

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET TG-140560
TRANSPORTATION COMMISSION,	)	
	)	
Complainant,	)	ORDER 05
	)	
v.	)	
	)	
WASTE CONTROL, INC. (G-101),	)	
	)	
Respondent.	)	
	)	
.....	)	

**ORDER GRANTING IN PART AND DENYING IN PART STAFF’S MOTION  
TO CLARIFY THE SCOPE OF WAC 480-07-520(4) AND MOTION TO  
COMPEL; GRANTING IN PART AND DENYING IN PART WCI’S MOTION  
FOR DISCOVERY MASTER AND/OR ALTERNATIVELY, SCHEDULING  
OF A DISCOVERY CONFERENCE**

**NOTICE OF DISCOVERY CONFERENCE**  
**(Set for July 11, 2014, at 9:30 a.m.)**

1 **Background.** On April 3, 2014, Waste Control, Inc. (WCI or Company) filed with the Washington Utilities and Transportation Commission (Commission) new Tariff No. 16 reflecting a general rate increase that, if approved, would generate approximately \$532,000 (15.4 percent) in additional revenue. The Commission convened a prehearing conference in this docket on April 30, 2014, before Administrative Law Judge Marguerite E. Friedlander (ALJ). At the prehearing conference, the parties agreed to a technical conference between their subject matter experts on May 15 and 16, 2014.<sup>1</sup>

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<sup>1</sup> Per the transcript:

ALJ: Well, and I think that it’s sounding more and more to me that the experts should really sit down for however long it takes and figure out what is – what are these discrepancies, why are

- 2 **Appearances.** David W. Wiley, Williams, Kastner & Gibbs PLLC, Seattle, Washington, represents WCI. Brett Shearer, Assistant Attorney General, Olympia, Washington, represents the Commission’s regulatory staff (Staff).<sup>2</sup> James K. Sells, Gig Harbor, Washington, represents the Washington Refuse and Recycling Association (WRRRA).
- 3 **Procedural History.** On June 10, 2014, WCI filed a Motion for Appointment of a Discovery Master and/or, Alternatively, Scheduling of a Discovery Conference (WCI’s Discovery Motion). On June 18, 2014, Staff filed its Response to the WCI Discovery Motion (Staff’s Response). WRRRA filed a Response to, and Joinder in, Respondent’s Discovery Motion (WRRRA’s Response and Joinder) on June 23, 2014.<sup>3</sup>
- 4 On June 12, 2014, Staff filed a Motion to Clarify the Scope of WAC 480-07-520(4), Compel Discovery, and Expedited Motion for Extension of Time (Staff’s Discovery Motion).<sup>4</sup> WCI filed a Response to Staff Discovery Motion on June 23, 2014 (WCI’s Response).

### **WCI’s Position**

- 5 Acknowledging Staff’s “continuing dissatisfaction ... with the thousands of pages of responses, supporting data and documents supplied so far by the Company in discovery,”<sup>5</sup> WCI requests the appointment of a third-party discovery master to

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they there, and then you’ll be able to do more in the way of discovery and such. Friedlander, TR 25:6-10.

<sup>2</sup> In a formal proceeding, such as this, the Commission’s 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.

<sup>3</sup> WRRRA echoes many of WCI’s comments in support of the Commission appointment of a discovery master and/or convening a discovery conference.

<sup>4</sup> The Expedited Motion for Extension of Time in which Staff requested modification of the procedural schedule by ten weeks due to the discovery dispute was granted in part and denied in part in Order 04. The procedural deadlines have been extended by four weeks, and this Order will not address that portion of Staff’s Discovery Motion.

<sup>5</sup> WCI’s Discovery Motion, ¶ 3. WCI explicitly rejects the idea of utilizing the assigned ALJ for this purpose, stating that “a third-party discovery master, as is the practice under the Civil Rules and as is anticipated by WAC 480-07-425(1), is likely the more appropriate facilitator/adjudicator

resolve the “discovery impasse.”<sup>6</sup> In the alternative, or even concurrently, the Company asks the Commission to convene a discovery conference pursuant to WAC 480-07-415.<sup>7</sup>

