clerical error, Order 02 was erroneously designated as Order 01. We will refer to the November 27, 2013, order as Order 02.

² In a formal proceeding, such as this, the Commission’s regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners’ policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

James K. Sells, Gig Harbor, represents Washington Refuse and Recycling Association (WRRRA).

3 **PROCEDURAL HISTORY.** The Commission convened a prehearing conference in this proceeding at its offices in Olympia, Washington on January 14, 2014. On January 16, 2014, the Commission entered Order 03 – Prehearing Conference Order; Notice of Hearing, which set a procedural schedule in this matter.

4 On February 18, 2014, Waste Control filed the direct testimony and exhibits of Joseph Willis, president of the Company, and Jacqueline G. Davis, owner/shareholder of G.L. Booth/J.G. Davis & Associates, PLLC, in support of its rate request.

5 **STAFF’S MOTION TO DISMISS.** On March 5, 2014, Staff filed its Motion to Dismiss Waste Control’s Tariff Filing (Motion to Dismiss). Staff alleges that the Company, in its prefiled direct testimony and exhibits, “failed to make a prima facie case for its requested rate increase.”³ Instead, Staff argues that the testimony of Waste Control’s primary accounting witness, Jacqueline Davis, “addresses just eight accounting issues that result in six adjustments in the pro forma results of operations and one adjustment in the Lurito-Gallagher revenue requirement calculation.”⁴ On the whole, Staff states that the Company does not address most of the pro forma results of operations which “consists of allocations between regulated and non-regulated operations, 18 additional restating adjustments, and five pro forma adjustments....”⁵

6 Quoting Ms. Davis, Staff asserts that Waste Control intentionally filed support for only six adjustments in the pro forma results of operations because it had reached agreement with Staff on the rest of the accounting issues.⁶ Pursuant to WAC 480-07-540 and RCW 81.04.130, the Company has the burden of proving the tariff filing, as proposed, will result in rates that are just,

³ Staff’s Motion to Dismiss ¶ 7.

⁴ *Id.* ¶ 2.

⁵ *Id.* (Internal citation omitted.)

⁶ *Id.* ¶ 4 (citing to Davis, Exh. No. JD-1T at 25:6-8.)

reasonable, fair, and sufficient.⁷ Further, WAC 480-07-540 provides that the Commission will consider the Company's prefiled evidence to be its full direct case in support of its rate filing for purposes of deciding any prehearing motion to dismiss under WAC 480-07-380.⁸

- 7 Even if Staff agrees with Waste Control on all of the adjustments the Company failed to file testimony in support of, the Commission still has to base its decisions on supporting evidence.⁹ Based on Waste Control's February 18th filing, "the Commission is not in a position to make legally defensible findings of fact on the accounting issues for which the [C]ompany has supplied no support."¹⁰
- 8 **In** support of its request to dismiss Waste Control's tariff filing after the Company filed its direct case, Staff cites to Commission precedent in *WUTC v. Puget Sound Energy, Inc.*, where the Commission dismissed Puget Sound Energy's filing due to the legal insufficiency of its prefiled evidence:

In reviewing a motion under WAC 480-09-246(1) [the predecessor to WAC 480-07-380], the Commission uses the prefiled evidence to define the pleadings originating the proceeding.... The situation is analogous to CR 50, which allows dismissal of a proceeding at the conclusion of the plaintiff's presentation if, taking the evidence in the light most favorable to the respondent, the evidence is insufficient to support the complaint. A company seeking a rate increase has the burden of coming forward with sufficient evidence to support its request... Other parties rely on the prefiled evidence as the basis for preparing their cross examination of witnesses and in formulating their responsive evidence.¹¹

⁷ *Id.* ¶ 6.

⁸ *Id.*

⁹ *Id.* ¶ 8.

¹⁰ *Id.* ¶ 9.

