

1                           BEFORE THE WASHINGTON STATE  
                           UTILITIES AND TRANSPORTATION COMMISSION  
 2 In re Application                   )  
 No. GA-079331 of                   )  
 3   ) Docket No. TG-042089  
 SURE-WAY SYSTEMS, INC.            )  
 4   ) Volume II  
 For a Certificate of Public        ) Pages 17 to 36  
 Convenience and Necessity to      )  
 Operate Motor Vehicles in         )  
 5   )  
 6 Furnishing Solid Waste            )  
 Collection Service                  )  
 7 \_\_\_\_\_ )

8                           A hearing in the above matter was held on  
 August 19, 2005, from 1:30 p.m to 2:00 p.m., at 1300  
 South Evergreen Park Drive Southwest, Room 108, Olympia,  
 9 Washington, before Administrative Law Judge KAREN  
 CAILLE.

10                        The parties were present as follows:  
                           THE COMMISSION, by GREGORY J. TRAUTMAN,  
 11 Assistant Attorney General, 1400 South Evergreen Park  
 Drive Southwest, Olympia, Washington 98504-0128,  
 12 Telephone (360) 664-1187, Fax (360) 586-5522, E-Mail  
 gtrautma@wutc.wa.gov.  
 13                        SURE-WAY SYSTEMS, INC., via bridge line by  
 GREG W. HAFFNER, Attorney at Law, Curran Mendoza, 555  
 14 West Smith Street, Kent, Washington 98035, Telephone  
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                           STERICYCLE OF WASHINGTON, via bridge line by  
 16 STEPHEN B. JOHNSON, Attorney at Law, Garvey Schubert &  
 Barer, 1191 Second Avenue, Floor 18, Seattle, Washington  
 17 98101, Telephone (206) 464-3939, Fax (206) 464-0125,  
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 24 Joan E. Kinn, CCR, RPR  
 25 Court Reporter

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1 P R O C E E D I N G S

2 JUDGE CAILLE: We are here for a  
3 teleconference on a discovery dispute in Docket Number  
4 TG-042089 regarding an application number GA-079331 of  
5 Sure-Way Systems Incorporated for a certificate of  
6 public convenience and necessity to operate motor  
7 vehicles in furnishing solid waste collection service  
8 consisting of biomedical waste.

9 May I have the appearances of the parties,  
10 and if you will just make an abbreviated appearance,  
11 that is state your name and whom you represent, that  
12 will be fine for our purposes today, and let's begin  
13 with the applicant.

14 MR. HAFFNER: Thank you, Your Honor, this is  
15 Greg Haffner, H-A-F-F-N-E-R, appearing for the applicant  
16 Sure-Way Systems, Inc.

17 JUDGE CAILLE: And for Stericycle.

18 MR. JOHNSON: Thank you, Your Honor, this is  
19 Steve Johnson appearing for Protestant Stericycle of  
20 Washington, Inc.

21 JUDGE CAILLE: And.

22 MR. TRAUTMAN: And this is Greg Trautman,  
23 Assistant Attorney General for Commission Staff.

24 JUDGE CAILLE: All right, let the record  
25 reflect there are no other appearances.

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1                   We are here today I believe at the request of  
2 Mr. Haffner to hear arguments about the subpoena duces  
3 tecum that was served on I guess Mr. Haffner and Mr. is  
4 it Chilcott, am I pronouncing that right?

5                   MR. HAFFNER: Yes.

6                   JUDGE CAILLE: And I have received, oh, there  
7 are two of them?

8                   MR. HAFFNER: Yes, there should be two  
9 subpoenas, one for Gary Chilcott, one for Dudley  
10 Chilcott.

11                   JUDGE CAILLE: Oh, okay, I only have Gary.

12                   MR. JOHNSON: The two subpoenas are  
13 identical, Your Honor.

14                   JUDGE CAILLE: Okay, I will make a copy of  
15 that later.

16                   MR. JOHNSON: And, Your Honor, did you  
17 receive, this is Steve Johnson, did you receive the  
18 E-mail I sent down just before noon today?

