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BEFORE THE WASHINGTON STATE

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UTILITIES AND TRANSPORTATION COMMISSION

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4 In the Matter of the Application of ) Docket TG-120033  
5 WASTE MANAGEMENT OF WASHINGTON, INC. D/B/A ) Pages 1-23  
6 WM HEALTHCARE SOLUTIONS OF WASHINGTON )  
7 For an Extension of Certificate G-237 for )  
8 a Certificate of Public Convenience and )  
9 Necessity to Operate Motor Vehicles in )  
10 Furnishing Solid Waste Collection Service )

9

10

DISCOVERY CONFERENCE, VOLUME I

11

Pages 1-23

12

ADMINISTRATIVE LAW JUDGE GREGORY J. KOPTA

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10:08 A.M.

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JUNE 20, 2012

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Washington Utilities and Transportation Commission  
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(Continued...)

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OLYMPIA, WASHINGTON, JUNE 20, 2012

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10:08 A.M.

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P R O C E E D I N G S

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JUDGE KOPTA: Let's be on the record.

7

We are on the record now in Docket No. TG-120033, In  
8 the Matter of the Application of Waste Management of Washington,  
9 Inc., d/b/a HM [sic] Healthcare Solutions of Washington For an  
10 Extension of Certificate G-237, et cetera.

11

We are here at the request of some of the Protestants  
12 for a discovery conference, although I think this is really more  
13 in the nature of a hearing on the motion that they are bringing.  
14 And we will take appearances after I say that this is Gregory J.  
15 Kopta, the administrative law judge who is presiding in this  
16 proceeding.

17

So let's start with the folks that are here in the  
18 room, which is for Commission Staff.

19

MS. WOODS: Good morning, Your Honor. I'm Fronda  
20 Woods, Assistant Attorney General, for Commission Staff.

21

JUDGE KOPTA: And for the Company?

22

MS. McNEILL: Good morning, Your Honor. This is  
23 Polly McNeill of Summit Law Group representing Waste Management  
24 of Washington, Inc.

25

And with me today is in-house counsel, Andrew

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1 Kenefick, for Waste Management. I believe that you have my  
2 address and contact information. I don't know if you would like  
3 to have Mr. Kenefick give his as well.

4 JUDGE KOPTA: Only if he's making an official  
5 appearance.

6 MR. KENEFICK: We can do it either way. I may have  
7 one or two comments just to make during the course of this, but  
8 if my being able to speak requires me to make an official  
9 appearance, I'd be happy to give my address.

10 JUDGE KOPTA: Well, why don't we go ahead and do that  
11 just for ease of reference.

12 MR. KENEFICK: Okay. The address is 720 Fourth  
13 Avenue, Suite 400, Kirkland, Washington 98033. And the name is  
14 spelled K-e-n-e, "F," as in Frank, i-c-k.

15 JUDGE KOPTA: All right. And do we have a phone  
16 number and e-mail address to go with that?

17 MR. KENEFICK: The phone number is 425.825.2003, and  
18 I believe I'm on the e-mail distribution list for the UTC for  
19 this matter.

20 JUDGE KOPTA: Okay. Then for Stericycle?

21 MR. JOHNSON: Thank you, Your Honor. This is Steve  
22 Johnson, attorney with Garvey Schubert Barer, representing  
23 Stericycle of Washington, Inc.

24 JUDGE KOPTA: And Mr. Sells?

25 MR. SELLS: Thank you. If Your Honor please, James

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1 Sells, attorney representing Protestants Washington Refuse and  
2 Recycling Association, Rubatino Refuse Removal, Consolidated  
3 Disposal, Murrey's Disposal, and Pullman Disposal. And my  
4 information is the same as initial appearances.

5 JUDGE KOPTA: Okay. Thank you. And that's why I  
6 used your name, because I thought I'd let you list off all of  
7 your clients.