¹¹ *Id.* ¶ 10 (citing *Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.*, Dockets UE-011163 and UG-011170, Sixth Supplemental Order at 5 (October 4, 2001)). (Emphasis added).

- 9 *Parties' Opposition to the Motion to Dismiss.* On March 10, 2014, Waste Control and WRRRA filed Responses to Staff's Motion to Dismiss. The Company asserts that solid waste rate cases are anomalous to utility rate cases because the latter generally include prefiled testimony as well as revised tariffs.¹² Waste Control does not dispute the applicability of WAC 480-07-540 which establishes the burden of proof firmly with the proponent of the rate increase and allows the Commission to consider the Company's prefiled evidence as its full direct case when deciding any prehearing motion to dismiss. Instead, Waste Control argues that it focused its prefiled testimony in support of any issues it anticipated Staff would dispute,¹³ and it plans to "refer to and develop foundational testimony on [its original tariff filing] at hearing."¹⁴ According to Waste Control, the Motion to Dismiss is an attempt "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."¹⁵ Waste Control explains that Staff is not disadvantaged by the abridged support for its rate request since Staff has already subjected the rate case filing "to extensive audit, data requests, site visits and review."¹⁶
- 10 The Company distinguishes *WUTC v. PSE* from the instant matter since PSE failed to file its results of operations and generally did not comply with WAC 480-07-510; while Waste Control asserts that its general rate case filing is consistent with WAC 480-07-520, the applicable rule for solid waste companies.¹⁷ Instead, Waste Control points to *WUTC v. Verizon Northwest, Inc.* in which the Commission rejected Staff's motion to dismiss and "distinguish[ed] the favorable standard against which a respondent's rate case

¹² Company's Response ¶ 4.

¹³ *Id.* ¶ 8.

¹⁴ *Id.* ¶ 14.

¹⁵ *Id.* ¶ 16.

¹⁶ Company's Response ¶ 3.

¹⁷ *Id.* ¶ 10.

is evaluated under a motion to dismiss standard from that of the burden of proof at the subsequent rate case hearing.”¹⁸

11 WRRRA admonishes Staff for not alerting the Company that its original rate filing, which Ms. Davis, Waste Control’s witness is sponsoring as Exhibit No. JD-2, needs to be “reconfigured as prefiled testimony.”¹⁹ In fact, WRRRA asserts that all of the information Staff alleges is missing can be found in Exhibit No. JD-2.²⁰ WRRRA states that, if Staff’s Motion to Dismiss is granted, “it is clear that the [C]ompany will refile the case, probably the very next day” and “we start the whole process over again, meaning the company continues its loss of revenue, and payment of attorney and accountant fees to travel the same ground which has already been done.”²¹

12 **DISCUSSION/DECISION.** Pursuant to WAC 480-07-380(1), a party may move to dismiss another party’s case on the basis that the opposing party’s pleading fails to state a claim upon which the Commission may grant relief. In reviewing a motion to dismiss, we will consider the standards applicable to a motion made under Court Rule (CR) 12(b)(6) and 12(c) of the Washington Superior Court’s civil rules.²² Washington courts treat CR 12(c) motions for judgment on the pleadings identically to CR 12(b)(6) motions to dismiss for failure to state a claim.²³ The purpose of both motions is to determine if a plaintiff can prove any set of facts that would justify relief.²⁴ In this review, we consider the facts alleged in Waste Control’s rate case filing in a light most favorable to the Company.²⁵

¹⁸ *Id.* ¶ 9.

¹⁹ WRRRA’s Response at 3.

²⁰ *Id.* at 2.

²¹ *Id.*

²² WAC 480-07-380(1).

²³ *P.E. Systems, LLC, v. CPI, Corp.*, 176 Wash. 2d 198, 203, 289 P.3d 638 (2012) (citing *Suleiman v. Lasher*, 48 Wash. App. 373, 376, 739 P.2d 712 (1989)).

²⁴ *P.E. Systems*, 176 Wash. 2d at 203.