19                   JUDGE CAILLE: Yes, I did, thank you very  
20 much, I got that. I don't know, since it took me so  
21 long to get it printed off the pdf, at least the  
22 attachments, I don't know, I didn't check my E-mail to  
23 see if there was anything from you, Mr. Haffner in  
24 response.

25                   MR. HAFFNER: No, I did not respond to it.

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1 JUDGE CAILLE: Okay.

2 Here's what I would like to do, I would like  
3 to hear Mr. Haffner's response. I don't know if this is  
4 in the form of a motion to quash the subpoena, but I  
5 would like to hear your response orally. And I really  
6 intend to make a ruling today, at least that's my  
7 intention unless something I hear would make me feel I  
8 need to think about it and delay ruling, but that is why  
9 I have the court reporter here. It's important for us  
10 to get these matters taken care of so that the parties  
11 can prepare for the hearing which is just a little over  
12 a week away.

13 So having said that, Mr. Haffner, why don't  
14 you begin.

15 MR. HAFFNER: Thank you, Your Honor.

16 I think you have correctly characterized this  
17 issue as a discovery dispute, and that's exactly why I'm  
18 opposed to the subpoenas. I don't think they are  
19 appropriate, that they need to be responded to, because  
20 they are additional discovery requests. I believe  
21 Mr. Johnson's E-mail to you which he copied other  
22 counsel on is nothing more than a motion to compel  
23 discovery as well as the request for additional  
24 discovery based on more information that he wants based  
25 on information that we disclosed to him. I'm not going

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1 to deny that some of the information that we have  
2 disclosed was past the timeline, past the deadline for  
3 the discovery period, but it came in when it came in. I  
4 think had Mr. Johnson wanted to have a motion to compel  
5 for these discovery requests, that should have been the  
6 format that he made, and he should have made that during  
7 the discovery period, which has come and gone.

8 I agree that this is the time now for the  
9 parties to be preparing for the hearing, not for the  
10 parties to have to be looking at these different  
11 discovery issues. I think the Court or Your Honor has  
12 the ability and the discretion to set a discovery  
13 schedule, and you have set that, and you have been  
14 somewhat flexible with that, and we have made an  
15 extension pursuant to an agreement with the parties, but  
16 I don't think that these subpoenas as Mr. Johnson wants  
17 to characterize them allow discovery to continue  
18 throughout the hearing process. I think they are a form  
19 of discovery, and that is all subject to the discovery  
20 schedule that you set forth in your prehearing order.

21 JUDGE CAILLE: All right.

22 And, Mr. Johnson, any response?

23 MR. JOHNSON: Yes, Your Honor, I do have a  
24 response, and I would specifically like to direct Your  
25 Honor's attention to the discovery rule at WAC

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1 480-07-400, and I would like to give you my take on what  
2 that rule provides for. That is the general discovery  
3 rule for the Commission. I believe as I read the rule  
4 that there are two types of what are categorized in that  
5 rule or dealt with in that rule as discovery.

6 One type of discovery is what I characterize  
7 as prehearing discovery, which is the development of  
8 information related to a party's -- the issues in the  
9 proceeding through data requests and that sort of, and  
10 depositions if allowed, that sort of prehearing  
11 discovery activity.

12 But there is another category of, I don't  
13 know, it's called discovery so I will call it that,  
14 another category of discovery dealt with in the rule  
15 that I referenced, and that is activities directly  
16 related to the hearing, and the three types of discovery  
17 that are permitted in conjunction with the hearing are a  
18 record requisition that is made during the hearing  
19 session or during a deposition, and a Bench request  
20 which is made during a hearing, and a subpoena, which  
21 only has meaning as I read the rule as a device to bring  
22 witnesses and documents to the hearing itself.