8 MR. SELLS: Yeah.

9 JUDGE KOPTA: Having been in your position once  
10 before, I understand.

11 MR. SELLS: I have to read them.

12 JUDGE KOPTA: Is there anyone else that wishes to  
13 make an appearance?

14 Hearing none, we will proceed to the motion.

15 I have read the motion and Waste Management's  
16 response.

17 Mr. Sells, do you have anything to add to what you  
18 have provided in writing?

19 MR. SELLS: Well, yes. If I may, Your Honor, I  
20 really hadn't planned on creating all of this commotion about  
21 the discovery. My goal here was to find out as early on as  
22 possible what, if any, of the data requests to my clients were  
23 appropriate, inappropriate, had to be answered, or did not have  
24 to be answered and tried miserably to do it in an informal way  
25 in my pleadings.

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1           And a formal hearing is fine with me, but I'm in a  
2 position very simply where I want to be able to go to my clients  
3 who, of course, don't want to answer any of these, and say,  
4 "Here's the ones you do have to answer. Here's the ones you  
5 don't have to answer," if there are any, and then they have some  
6 decision-making to do.

7           I'm concerned that -- you may have noticed that my  
8 clients are the smaller companies and smaller divisions of at  
9 least two fairly large companies. And the burden of doing this  
10 and the cost of doing this, especially with the ones that use  
11 outside accountants, probably takes up two or three years' worth  
12 of whatever profit they have on medical waste.

13           So that's -- you know, I'm not trying to stir up  
14 trouble here. I'm just trying to find out as soon as I can  
15 where we stand on this on the discovery.

16           JUDGE KOPTA: Fair enough.

17           MR. JOHNSON: Your Honor, this is Steve Johnson. If  
18 I could comment, perhaps, from a Protestant's perspective as  
19 well?

20           JUDGE KOPTA: Sure. Go ahead.

21           MR. JOHNSON: Thank you. Your Honor, let me explain  
22 Stericycle's interest here. Although this motion was brought by  
23 Mr. Sells with respect to his particular clients, the data  
24 requests that have been served on his client by Waste Management  
25 are in some cases identical to those served on Stericycle.

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1           Now, we reserve our right to object to those and to  
2 present our reasons in detail with respect to those data  
3 requests as they apply to Stericycle in particular, but I would  
4 like to support Mr. Sells with respect to a number of the points  
5 that were made in his -- in his motion and also to comment on  
6 the response that was submitted by Waste Management, because  
7 these matters do affect Stericycle.

8           In particular, the data request submitted for highly  
9 detailed financial information with respect to the Protestants'  
10 current business operations, I believe are entirely out of  
11 bounds in terms of being overly burdensome and inappropriate in  
12 the sense that -- (phone beeps) -- not at a level of detail that  
13 is far beyond what anything that Waste Management has any  
14 reasonable reason to request in the context of this proceeding.

15           Just as an example, this Data Request No. 1, asking  
16 for a detailed general ledger for Washington operations for  
17 calendar year 2011, my folks tell me that what that means is  
18 that they want -- that Waste Management is asking for the level  
19 of detail that would identify every payor and payee that either  
20 has submitted funds or received funds from the Protestants  
21 during this calendar year.

22           And in the case of Stericycle, that might involve  
23 potentially hundreds of pages, maybe thousands for the  
24 particular year involved, and that it would require  
25 identification of every payor and payee that -- to whom



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1 Stericycle issued a check or from whom Stericycle issued --  
2 received funds during 2011. And that level of detail is just  
3 entirely inappropriate and unnecessary for any reasonable  
4 requirement that Waste Management might have with respect to  
5 evaluation of the finances of any of the Protestants. So, you  
6 know, the detailed general ledger seems to us to be enormously  
7 overbroad, unreasonably burdensome, and to seek information at a  
8 level of detail that is unnecessary and inappropriate in the  
9 context of this proceeding.

10 With respect to Waste Management's sort of commentary  
11 with respect to this, I would like to point out that under their  
12 Paragraph 10 of Waste Management's response to the Rubatino, et  
13 al., motion, that they specifically sort of justified their  
14 requests by the need to identify the quality of the Protestants'  
15 services and the customer satisfaction with those services and,  
16 in fact, the legitimate service demands of the customers.