- 6 WCI states that it has contacted Staff on numerous occasions via email, correspondence, and telephone to resolve Staff’s apparent discontent with the Company’s data request responses.<sup>8</sup> Yet, WCI contends that Staff has expended “negligible effort to date to communicate with the Company about any alleged continuing deficiencies or shortcomings in the discovery process.”<sup>9</sup> For example, WCI notes that Staff’s Discovery Motion was the first it had heard that Staff had a problem with WCI’s responses to Staff Data Request Nos. 7 and 8.<sup>10</sup> The Company contends that Staff has not attempted to “work out discovery disputes ‘informally’ and ‘in good faith.’”<sup>11</sup> In fact, WCI argues that the Commission’s discovery rule “presuppose[s] some effort, perhaps a telephonic or email request, for written follow-up to the [r]esponse before a [m]otion to [c]ompel is filed.”<sup>12</sup>
- 7 The Company contends that any objections Staff has concerning WCI data request responses would best be handled by an in-person discovery conference or in-person additional technical conferences.<sup>13</sup> WCI asserts that the perfect opportunity to resolve any issues Staff had was the May 15-16, 2014, technical conference.<sup>14</sup> Instead, by refusing to participate in-person and limiting the subject matter of the conference “to reconciling the differences between the dismissed and current filing,” Staff circumvented that opportunity.<sup>15</sup>

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of standard and ongoing discovery rule interpretation and application issues in this proceeding.”  
*Id.*, n 2.

<sup>6</sup> *Id.*, ¶ 10.

<sup>7</sup> *Id.*, ¶ 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, ¶ 5.

<sup>10</sup> *Id.*, ¶ 28.

<sup>11</sup> *Id.* (citing implicitly to WAC 480-07-425).

<sup>12</sup> *Id.*, ¶ 29.

<sup>13</sup> *Id.*, ¶ 6

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, n. 4 and WCI’s Response, ¶ 9.

8 In support of this claim, WCI attached several emails and correspondence between the Company and Staff which date back to before and even after the technical conference. These emails concern discovery issues including the hardcoding of spreadsheets.<sup>16</sup> Staff demands that the Company replace these hardcodes with calculations and externally-linked documents used in support of its filing. One of the spreadsheets in controversy is an exhibit, Exhibit No. JD-8, sponsored by WCI witness, Ms. Jacqueline Davis. The Company argues that its exhibit is an “amalgamated work product of [S]taff and [the C]ompany [created] in the evolution of audits ... in other words, the [C]ompany ([B]ooth Davis) was not uniformly the author/creator of some parts of the worksheets, etc.”<sup>17</sup> WCI also indicates that it only included the spreadsheet in support of Ms. Davis’ testimony “to establish where [it] derived the amount of the 2009 [affiliated] rent allowance” allowed in the prior general rate case.<sup>18</sup> In Attachments 8 and 9 to WCI’s Discovery Motion, the Company includes emails from Ms. Davis, an accountant, to Ms. Melissa Cheesman, Staff’s accountant, stating that hardcodes for the spreadsheets associated with Exhibit No. JD-8 have been corrected. In a later email from Ms. Cheesman to Ms. Davis, Staff informs WCI that the revised spreadsheets still contain hardcodes and external links but does not indicate the location of the non-conforming cells in each spreadsheet.<sup>19</sup> The Company contends that a discovery conference that would get the parties in the same room is a better option than the constant volley of data requests and apparently non-conforming responses.<sup>20</sup>

9 In addition, WCI argues that the Commission’s rules do not require removal of the controversial hardcodes.<sup>21</sup> Neither the general discovery rule, WAC 480-07-400, nor the electronic formatting rule, WAC 480-07-140(6) and the solid waste general rate case rule, WAC 480-07-520(4), explicitly require the removal of hardcodes or externally-linked sources.<sup>22</sup> In fact, the Company asserts that the Commission’s regulations provide an exemption to the production requirement for electronic spreadsheets that are not created by, for, or on behalf of a party to or a witness in the

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<sup>16</sup> See Attachment 6 to WCI’s Discovery Motion.

<sup>17</sup> Attachment 5 to WCI’s Discovery Motion.

<sup>18</sup> Attachment 6 to WCI’s Discovery Motion.

<sup>19</sup> Attachment 10 to WCI’s Discovery Motion.

<sup>20</sup> WCI’s Response, ¶ 11.

<sup>21</sup> See Attachment 22 to WCI’s Discovery Motion.