23 Certainly a Bench request, although  
24 categorized as discovery or within the, you know, the  
25 rubric of discovery under WAC 480-07-400, is not a form

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1 of prehearing discovery. It is a request that the  
2 administrative law judge is authorized to make during  
3 the course of a hearing.

4 Similarly a records requisition is not a form  
5 of prehearing discovery, but is a device to allow a  
6 party to require another party to bring documents to a  
7 hearing in the context of the hearing itself.

8 Now a subpoena, the subpoenas that are  
9 referenced in subsection, what is it here, it's  
10 subsection (c)(2)(a) of WAC 480-07-400, refers to I  
11 believe subpoenas for the hearing. And what the rule  
12 says is that subpoenas are allowed in all adjudicated  
13 proceedings, and when it refers to subpoenas, it  
14 explicitly states subpoenas including a subpoena duces  
15 tecum.

16 So what I have done here is issue a subpoena  
17 duces tecum for documents that I have required  
18 Mr. Haffner's client to bring to the hearing pursuant to  
19 WAC 480-07-400, again subsection (2)(a). There is no  
20 context for a subpoena under these -- under this rule  
21 other than a subpoena to the hearing itself. Subpoena  
22 is not referenced in connection with depositions or  
23 anything else of that kind. And I explained this to  
24 Mr. Haffner, my reading of the rule, when we had a  
25 conference chat about this before he requested that Your

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1 Honor take a look at this question.

2           So I believe there are two types of what we  
3 might call discovery authorized by the rule. One is a  
4 prehearing discovery, and that was the type that was  
5 governed by your prehearing order, and the second type,  
6 which is, and I don't even think it's properly called  
7 discovery but anyway it's under the rule with that name,  
8 that requires people in the context -- either in the  
9 context of the hearing to bring documents to the  
10 hearing, that would be a Bench request or a record  
11 requisition or a subpoena to appear at the hearing or to  
12 bring documents to the hearing, and that's what we've  
13 got in front of us here.

14           So I understand Mr. Haffner's argument about  
15 Your Honor's prehearing conference order. I know that  
16 we, you know, the reality is we all agreed to continue  
17 discovery long after the period in which discovery was  
18 authorized in that order, and as I recounted in my  
19 E-mail that I filed earlier today, you know, discovery,  
20 in fact production of documents, we submitted data  
21 requests we filed -- or I say we served data requests on  
22 Sure-Way on April 1, we only got the last documents  
23 relevant to those data requests on July 15th, and the  
24 reality is that rather than engaging in a lot of  
25 pretrial motion practice, we attempted to accommodate



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1 Mr. Haffner, we attempted to continue to pursue him and  
2 his client to provide full responses to our discovery  
3 requests, and they did, they did trickle out responses  
4 over many months.

5           Now we have asked that they bring certain  
6 documents to the hearing, and we believe that we're  
7 entitled to do so under the subpoena provision of WAC  
8 480-07-400. And in my E-mail I also tried to say, you  
9 know, what is it that we're requesting and how  
10 significant is it. Mr. Haffner has not claimed, at  
11 least I haven't heard him claim, that the document  
12 requests that we submitted as attachments to the  
13 subpoenas are unduly burdensome. In fact, as I pointed  
14 out in my E-mail correspondence to you, Your Honor, the  
15 -- a great big chunk of the material requested is  
16 material that we are just simply trying to confirm in  
17 detail that Mr. Haffner's client does not have. As I  
18 have indicated in my E-mail correspondence with you,  
19 Mr. Haffner has represented that there are no documents  
20 evidencing compliance by Sure-Way with its own QSR  
21 manual. The QSR manual is -- QSR stands for quality  
22 system regulation, and it's --

23           JUDGE CAILLE: I'm familiar with that from  
24 your definitions.

25           MR. JOHNSON: Okay, very good.

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1                   So Mr. -- well, so as I mentioned in the  
2 E-mail, items, you know, requests number 1, 2, 3, 4, 5,  
3 all relate to materials that are related to the quality  
4 system manual, and Mr. Haffner says they don't have any  
5 of these documents, or at least he said it in a very  
6 informal way in an E-mail to me. Now I am trying to  
7 confirm in detail that his client does not have these  
8 documents. If they want to show up at the hearing now,  
9 they need to show up at the hearing and put on the  
10 record that they don't have these documents. We don't  
11 want them to come to the hearing and say, oh, you meant  
12 those documents, you know, oh, of course, well, we have  
13 those but we don't have them with us. So that's the  
14 purpose of those requests.