17 Frankly, all of that information is available from  
18 the generator community, and Waste Management should, in fact,  
19 be seeking to develop its case by presenting evidence from the  
20 generator community with respect to whatever unmet needs may be  
21 out there that are not being served by existing service  
22 providers.

23 And so it's just palpably inaccurate to say that this  
24 information is within the control and possession of the  
25 Protestants here, and so, you know, I think this is, in fact,

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1 the paradigm fishing expedition with respect to the issues of  
2 quality of service and customer satisfaction with those  
3 services. Waste Management should be directed to find those --  
4 you know, evidence that it wants to present with respect to  
5 those issues from the generator community, and that's -- as the  
6 Commission Staff's memo dealing with the, you know, preliminary  
7 legal issued identified, that's the issue with respect to  
8 service to the satisfaction of the Commission that needs to be  
9 presented.

10 So that's our view with respect to Data Request  
11 No. 1, and -- and with respect to Waste Management's arguments  
12 in support of those data requests.

13 Similarly, with Data Request No. 2 requesting a  
14 detailed --

15 JUDGE KOPTA: Well, Mr. Johnson, we will walk through  
16 the data requests...

17 MR. JOHNSON: One by one?

18 JUDGE KOPTA: One by one. I wanted to just get to  
19 the general issue of whether or not Protestants need to respond  
20 to discovery at this point.

21 So is there anything else that you wanted to address  
22 at this time?

23 MR. JOHNSON: No. It's not my view that Protestants  
24 don't need to respond to discovery.

25 JUDGE KOPTA: Okay. And, Ms. McNeill, do you want to

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1 say anything more at this point? And reserving any comments on  
2 Data Request No. 1 until we get there, please.

3 MS. McNEILL: No. I would say if that's the  
4 conversation about Data Request No. 1, then I clearly, despite  
5 my time disparity, did not set aside enough time for this  
6 hearing.

7 You know, I think our papers are pretty clear in  
8 terms of the nature of the requests that we made. We took very  
9 seriously the exportation from the Commission that discovery not  
10 be a fishing expedition; that it be narrowly tailored to the  
11 specific needs of the parties.

12 And, you know, in his papers, Mr. Sells acknowledges  
13 that we have the burden of proving that the existing certificate  
14 holders are not serving to the satisfaction of the Commission.  
15 I will, as a side observation, acknowledge that the result on  
16 the legal briefing that has been recently submitted could in  
17 some fashion influence incrementally the amount or the types of  
18 responses and burden of proof that Waste Management might have  
19 with regard to the satisfaction of the Commission and the  
20 existing certificate holders.

21 But standing as we do here today, it is our burden of  
22 proof. We certainly cannot expect -- although Mr. Sells  
23 suggests that somehow in his case in chief he's going to be  
24 presenting the evidence that we need to prove our case, and I  
25 would be delighted if he did that, but I don't expect him to

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1 come forward with that kind of information.

2 Our data requests went to two different specific  
3 areas of inquiry. One was that we are certain that the parties  
4 are going to assert a claim that the entry into the remaining  
5 portion of the state that is not yet served by Waste Management  
6 will somehow have some economic impact on the Protestants'  
7 ability to have a viable business model, and that it will have a  
8 public interest -- negative impact on the public interest,  
9 because it will cause prices to go up and the shipping public  
10 will be adversely harmed by it.

11 Now, certainly we have expressed, at least to  
12 Mr. Sells, not to Mr. Johnson yet, but we have expressed an  
13 interest in stipulating around that and certainly would be  
14 willing to discuss that. But one of the primary areas of our  
15 data requests, our exploring data requests, are to have the  
16 financial analysis that we need in order to evaluate whether  
17 there have been trends in the medical waste collection  
18 activities, revenues, demands, and how the financial -- how the  
19 companies that are currently providing medical waste have  
20 financially managed around those changes or not.