²⁵ *M.H. v. Corporation of Catholic Archbishop of Seattle*, 162 Wash. App. 183, 189, 252 P.3d 914 (2011).

- 13 WAC 480-07-540 is clear that the burden of proof in a general rate case for both utility and transportation companies rests with the proponent of the request:

Public service companies bear the burden of proof in general rate proceedings that propose changes that would increase any rate, charge, rental, or toll, as provided in RCW [80.04.130](#) or 81.04.130. The burden of proof includes the burden of going forward with evidence and the burden of persuasion. *The commission will consider the company's prefiled evidence to be its full direct case in support of its rate filing for purposes of deciding any prehearing motion to dismiss under WAC [480-07-380](#).*²⁶

- 14 Waste Control does not dispute that its prefiled testimony and exhibits fail to support most of the adjustments in its general rate case filing. The Company admits it only filed testimony and exhibits for the adjustments it expected Staff to contest. At the same time, Waste Control does not dispute the requirements in WAC 480-07-540 but instead explains that it will develop its full case at hearing. This is not the common practice before the Commission, nor is it what is anticipated in our rules. As we stated in *WUTC v. PSE*:

In Commission proceedings, prefiled evidence *is* a party's evidence supporting its case. Prefiled evidence serves an essential regulatory function. The Commission resolves complex, high-stakes, multiparty litigation within time frames from start to completion that are often shorter than the civil courts can schedule and hold a trial. Prefiled evidence is one of the means by which this efficiency is accomplished. Other parties rely on the prefiled evidence as the basis for preparing their cross examination of witnesses and in formulating their responsive evidence.²⁷

²⁶ WAC 480-07-540 (emphasis added).

²⁷ *WUTC v. PSE*, Dockets UE-011163 and UE-011170, Sixth Supplemental Order – Order Granting Motions; Dismissing Dockets, ¶ 15 (October 4, 2001). (Emphasis in original).

- 15 Waste Control and WRRRA point to the “case” that the Company filed on September 23, 2013, when this proceeding was initiated, as sufficient evidence to support the Company’s direct case. The Company’s September 23rd filing, however, consists of proposed tariff pages containing the requested rate increases as well as customer notices of the rate filing. The filing includes little, if any, explanation or support for the revised rates.
- 16 Waste Control also contends that its rate request has already been subject to audit, review, and numerous data requests from Staff.²⁸ Staff is not responsible for making the Company’s case. Staff conducts its audit or review to formulate its position in the litigation, not to produce evidence that will support Waste Control’s request. Additionally, while Staff possesses this information, the Commission, which is separate and distinct from its regulatory staff, does not. None of this information has become part of the evidentiary record. Ultimately, it is the Company that bears the burden of proof. Waste Control has not met that burden.
- 17 The Company points to Order 05 in Docket UT-040788, *WUTC v. Verizon Northwest, Inc.*, in which we found that Verizon had demonstrated enough of a prima facie case to proceed to hearing. In *Verizon*, the Respondent supplied sufficient evidentiary support to sustain its case to hearing which Waste Control has not. *WUTC v. PSE*, as Staff explains, is more analogous to the instant situation and reiterates that the burden of proof in rate cases rests with the proponent of the increase.²⁹ This burden attaches when the case is filed and continues until it has been met. Waste Control, as the requestor, has the burden and has failed to meet it.

²⁸ Waste Control references *Berge v. Gorton*, a case in which the Supreme Court of Washington noted that a court may take judicial notice of a public record. 88 Wn.2d 756, 763, 567 P.2d 187 (1977). While the Company notes that the Commission could consider its data request responses and workpapers “in weighing the sufficiency of the Company’s necessary showing at this stage of the case,” Waste Control has neither asked us to do so, nor provided us with the documents in question. As a result, we decline to take judicial notice of the workpapers and data request responses in question.