15                   We have also asked for documents that are  
16 required to be kept by Sure-Way under its so called  
17 safety manual. Now this is a document that was first  
18 delivered to us on July 15th, one day before we had to  
19 file our prefiled testimony on the following Monday.  
20 The safety manual, they had previously told us they  
21 didn't have a safety manual, that what they referred to  
22 in their other documents as a safety manual was actually  
23 a compilation of other materials that they had provided  
24 to us in another form. Well, July 15 rolls around, and  
25 sure enough, there is a safety manual. Now what should

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1 I do about that safety manual at that point? It seems  
2 to me that what I have done is the responsible thing and  
3 is appropriate, it helps to facilitate the hearing,  
4 which is to ask them in advance to bring with them  
5 documents that are required to be kept and maintained by  
6 their safety manual that they only delivered to us on  
7 July 15 in response to a request on April 1. Now I  
8 don't think that's unduly burdensome, and I think it's  
9 appropriate for them to do that, so that's Data Request  
10 Number 8.

11 Data Requests 9 and 10 are for documents that  
12 they have repeatedly promised that they would provide to  
13 us when they're available. So I mean that's merely a  
14 placeholder to, you know, to require them to bring those  
15 documents since they haven't produced them so far,  
16 produce them at the hearing or tell us on the record why  
17 they can't.

18 And I guess the last thing is items number 11  
19 and 12 relate to materials that are dealt with in  
20 Sure-Way's reply testimony. I think they're materials  
21 that we would be entitled to request at the hearing by  
22 records requisition, but instead of doing it that way,  
23 we have given advance notice in the form of a subpoena  
24 and simply asked them to produce documents relevant to  
25 the claims that they have made in their reply testimony.

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1                   So, you know, for all those reasons I think  
2 if you look -- I think we have two arguments here. One  
3 is under the rule I think we're entitled to issue a  
4 subpoena of this type. I don't think it's governed by  
5 the prehearing discovery schedule that Your Honor issued  
6 early in the case. I think it's a type of, you can call  
7 it discovery if you want, but it's a -- it's part of the  
8 hearing procedure that we're entitled to invoke in order  
9 to address the issues that are presented by this  
10 hearing. And then if you look past the sort of the rule  
11 issue, the technical issue as to whether this is an  
12 authorized activity, authorized subpoena, and look to  
13 the substance of what we have asked for, we haven't  
14 asked for anything unreasonable, and I think that  
15 everything we have asked for is relevant, and Your Honor  
16 should permit us to proceed with that.

17                   Thank you.

18                   JUDGE CAILLE: All right, Mr. Haffner, any  
19 reply?

20                   MR. HAFFNER: Yes, Your Honor, thank you.

21                   Boy, this is what we're going to be facing in  
22 this hearing. Mr. Johnson has stated that I'm not  
23 claiming that these requests are burdensome. The reason  
24 I'm not claiming at this point that they are, which I  
25 believe that they are, is because this is not a motion

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1 to compel discovery as far as I know. This is my  
2 request for the Court to disallow these subpoenas, as  
3 Your Honor correctly states to quash the subpoenas,  
4 because I believe that they are outside of the scope of  
5 the discovery schedule. This is the way that  
6 Mr. Johnson conducts his discovery and his hearing is  
7 that the more information we give him, the more  
8 information he wants. Every time we deliver something  
9 to him, he will find three or four more things in that  
10 to inquire about.