21 The second area of inquiry is about the existing  
22 certificate holders' ability to meet the Commission's standards  
23 in terms of sufficiency or deficiencies in service. We do not  
24 believe that every complaint that has ever been made has been  
25 presented to the WUTC. We think we have a right to ask because

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1 only the Protestants have that information.

2           And we'll go through those data requests  
3 specifically, but those are the two general areas of inquiry  
4 that we have focused on. And, you know, we believe that we  
5 narrowly tailored them to those interests.

6           Now, nobody has picked up the phone and said to us,  
7 "Look. You asked for this general ledger, but do you really  
8 need every payor and payee," because I would say, "No, we  
9 don't."

10           I'm sure we can respond to reasonable requests to  
11 tailor the data requests to respond to what we need without  
12 making them unduly burdensome. But, nonetheless, that possibly  
13 is part of the discussion that we can have today.

14           I think my final observation would be that I  
15 understand why Stericycle is in on this hearing today. It does  
16 have some commonality of interest in terms of the overlay of our  
17 concern, Waste Management's need to prove both with regard to  
18 the WRRRA Protestants, as well as Stericycle, that our -- the  
19 Company's incremental increase into the remainder of the state  
20 is not going to adversely affect the financial viability of  
21 their operations. That is common to both of them, and certainly  
22 it is common to both of them that we will be in need of  
23 information from them about their customer services and customer  
24 demand.

25           There are two sides to the customer service coin.

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1 There certainly is the generator public, but there is also the  
2 serving community. And so knowing more about the actual service  
3 requests that the existing certificate holders have received is,  
4 I think, relevant information and necessary for us to prove our  
5 case.

6 We're not trying to make anybody spend a great deal  
7 of money. Jim's clients are Protestants, however, and in that  
8 role, they really have no different position than Stericycle  
9 does. Any one of them individually could be making the same  
10 case against Waste Management, so we -- you know, we considered  
11 whether there was some way of treating Jim's clients differently  
12 in terms of the data requests. We actually actively evaluated  
13 that prospect and concluded that we just didn't see how just  
14 because they're smaller. We still need the same information  
15 from them.

16 So I will pause -- I will pause with one last  
17 comment, which is that I do think there's commonality of  
18 interest between Stericycle and WRRRA here, but this is Jim's  
19 hearing, it is Jim's motion, and I think he should be carrying  
20 the water, not Steve.

21 JUDGE KOPTA: All right. Fair enough.

22 Ms. Woods, did you want to add anything?

23 MS. McNEILL: I'm sorry. I should pause and ask  
24 whether Mr. Kenefick has anything to add, if you don't mind.

25 JUDGE KOPTA: Oh, all right.

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1           MR. KENEFICK: I would just reiterate that we have  
2     tried to be careful to carefully tailor these data requests to  
3     make sure that they would not be unduly burdensome, and would  
4     certainly look for opportunities to narrow them down to be able  
5     to both address the concerns that Jim's clients have about  
6     having to spend too much time and money to pull this material  
7     together, yet balanced against the needs that we have to -- to  
8     make the showing that Polly has already outlined that we're  
9     obligated to do.

10           And it's -- you know, the very nature of discovery is  
11     to find out information that the other side has. And we can get  
12     into some of the discussions, I'm sure, with respect to No. 1  
13     that Steve Johnson raised, but I just -- I think it's not quite  
14     good enough to say, "Well, you could go find it somewhere else."

15           That's not typical of discovery, and it can be very  
16     burdensome to expect parties to go develop that information  
17     truly on their own without having access to the kinds of  
18     information that the very Protestants, you know, would have.

19           So I think we're -- we're happy to discuss how we can  
20     narrow it, and we'll certainly do so provided we can still get  
21     the necessary information to present our case. Thank you.

22           JUDGE KOPTA: All right. Ms. Woods, now is there  
23     anything that you would like to add?

24           MS. WOODS: This is Fronda Woods, Assistant Attorney  
25     General, and, no, I have nothing to add at this time.

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1                   JUDGE KOPTA: Okay. I didn't think you had a dog in  
2 this fight.