<sup>22</sup> WCI’s Response, ¶ 12.

proceeding for which no version in the required formatting is available<sup>23</sup> or are voluminous material not originally prepared in the required format.<sup>24</sup>

### Staff's Position

- 10 Staff asserts that the appointment of a discovery master and/or scheduling of a discovery conference would “be an exercise in futility at this stage of the proceeding.”<sup>25</sup> Staff argues a discovery master would face the “extremely difficult and time-consuming task” of reviewing “extensive amount[s] of relevant information” produced so far in this proceeding and its predecessor, Docket TG-131794.<sup>26</sup> Similarly, it dismisses the suggestion of a discovery conference, noting frankly that WCI “has provoked exasperation among Staff” such that “there is simply no longer substantial prospect for a discovery conference to save Staff or the Company effort or expense.”<sup>27</sup>
- 11 Instead, Staff asks that the Commission clarify that solid waste companies seeking a general rate increase are required to provide supporting calculations and documents pursuant to WAC 480-07-520(4) and the work paper filing rules.<sup>28</sup> With the clarification, Staff requests that the Commission then compel full responses to its Data Request Nos. 7, 8, and 11.<sup>29</sup> Absent WCI’s work papers, which Staff characterize as “absolutely essential” and the subject of the aforementioned data requests, it cannot fully analyze the Company’s request.<sup>30</sup>
- 12 With regard to WAC 480-07-520(4), Staff asks the Commission to rule that WAC 480-07-520(4) and WAC 480-07-140(6) require WCI to provide Staff “with spreadsheets that include formulas and linked spreadsheets ... [that are not] locked, password protected, or [include] hidden cells.”<sup>31</sup> If hardcodes within the Company’s

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<sup>23</sup> *Id.*, (citing WAC 480-07-140(6)(b)(i)(A)).

<sup>24</sup> *Id.*, (citing WAC 480-07-140(6)(b)(i)(B)).

<sup>25</sup> Staff’s Response, ¶ 1.

<sup>26</sup> *Id.*, ¶ 5.

<sup>27</sup> *Id.*, ¶ 6.

<sup>28</sup> *Id.*, ¶ 7.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Staff’s Discovery Motion, ¶ 8.

responses to Staff Data Request Nos. 7, 8, and 11 cannot be linked, Staff requests that the Commission order the Company to cross-reference these values “so that their sources and destinations are readily identified.”<sup>32</sup>

13 Staff argues that discovery rules are broad, with limits primarily focused on requests that are unreasonable and create excessive burdens on responders.<sup>33</sup> However, Staff asserts that the Commission’s own rules require provision of the information for which it is asking.<sup>34</sup>

14 The Commission’s rules require both proper formatting,<sup>35</sup> for example, spreadsheets submitted in the Excel format, and supporting formulas with “all supporting calculations and documentation for all adjustments.”<sup>36</sup> Staff explains that WAC 480-07-140(6)(b) requires that these formulas and calculations are not locked, password protected, or hidden.<sup>37</sup> According to Staff, WCI’s attempts to comply with this provision resulted in the Company removing “cell references to linked files in the belief that it would not have to provide the linked files.”<sup>38</sup> Yet, in removing these references, WCI created more hardcodes and further complicated Staff’s analysis of the data.<sup>39</sup>

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<sup>32</sup> *Id.* Staff also makes one sole reference to seeking an order “to compel [WCI] to provide narrative, with spreadsheet locations, that describe and locate all changes the Company has made to spreadsheet ‘DR 3 and DR 4 – TG-140560WCI Operations 052214.xls’.” Staff Discovery Motion, ¶ 3. This spreadsheet is not referenced in Staff’s Data Request Nos. 7, 8, and 11, nor is the document directly referenced again. Having failed to provide support for the request to compel narration regarding DR 3 and DR4 – TG-140560WCI Operations 052214.xls, that request is denied. Staff is encouraged to work with the Company on obtaining that narrative at the July 11, 2014, discovery conference.

<sup>33</sup> Staff Discovery Motion, ¶ 11.

<sup>34</sup> *Id.* “Thus, a regulated company must be prepared to provide supporting formulas and externally-linked documents for all values included in its general rate filing.”

<sup>35</sup> *Id.*, ¶¶ 12 and 13. See, WAC 480-07-140(6)(b).