11           The important thing here is, however, that  
12 these subpoenas are discovery vehicles. They are in the  
13 discovery section of the WAC, they are subject to the  
14 discovery schedule, and the schedule for discovery has  
15 come and gone. And had he wanted these items to be  
16 produced earlier, he should have brought a motion to  
17 compel. If these items -- if there are issues in the  
18 hearing that come up, he is certainly entitled to ask  
19 the Bench to make a Bench request and ask Your Honor to  
20 make that request, and we will comply to the extent that  
21 those documents exist.

22           Mr. Johnson already served us with 71 data  
23 requests, and then when he felt that we didn't  
24 adequately respond to those, he gave us a multipage  
25 letter detailing what additional information we needed

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1 to provide. Now we have this additional request, which  
2 he admits includes some additional items that he did not  
3 previously see. It's got to come to a point where it  
4 has to end, and I think that point has now passed.

5 I'm not going to get into all of the details  
6 of why I think these requests are burdensome, because I  
7 think that would probably take us at least another half  
8 an hour and I would probably need to confer with my  
9 client. He just served us with or sent us this E-mail  
10 regarding his explanation for his request 10 minutes  
11 before noon, I have not had a chance to discuss it with  
12 my client, and frankly I don't think that it's necessary  
13 for me to do so under the Court rules and under the  
14 Court schedule.

15 JUDGE CAILLE: All right, I see that  
16 Mr. Trautman wants to weigh in on this.

17 MR. TRAUTMAN: Just briefly, Your Honor.

18 Staff would just observe that on the question  
19 of the subpoena and where it fits in the discovery rule,  
20 Staff's belief is yes, the rule does say that the  
21 subpoenas are available in all adjudicated proceedings,  
22 whereas some of the other discovery methods, for example  
23 data requests, may not be. But nevertheless, Staff  
24 believes that they are also subject to subsection 5 of  
25 the rule, which refers to a discovery schedule and says

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1 that the Commission may establish and set forth a  
2 schedule for discovery, and generally that schedule  
3 should be honored.

4           Now that being said, it's also true that in  
5 hearings sometimes there are additional requests made,  
6 and the most frequent example by a party being a record  
7 requisition, which is another name for a data request  
8 made during a hearing. Staff's understanding is that  
9 generally those are allowed when they are based on  
10 additional information that was obtained during the  
11 course of the cross-examination or during the testimony  
12 taking at the hearing when, if new information is  
13 learned, that might generate an additional record  
14 requisition or data request or document request, if you  
15 will, that may not have been known earlier. And Staff  
16 believes that that also comports with section 4 of the  
17 rule, which talks about the frequency, extent, and scope  
18 of discovery, and about two thirds of the way down it  
19 mentions that a discovery request is inappropriate when  
20 the party seeking discovery has had ample opportunity to  
21 obtain the information sought or the discovery is unduly  
22 burdensome, taking into account the needs of the  
23 proceedings and the parties, et cetera. So the issue I  
24 think becomes on the various requests whether that would  
25 apply or not, whether there was ample time to obtain

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1 information, or perhaps it was information that was only  
2 learned of because of a document that was just  
3 submitted.

4           So in general I do agree that the subpoena is  
5 subject to the prehearing rules and to the schedule, but  
6 there have been limited exceptions that have been made  
7 in instances such as record requisitions when they're  
8 based on new evidence that was not previously known or  
9 could not reasonably have been known.

10           JUDGE CAILLE: All right, thank you,  
11 Mr. Trautman.

12           Maybe some of the difficulty here is,  
13 Mr. Johnson, I don't know how familiar you are with our  
14 process here at the UTC. The way Mr. Trautman just  
15 described the process is correct. There are, in certain  
16 types of proceedings, there are certain types of  
17 discovery available, and then the subpoena is under the  
18 rule always available. Now I have only seen your  
19 subpoena and one other subpoena when I was on the Bench  
20 in Illinois, so subpoenas are not used very often here.  
21 The same applies to depositions, and if you will recall  
22 in my prehearing conference order I noted how the  
23 Commission disfavors those because of the burdens and  
24 expenses that it puts on the parties.