3                   All right. Mr. Sells, I will overrule your general  
4 objection to providing responses to any data requests at this  
5 stage of the proceeding. Protestants are like any other party.  
6 They are subject to discovery requests. And, obviously, pending  
7 consideration of individual requests, I don't think there's any  
8 basis for relieving your clients from their obligation to  
9 respond to discovery.

10                   So at this point, I think we have two options: One  
11 is that we could walk through each of these step by step, and I  
12 can hear competing concerns and rule on the objections that have  
13 been raised by the WRRRA Protestants.

14                   I'm hesitant to do that simply because in general,  
15 the Commission expects that the parties will discuss these  
16 discovery disputes before bringing in to the Commission and have  
17 already worked out ways that they might been narrowed. That  
18 hasn't been done in this case, largely because there was the  
19 general objection to any kind of discovery at all. But now that  
20 that has been overruled, then there is an opportunity now for  
21 parties to have those discussions.

22                   I am aware, however, that I don't want to be back  
23 here again in a couple of weeks to go back over these same data  
24 requests, only somewhat narrowed after the parties have had a  
25 chance to discuss them.



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1                   Accordingly, Option No. 2 would be to go off the  
2 record, have a discovery conference, in which I can be involved  
3 in the parties' discussions of ways to narrow these requests,  
4 and then to the extent that at the end of that discussion there  
5 are disputes that the parties cannot resolve among themselves,  
6 we can go back on the record and I can resolve those disputes.

7                   So, Mr. Sells, since this is your party, do you have  
8 a preference about how we proceed?

9                   MR. SELLS: Door No. 2 is what I was really intending  
10 here, and that is to get Your Honor's thoughts on these three or  
11 four major issues here and go from there.

12                  JUDGE KOPTA: All right. Does anybody have an  
13 objection to proceeding that way?

14                  MS. MCNEILL: This is Polly McNeill. I don't have an  
15 objection to it, but I do have a caveat about it. As you know,  
16 we were a little confused about what today's hearing or  
17 conference, which one it was going to be, and I would be  
18 delighted to walk through Door No. 2 with Mr. Sells.

19                  However, you know, we rely to a great deal on our  
20 financial experts and operations people in terms of describing  
21 what the needs are and how they -- you know, how they have their  
22 books which translates to how they expect the other -- the  
23 Protestants to have their books.

24                  So there are going to be points of discussion and  
25 detail that I would suspect Mr. Sells would agree with me. We,

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1 as lawyers, may not be using the right terminology or talking  
2 about the right specifics, so we did not -- I mean, a discovery  
3 conference, as we read the rule, would have been us with our  
4 experts sitting down with Jim and his people and trying to  
5 figure out what exactly we need in an informal off-the-record  
6 kind of discussion.

7 I'm a little uncomfortable to be having that  
8 discussion before Your Honor. You know, even though it's not on  
9 the record, still, once the bell's rung -- I mean, you know,  
10 you've heard this.

11 So I just have some concerns about number one, how  
12 far we can go with the discovery conference, because we're not  
13 really prepared for taking that to the ultimate conclusion, and  
14 how far we should go with the discovery conference in light of  
15 the fact that we're all on this together.

16 MR. JOHNSON: Your Honor, this is Steve Johnson. If  
17 I could comment for a moment?

18 JUDGE KOPTA: Sure.

19 MR. JOHNSON: Thank you. I think Ms. McNeill's  
20 points are very well made, and, frankly, I think, you know, we  
21 had -- we had raised informally the question of whether this  
22 might be punted downstream a little bit to allow Stericycle to  
23 come to the table with its position on the discovery requests  
24 that have been submitted to Stericycle. And it seems to me that  
25 the logic of what Ms. McNeill is saying is absolutely the case.

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1 For all of us, you know, lawyers, we need to be able to pull in  
2 the accounting experts and the financial people that have access  
3 to the information that is at issue to decide, you know, in a  
4 coherent way, what can be produced, within what time frame, and  
5 what may be broader than what the Waste Management folks  
6 actually need for their purposes.

