

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

MURREY'S DISPOSAL COMPANY,

Respondent

DOCKET TG-230778

COMMISSION STAFF'S AMENDED
MOTION FOR A SPECIAL
PROTECTIVE ORDER

I. INTRODUCTION

1 In any Commission proceeding, discovery should be aimed at the disclosure of relevant evidence and not engaged in where the propounding party has other, less burdensome means of obtaining the evidence. Murrey's has served on Staff several data requests that run afoul of these guidelines: they are either aimed at discovering information about the Commission and its processes, none of which is directly relevant or reasonably calculated to result in relevant, admissible evidence, or they ask Staff to produce evidence that Murrey's could obtain through other, less burdensome means. Staff, accordingly, asks the Commission to issue a protective order excusing it from answering those data requests.

II. RELIEF REQUESTED

2 Staff respectfully requests that the Commission issue an order excusing it from responding to the following data requests or data request subsections: 1, 2, 3, 4, 7a, 7b and 8.

III. STATEMENT OF FACTS

3 On December 21, 2023, the Commission suspended this matter, which concerns Murrey's most recent rate case, pending an investigation into whether the filed rates were

fair, just, reasonable, and sufficient.¹

4 After a prehearing conference, the Commission issued Order 02 in this matter.² As
relevant here, Order 02 authorized discovery pursuant to the Commission’s rules.³

5 On March 4, 2024, the Company served Staff with its Data Request Nos. 1-8.

6 Several of the data requests ask about the Commission’s employment practices. For
example, Data Request No. 1 concerns severance.⁴ It provides, in full:

Severance.

- a. Has the Commission paid severance to any union or non-union employee/staff member in the past five years?
- b. If so, please provide the number of individual severance payments by year from 2019 to the present and the aggregate total amount of payments.
- c. What benefit to state taxpayers does the Commission believe is advanced by the payment of severance ?
- d. What business or regulatory purpose is served by paying severance in the above cases?
- e. Has the Commission granted severance as an allowed expense in whole or in part in any solid waste collection company general rate case in the last three years? If so, please identify the company and docket number in which severance was allowed.⁵

¹ See generally, *Wash. Utils. & Transp. Comm’n v. Murrey’s Disposal Co.*, Docket TG-230778, Order 01 (Dec. 21, 2023).

² See generally, *Wash. Utils. & Transp. Comm’n v. Murrey’s Disposal Co.*, Docket TG-230778, Order 02 (Feb. 5, 2024). (Order 02).

³ Order 02 at 1 ¶ 4.

⁴ Decl. of Jeff Roberson, Attachment A, at 1 (“Roberson Decl.”).

⁵ Roberson Decl., Attachment A, at 1.

Data Request Nos. 3⁶ and 8⁷ similarly concern employment practices and relate to the

⁶ Data Request No. 3 reads:

Employee Meals.

Does the Commission ever provide employee meals? If so, what is the business or regulatory need for providing meals?

- a. What benefits accrue to regulated companies and/or ratepayers though the provision of employee meals?
- b. If meals are in fact ever provided, what is the approval process for their provision and are there any budget limitations on their provision?
- c. Has the Commission authorized company-provided employee meals as an allowed expense in whole or in part in any solid waste collection company general rate case filing in the last three years? If so, please identify the company and docket number in which employee meals were allowed.
- d. Please provide a list of Commission-paid employee meals in 2022 and 2023. If possible, provide location, number of employees present, amount paid, and regulatory purpose.
- e. Please provide a copy of the Commission's policy, if any, for providing food for employee meals, events and/or meetings-
- a. Please also provide a copy of the Commission's policy, if any, on mileage and travel reimbursement for Commission employees.

Roberson Decl., Attachment A at 1-2.

⁷ Data Request No. 8 reads:

"Blue Team"/Temporary Staffing.

The Company requests that costs incurred to temporarily fill vacant positions be included in rates. Through its Blue Team initiative, the Company addresses many such roles by absorbing the wages of workers from nearby affiliated companies at a daily premium that is paid directly to the employee, plus travel cost reimbursement through direct expensing of meals/hotel/mileage or through the use of a flat per diem.