<sup>36</sup> *Id.*, ¶ 15 (quoting WAC 480-07-520(4)(a)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

- 15 Staff, in support of its Motion to Compel, asserts that WCI only provided an incomplete response to Data Request No. 7.<sup>40</sup> The Company addressed only six of the seventeen adjustments, and, even then, its response simply contained “a copy of [WCI’s] May 16, 2014, summary report of the May 15 and 16 [t]echnical [c]onference.”<sup>41</sup> Within this summary, the Company references several spreadsheets “but does not provide file names to clarify [its] response.”<sup>42</sup>
- 16 WCI refused to provide a meaningful response to Data Request No. 8, and instead, the Company stated that the request for supporting workbooks “was resolved as well in last week’s technical conference.”<sup>43</sup> Staff states that WCI claimed to have already answered the Data Request in the attachment to Staff Data Request No. 7, a May 19, 2014, letter to Staff’s attorney, and responses the Company submitted to Staff Data Request Nos. 2 and 8 in Docket TG-131794.<sup>44</sup>
- 17 Staff argues that none of these documents provides the detailed narrative addressing “the used and usefulness of all the itemized properties included in [WCI’s] supporting workbook(s).”<sup>45</sup> The information provided by WCI regarding Data Request Nos. 2 and 8 in Docket TG-131794, according to Staff, does not include detailed narratives of “the used and usefulness of all property included in land rents”<sup>46</sup> or “construction that took place during the test year to April 3, 2014, on all the itemized properties included in the supporting [workbook(s)].”<sup>47</sup>
- 18 Finally, Staff states that it propounded Data Request No. 11 asking, in part, that the Company:

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<sup>40</sup> *Id.*, ¶ 30.

<sup>41</sup> *Id.*, ¶ 31.

<sup>42</sup> *Id.*, ¶ 32.

<sup>43</sup> Appendix E to Staff’s Discovery Motion.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, and Staff’s Discovery Motion, ¶ 38.

<sup>46</sup> *Id.*, ¶ 40.

<sup>47</sup> *Id.*, ¶ 41.

please correct [all filed, either received or newly filed] to comply with WAC 480-07-140(6)(b): for every hardcode, provide the source or calculation, and provide all externally linked files. If the [C]ompany provides externally linked files that themselves contain hardcodes or external links, (1) for every hardcode, provide the source or calculation, and (2) provide all externally linked files.<sup>48</sup>

Staff asserts that WCI has objected to providing this information on multiple grounds, including the exemptions listed in WAC 480-07-140(6)(b)(i)(A) and (B).<sup>49</sup> WAC 480-07-140(6)(b)(i)(A) exempts “[d]ocuments not created by, for, or on behalf of a party to or a witness in the proceeding for which no version in the required formatting is available,” and WAC 480-07-140(6)(b)(i)(B) exempts “[p]ublished, copyrighted material and voluminous material not originally prepared in the required format.” Both exemptions turn on the unavailability of documents requested in an electronic spreadsheet format. Staff contends that, based on the fact that WCI provided the documents as spreadsheets in response to the data requests, “they are already in the requisite format.”<sup>50</sup>

19 **Discussion.** We decline to opine upon the scope of WAC 480-07-520(4), as requested in Staff’s Discovery Motion, since the production of the information Staff seeks is already required under WAC 480-07-140(6). WAC 480-07-140(6)(b) requires submission of electronic versions of all documents provided to the Commission in .pdf (Adobe Acrobat) format, supplemented by a separate file in an accessible format (i.e., Excel, MS Word, or Power Point) “so that spreadsheets displaying results of calculations based on formulas include all formulas, and do not include locked, password protected or hidden cells.”<sup>51</sup> Spreadsheet cells that are hardcoded are, for all relevant purposes, locked. Without the formula or external link to an invoice, receipt, or other document, Staff is unable to fully analyze the Company’s financial documents.

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<sup>48</sup> Appendix A to Staff’s Discovery Motion at 1.

<sup>49</sup> Staff’s Discovery Motion, ¶ 10.

<sup>50</sup> *Id.*, ¶ 13.

<sup>51</sup> WAC 480-07-140(6)(b). (Emphasis added).