7 So my inclination would be to suggest that Your Honor  
8 terminate the discussion at this point, having ruled on the  
9 general objection of Mr. Sells, remit the parties to their -- to  
10 informal discovery conference process, in which they would  
11 participate -- in which all Protestants would participate with  
12 Waste Management, and see if we can sort of work these things  
13 out or at least narrow the issues and present them in a little  
14 more -- with a little more development before we try to wade  
15 into these things in front of Your Honor.

16 MS. McNEILL: Excuse me. This is Polly McNeill  
17 again. Again, I'm the only woman, so I guess I'll stop saying  
18 who I am.

19 But it strikes me that there might be a middle ground  
20 here. It strikes me that it would be, I think, very useful to  
21 go through the individual data requests and determine the extent  
22 to which they are relevant, given our limitations in terms of  
23 not having the financial and operational people with us.

24 But if we march through them -- I mean, for instance,  
25 there may be a data request that when we discuss it, Your Honor,

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1 you say, you know, "That's" -- "No, you don't need that.  
2 Forget" -- "Drop it," or, "Yes, you do. Yes, Waste Management  
3 does need that. Now, exactly what they need, I will send you  
4 off to work out together and try to figure out how you can  
5 respond to it."

6 But what -- you know, the topic of what they are  
7 inquiring and asking about is a permissible one, so I think we  
8 could make some progress in alleviating the potentiality for  
9 some threshold squabbles but tabled, perhaps for later, the  
10 opportunity to work through the details of how to actually  
11 respond to the requests.

12 JUDGE KOPTA: Mr. Sells, do you want to comment on  
13 these?

14 MR. SELLS: Well, yeah. I don't necessarily disagree  
15 with anything that either Steve or Polly just said.

16 My experience over way too many years, not  
17 necessarily in administrative matters, but in civil matters, is  
18 that if you're trying to some -- some sort of agreement even on  
19 discovery, that it is just extremely helpful to have a third  
20 party there. Whether you call them a mediator or a consummatory  
21 person or even the judge in an informal capacity, I can imagine  
22 us sitting, you know, for a whole day in Seattle surrounded by  
23 guys with pocket protectors and, you know, calculators and not  
24 get to the basic questions.

25 Like a basic question, for example, on our No. 1, is

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1 produce a detailed general ledger.

2 Well, is that general ledger for everything? Is that  
3 general ledger for medical waste? You know, what is it? Other  
4 questions like does the DiTomasso rule apply; you know, general  
5 sorts of things.

6 But I certainly have no problem in taking part in  
7 whatever sort of formal or informal proceeding we have here,  
8 although I have to -- you know, I have to warn everybody that  
9 I'm going to have people on the telephone who may or may not be  
10 able to answer these questions.

11 JUDGE KOPTA: Okay. I think I get the general idea,  
12 which is, again, why the Commission prefers that folks talk  
13 about this before bringing these issues.

14 So what I propose to do is to go off the record, and  
15 we can have some informal discussions. I can give you my  
16 preliminary thoughts and general guidance off the record so that  
17 you will have an idea, when you are negotiating, where I'm  
18 likely to come down if you bring the issue to me for resolution.

19 But, otherwise, I will leave to the parties  
20 discussions among themselves to try and narrow the scope of  
21 these requests and make sure that they do what they can to  
22 provide Waste Management with the information that it feels that  
23 it needs.

24 So with that, let's be off the record.

25 (A break was taken from 10:38 a.m.)

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1 to 10:57 a.m.)

2 JUDGE KOPTA: Let's be back on the record.

3 While we were off the record, we had informal  
4 discussions about the specific requests that Waste Management  
5 had propounded to the WRRRA Protestants. The parties are going  
6 to negotiate those requests, and, if necessary, bring back any  
7 disputes that they are unable to resolve among themselves for  
8 decision by the Commission.

9 But pending that, we have concluded our discussion of  
10 these issues for today and are adjourned. Thank you.

11 (Proceeding adjourned at 10:58 a.m.)

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