- a. Does the Commission ever retain temporary staffing services to fill job vacancies during ongoing efforts to permanently fill them?
- b. If yes, please produce invoices for all temporary staffing invoices paid in 2022 to the present.

For each position filled with a temporary staffing position from 2022 to the present, please list the following:

- i. The amount of time the position was vacant between last full-time employment and the start date of the next full-time replacement employee.
- ii. Please list the last full-time wage paid prior to the vacancy and the average all-in wage paid (sum of wages to employee, benefits, and agency fees) to the outside staffing agency. For comparison purposes, please convert salaried positions to an hourly rate by dividing by 2080 hours.
- c. Has the Commission authorized temporary or contract labor as an allowed expense in whole or in part in any solid waste collection company general rate case filing in the last three years? If so, please identify the company and docket number in which temporary or contract labor expenses were allowed.

Roberson Decl., Attachment A, at 3-4.

Commission's provision of meals to employees and employment of temporary personnel, respectively.

7 Other Data Requests concern publicly available records. For example, Data Request No. 2 provides:

Suspended Cases.

How many transportation and water general rate cases have been subject to a suspension order since July 1, 2022 to present?

- a. Please list any such cases by company name and docket number by calendar year beginning July 1, 2022.
- b. To staff's knowledge, did any of those suspended proceedings involve insurance or casualty loss item disputes? If so, please provide the company name and docket number in which those items/issues were in dispute between the company and staff.

In a similar vein, Data Request No. 7⁸ concerns the "rate normalization adjustments" and asks about, among other things, the Commission's approval of any such adjustments for solid waste cases over the last five years.

8 One other data request concerns Commission processes. Specifically, Data Request No. 4 reads:

⁸ Data Request No. 7 reads:

The Company has requested that its large casualty loss be included in rates under the concept of rate normalization which allows for unusual but allowable costs to be amortized into the rates over a reasonable period of time.

- a. Has the Commission granted any rate normalization adjustments in past docketed solid waste rate cases in the last five years?
- b. If so, please list the docket numbers and nature of the normalization adjustment for each case approved in the 2019 through 2023 date range.
- c. What thresholds or standards does Staff apply to determine whether an adjustment qualifies for normalization?
- d. Does Staff consider a casualty loss to be unusual in a regulated transportation company's operations in which the company operates hundreds of thousands of miles annually?
- e. Does the absence of a civil or criminal citation associated with a casualty/accident loss influence Staff's position on accepting or denying a casualty loss inclusion in rates? Please explain.

Roberson Decl., Attachment A, at 3.

Case Handling.

- a. Aside from the assigned rate case analyst, who on staff is responsible for making the final decision on the amount of the revenue requirement of any filed solid waste general rate case to recommend at an Open Meeting?
- b. Is that the individual (s) who made the decision to recommend suspension to the Commissioners at the Open Meeting on December 21, 2023 for Docket Item TG-230778? If that is not the same individual (s) noted in DR 4. a. above, please identify that individual (s).⁹

9 The parties attempted to informally resolve disputes concerning these data requests during a phone call on March 5, 2024, and again on March 8, 2024.¹⁰ Unfortunately, the parties could not do so. This motion followed.

IV. STATEMENT OF ISSUES

10 Should the Commission issue a protective order excusing Staff from responding to Data Request Nos. 1 through 4; Data Request No. 7 subsections a and b; and Data Request No. 8?

V. EVIDENCE RELIED UPON

11 Staff relies upon the Declaration of Jeff Roberson, filed concurrently with this motion.

VI. ARGUMENT

12 Murrey’s objectionable data requests largely ask for information about the Commission and its internal processes, none of which is relevant here, or ask for information that the company could more easily obtain through its own research efforts. The Commission should grant the protective order excusing Staff from answering those data requests.

⁹ Roberson Decl., Attachment A, at 2.

¹⁰ Roberson Decl. Attachment A, at 2.