20 The two exceptions to this requirement in the Commission’s rules, as argued by WCI, are inapplicable. First, WAC 480-07-140(6)(b)(i)(A) exempts production of documents that were not created by, for, or on behalf of a party or witness in the proceeding for which no version in the required format is available. Yet WCI is not arguing that the documents cannot be produced in the correct “format” (i.e., an Excel spreadsheet). They are already in the appropriate format. The Company asserts that the document is an “amalgamated” work product of Staff and WCI, and therefore, Ms. Davis’ own exhibit was not created for, by, or on behalf of the Company or any other party to the proceeding. This argument is illogical. Ms. Davis is sponsoring the exhibit, the Company admits to playing a role in its creation, and it cannot now argue the exemption in WAC 480-07-140(6)(b)(i)(A). Further, WAC 480-07-140(6)(b)(i)(B) exempts production of voluminous documents not originally prepared in the required format. Ms. Davis’ Exhibit No. JD-8 is 4 pages in length and hardly what one would call voluminous.

21 Staff’s Data Request Nos. 7, 8, and 11 appear relevant to the issues in the adjudicative proceeding or likely to lead to the production of information that is relevant. WCI’s only objection, with regard to WAC 480-07-400, relates to the “cumulative, burdensome, and expensive delays” Staff’s technical objections to its hardcoded and externally-linked spreadsheets have caused WCI.<sup>52</sup> WCI has not demonstrated that the information sought by Staff is duplicative or is obtainable from another source that is more convenient, less burdensome or expensive. Staff’s Motion to Compel Response to Staff Data Request Nos. 7, 8, and 11 is granted.

22 That said, the Commission understands WCI’s frustration with Staff’s decision to participate telephonically in a technical conference that was clearly meant to be conducted in person. Part of the confusion and delay relating to WCI’s failure to provide responsive information to Staff must fall on Staff’s shoulders. It becomes evident, through reading the multiple pages of email trails between Staff’s and the Company’s experts, that some disputes should be worked out face-to-face. In an effort to expeditiously promote the production of acceptable responses to Staff’s Data Request Nos. 7, 8, and 11, as compelled by this Order, WCI’s Motion for a Discovery Conference is granted.

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<sup>52</sup> WCI’s Response, ¶ 11.

23 **THE COMMISSION GIVES NOTICE That a discovery conference in this matter will be held on Friday, July 11, 2014, beginning at 9:30 a.m. in Room 212, Richard Hemstad Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. The Commission’s teleconference bridge line will not be available for the discovery conference.** Both WCI and Staff, as well as each parties’ accounting experts, are directed to attend. The discovery conference will continue, as needed, until 4:30 p.m. WCI and Staff will bring all necessary documents, electronic files, and electronic devices (i.e., laptops, tablets, et cetera) with them. While the main purpose of the conference will be to facilitate the exchange of information and unlocking of hardcodes and external links associated with Staff Data Request Nos. 7, 8, and 11, the parties should use this time to collaborate on any and all outstanding discovery matters.

24 The Commission does not utilize “Discovery Masters” as contemplated by WCI, and the request for the appointment of such is denied. However, there does appear to be some need for an individual who can assist the parties with issues of hardcoding and externally-linked sources. In accordance with WAC 480-07-415, Mr. Danny Kermode, Commission Senior Policy Advisor and accountant, will act as facilitator at the July 11, 2014, discovery conference in accordance with this Order. Mr. Kermode is not associated with either party and has not been assigned to assist the ALJ in drafting the initial order in this proceeding. The discovery conference will not be recorded nor will statements made by the parties at the conference be admissible as evidence unless the parties agree otherwise. The parties are directed to work with each other, and Mr. Kermode, in good faith to facilitate the exchange of information at this discovery conference. It is anticipated that Staff will receive responses to Data Request Nos. 7, 8, and 11, that any other discovery issues will be resolved, and that Staff will file its response testimony by July 18, 2014, the current deadline.

### **ORDER**

#### **THE COMMISSION ORDERS THAT:**

25 (1) The Motion to Clarify the Scope of WAC 480-07-520(4) and Compel Discovery, filed by Staff, is granted in part and denied in part, in accordance with paragraphs 19-21, above.

- 26 (2) The Motion for Appointment of a Discovery Master and/or, Alternatively, Scheduling of a Discovery Conference, filed by Waste Control, Inc., is granted in part and denied in part, in accordance with paragraphs 22-24, above.
- 27 (3) Staff and Waste Control, Inc., along with their respective accounting experts, are directed to attend a discovery conference **on Friday, July 11, 2014, at 9:30 a.m.** to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective July 2, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER  
Administrative Law Judge