25           Now having said that, you folks agreed to



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1 have a deposition, and that was after the discovery  
2 period was to end. The discovery period in the  
3 prehearing conference order specifically states that it  
4 would end on May 27th, 2005. Now we had the prehearing  
5 conference on March 3rd, so from March 3rd to May 27th,  
6 that was the discovery period. Then on June 6th, the  
7 Commission pursuant to a stipulation of the parties  
8 extended the written discovery deadline to June 17th and  
9 allowed additional time for Stericycle to take the  
10 deposition of Gary Chilcott during the week of June  
11 27th. Mr. Chilcott was deposed on June 24th. As far as  
12 I'm concerned, that was the end of the discovery period,  
13 and you have had your opportunity to conduct discovery.

14           You are bringing this request one week before  
15 hearings start in this proceeding, and nothing has been  
16 brought to me despite what is in the prehearing  
17 conference order about bringing motions to compel or any  
18 kind of discovery dispute to the awareness of the ALJ so  
19 that things can be handled expeditiously. So here we  
20 are one week before hearing, and I have to say that  
21 reading through the requests, in my 14 years on the  
22 Bench I have never seen such a detailed request, and  
23 just reviewing what you have sent me via E-mail that  
24 records your request, I can see that each time there are  
25 additional requests and additional requests, so this has

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1 to stop now. We are on the eve of hearing, and we have  
2 12 days of hearing, you have sufficient time to do  
3 cross-examination, I believe that the Commission will  
4 have a very good record from which to make a decision on  
5 this without asking for more discovery that I think is  
6 really unreasonable and overly burdensome.

7 So I take it, Mr. Haffner, that that was a  
8 motion to quash the subpoena?

9 MR. HAFFNER: Yes, Your Honor.

10 JUDGE CAILLE: So I will grant the motion to  
11 quash the subpoena, and I find that under WAC  
12 480-07-400(4) and taking into account the needs of this  
13 adjudication that Stericycle has had ample opportunity  
14 for discovery and that the requests are unduly  
15 burdensome.

16 I will note that this ruling is subject to  
17 review under WAC 480-07-810, and I will be happy to  
18 discuss with the parties now what they would like --  
19 well, perhaps we could discuss what documents you want  
20 to -- actually I suppose all the documents that have  
21 been submitted to me should be part of the file, so that  
22 would include the subpoena and the list in the subpoena,  
23 the E-mail from Mr. Johnson, and those attachments.

24 MR. HAFFNER: This is Mr. Haffner, Your  
25 Honor, I would agree that all of those documents that

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1 have been exchanged, E-mails and the attachments to  
2 those E-mails, should be made a part of the record.

3 JUDGE CAILLE: All right, let me just see if  
4 there's anything else.

5 Oh, yes, there is something else. I just  
6 want to make clear so that we do not get burdened during  
7 the hearing with record requests, the way Mr. Trautman  
8 described the record request is the way we will deal  
9 with record requests. A Bench request is a request from  
10 me, so the record requests will be something that, you  
11 know, if it turns up in the course of cross-examination.  
12 And again, you know, you can ask for the request, but I  
13 will weigh this and determine whether your request will  
14 be granted. There's such a thing as overfilling the  
15 record with too much information, and we lose sight of  
16 the real issues here, so I really want to make sure that  
17 the parties focus on the issues in this proceeding. I  
18 want you to be aware that I am the person in charge, and  
19 I will not allow this hearing to get out of hand. So I  
20 think that's all I have to say.

21 Is there anything further from any of the  
22 parties?

23 MR. HAFFNER: No, Your Honor.

24 MR. TRAUTMAN: No, Your Honor.

25 JUDGE CAILLE: All right, then I will see you

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1 on Tuesday morning, thank you.

2 (Hearing adjourned at 2:00 p.m.)

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