A. Governing Legal Principles

1. The Commission's Motion and Discovery Rules

13 The Commission's rules allow parties to file various types of motions in an adjudication.¹¹ Among these are discovery motions, which "are requests to resolve disputes concerning the exchange of information among parties during the discovery phase of a proceeding."¹²

14 The basic unit of discovery in an adjudication before the Commission is the data request.¹³ Data requests "call[] for another party to produce data in connection with an adjudicative proceeding."¹⁴ The Commission has explained that "[g]enerally, data requests seek one or more of the following: Existing documents; an analysis, compilation, or summary of existing documents into a requested format; a narrative response describing a party's policy, practice, or position; or the admission of a fact asserted by the requesting party."¹⁵

15 As seen in the definition of a data request, the Commission's rules allow for broad discovery.¹⁶ But that scope is not unlimited: "[d]iscovery must seek only information that is relevant to the issues in the adjudicative proceeding or that may lead to the production of information that is relevant."¹⁷ Further, "[p]arties must not seek discovery that is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. A discovery request is inappropriate where

¹¹ WAC 480-07-380.

¹² WAC 480-07-380(1)(c).

¹³ WAC 480-07-400(1)(c)(iii).

¹⁴ WAC 480-07-400(1)(c)(iii).

¹⁵ WAC 480-07-400(1)(c)(iii).

¹⁶ See WAC 480-07-400(1)(c)(iii); see also WAC 480-07-400(3) ("A party may not object to discovery on the grounds that the information sought will be inadmissible at the hearing, if that information appears reasonably calculated to lead to discovery of admissible evidence.").

¹⁷ WAC 480-07-400(3).

the party seeking discovery has had ample opportunity to obtain the information the party seeks or the discovery is unduly burdensome or expensive, taking into account the needs of the adjudicative proceeding, limitations on the parties' resources, scope of the responding party's interest in the proceeding, and the importance of the issues at stake in the adjudicative proceeding.”¹⁸

16 The Commission may limit discovery if a dispute arises between the parties. Parties must first make “good faith efforts to resolve” any such dispute on an informal basis.¹⁹ Where those efforts fail, the “presiding officer may order appropriate limitations on discovery” in response to a “motion by a party or by the person from whom discovery is sought that establishes a need to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, the presiding officer may order appropriate limitations on discovery.”²⁰ Those appropriate limits may include, among others, declaring that “[t]he discovery will not be allowed;” that “[t]he discovery will be allowed only on specified terms and conditions;” or that “[c]ertain matters may not be inquired into, or the scope of the discovery will be limited to certain matters.”²¹

2. **Relevance**

17 Both the Administrative Procedure Act and the Commission's rules point to the Washington's Rules of Evidence as a source of authority for evidentiary rulings.²² Those rules define relevant evidence as “evidence having any tendency to make the existence of

¹⁸ WAC 480-07-400(3).

¹⁹ WAC 480-07-425(1)(a).

²⁰ WAC 480-07-420(3).

²¹ WAC 480-07-420(3)(a), (b), (d).

²² RCW 34.05.452(2); WAC 480-07-495(1).

any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”²³

B. Data Request Nos. 1, 3, and 8 are not reasonably calculated to lead to the discovery of admissible evidence

18 The first set of objectionable DRs concerns the Commission’s employment practices over the last five years, specifically its payment of severance, provision of meals to employees, and employment of temporary employees. To state the obvious, the Commission is not seeking a rate increase; Murrey’s is. The Commission’s practices over that time period are neither directly nor indirectly relevant to the company’s request, and the Commission should issue a protective order excusing Staff from answering these DRs.

19 The Commission’s recent employment practices are not directly relevant to Murrey’s filing. While Murrey’s does pay regulatory fees, which it will recover through the rates that result from this proceeding, those fees do not reflect a pass through of costs.²⁴ Instead, the fee is fixed as one percent of Murrey’s gross intrastate revenues and has been fixed at that level for nearly 20 years.²⁵ Put otherwise, the Commission could have spent no money on severance, or employee meals, or temporary staff, and Murrey’s would pay one percent of its gross intrastate revenues in regulatory fees. The Commission, conversely, could have spent substantial sums of money, and Murrey’s would nevertheless still pay one percent of its gross intrastate revenues in regulatory fees. As the Commission’s employment practices do not affect the amount of regulatory fees paid, they are by definition inconsequential, and thus not of consequence.