²⁹ Dockets UE-011163 and UE-011170, Sixth Supplemental Order – Order Granting Motions; Dismissing Dockets (October 4, 2001).

18 With regard to Waste Control's argument that dismissal would waste resources, an argument that WRRRA has echoed, the Company, not the Commission or Staff, is responsible. Our rule, WAC 480-07-540, is clear as to the burden of proof in this case. Waste Control agreed to prefile its direct case as laid out in the procedural schedule. The Company's failure to file a direct case that provides full support for its rate request necessarily results in dismissal of that case and rejection of the tariff filing.

19 **Taking** the evidence in the light most favorable to the Company, Waste Control's evidence is insufficient to support its rate request. We grant Staff's Motion to Dismiss without prejudice and reject the tariff filing.

20 Effective December 1, 2013, we allowed Waste Control to collect rates to recover, on a temporary basis and subject to refund, increased disposal fees. Waste Control has expressed its intent to re-file its rate request, from which the temporary disposal fee rates originated, if Staff's Motion to Dismiss is granted. As a result, it would likely cause confusion if we were to require the Company to refund the disposal fees during the interim between this Order and the re-filed rate request, only to have to implement the rate increase again once in accordance with RCW 81.77.160. At this time, we will not require Waste Control to refund the temporary disposal fees so long as:

- Waste Control re-files its rate request within ten business days of the effective date of this Order, and
- The new filing, with its new docket number and new statutory effective date, contains the same disposal fee rate increase that was allowed to become effective as of December 1, 2013.

By not requiring the Company to refund this rate, we are in no way presuming its reasonableness, and in fact, the rate will continue to be temporary and subject to refund. If we ultimately order the Company to refund the disposal fees in its re-filed case, the refund will extend back to the December 1, 2013, effective date of the rates.

FINDINGS AND CONCLUSIONS

- 21 (1) The Commission is an agency of the state of Washington vested by statute with the authority to regulate the rates, rules, regulations, and practices of auto transportation companies.
- 22 (2) On September 23, 2013, Waste Control, Inc. filed with the Commission new Tariff No. 15 reflecting a general rate increase of approximately \$392,000 (11.4 percent) in additional annual revenue.
- 23 (3) On November 27, 2013, the Commission entered Order 02 suspending Waste Control's tariff filing and temporarily allowing rates relating to disposal fees, subject to refund.
- 24 (4) On February 18, 2014, Waste Control filed the direct testimony and exhibits of Joseph Willis, president of the Company, and Jacqueline G. Davis, owner/shareholder of G.L. Booth/J.G. Davis & Associates, PLLC, in support of its rate request.
- 25 (5) The Commission's regulatory staff filed a Motion to Dismiss Waste Control's Tariff Filing, alleging that the Company's direct prefiled testimony and exhibits failed to support the requested rate increase.
- 26 (6) Pursuant to WAC 480-07-380 and WAC 480-07-540, the Commission finds that Waste Control has failed to meet its burden of proof by producing insufficient evidence to support its rate request and Staff's Motion to Dismiss should be granted.
- 27 (7) The temporary rates derived from increased disposal fees, effective on December 1, 2013, and subject to refund, shall remain in effect if, within ten business days of the effective date of this Order, Waste Control re-files its rate request containing the same disposal fee increase.

ORDER

THE COMMISSION ORDERS That:

- 28 (1) The Motion to Dismiss Waste Control, Inc.'s Tariff Filing, filed by the
Commission's regulatory staff, is GRANTED.
- 29 (2) The Tariff Filing of Waste Control, Inc. is REJECTED for failure to
demonstrate that the proposed revised rates are fair, just, reasonable,
and sufficient.
- 30 (3) The temporary rates derived from increased disposal fees will remain in
effect, subject to refund, pending further action from the Commission
in this or a subsequent docket.

Dated at Olympia, Washington, and effective March 25, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and three copies of any Petition or Answer must be filed by mail delivery to:

Attn: Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250