²³ ER 401.

²⁴ See WAC 480-70-076.

²⁵ WAC 480-07-076.

20

Nor are the Commission's recent employment practices otherwise relevant to Murrey's filing. Industry standards might shed light on the reasonableness of Murrey's costs.²⁶ But the Commission and Murrey's are not members of the same industry such that the conduct of one illuminates the reasonableness of the conduct of the other. The Commission is an arm of the state.²⁷ Murrey's is a for-profit corporation. The Commission exists to ensure that entities like Murrey's act consistently with the public interest.²⁸ Murrey's exists to benefit its owners. More saliently, the Commission operates under various constitutional and statutory provisions that do not apply to Murrey's.²⁹ And, conversely, Murrey's operates subject to various statutory provisions that do not apply to the Commission.³⁰ Put simply, the Commission and Murrey's are not peers, and nothing about the Commission's policies sets some kind of industry standard that would serve as a guidepost for evaluating Murrey's. To the extent that Murrey's wants to introduce evidence about the conduct of its peers, it should be looking to sister companies in the Washington Refuse and Recycle Association, not its regulator.

21

Regardless, even if the Commission's conduct was somehow informative (and it is not, as just discussed), it would only be relevant if Murrey's acted with knowledge of and reliance on it. Solid waste collection companies are common carriers.³¹ In any rate proceeding involving a common carrier, the Commission must set rates that are fair, just,

²⁶ *Cf. Broten v. May*, 49 Wn. App. 564, n.3, 744 P.2d 1085 (1987) (noting that in negligence actions, "[i]ndustry standards are generally admissible as evidence of standard of care," which help define the reasonableness of the defendant's actions).

²⁷ RCW 80.01.010; RCW 81.01.010.

²⁸ RCW 80.01.040.

²⁹ *See, e.g.*, U.S. Const. AMEND. XIV, § 1 ("nor shall any state deprive any person of life, liberty, or property without due process of law."); *see generally* Title 41 RCW; chapters 42.30 & 42.52 RCW.

³⁰ *E.g.*, chapters 81.08, 81.12, and 81.16 RCW.

³¹ RCW 81.04.010(11).

reasonable, and sufficient.³² A bedrock principle underlying such rates is that they must only allow for the recovery of prudently incurred costs.³³ The Commission measures prudence by looking to what a reasonable company’s owners or management would have done knowing what they knew or should have known at the time they made the decision.³⁴

22 To include costs in rates, Murrey’s must thus show that it acted reasonably given what it knew at the time it acted. That makes one of two things true. If the company seeks discovery of information it did not already know at the time it paid severance, or provided meals, or employed temporary employees, then that information has no bearing on the prudence of its decisions. But if the company knew what the Commission was doing, and acted in light of that knowledge, then the company can obtain the information it seeks from a more convenient source – its own personal knowledge – making the request inappropriate.

C. Data Request Nos. 1(e), 2, 3(c), 7a, 7b, and 8(c) seek information that is irrelevant or readily available from a source that is more convenient and less burdensome

23 Data Request Nos. 1(e), 2, 3(c), 7(a), 7(b), and 8(c) concern information that Murrey’s can readily discover through publicly available information and through legal research tools that it has access to. It is unduly burdensome to require Staff to perform the company’s legal research for it and then pass what it learns on to the company given that reality.

24 Data Request No. 2 requests information about suspended cases. Staff does not keep a list of such cases. But any suspended case would inevitably require action by the

³² RCW 81.28.010, .230.

³³ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Order 09, 9-11 ¶¶ 36, 38-39 (Nov. 25, 2020).; e.g., *Wash. Utils. & Transp. Comm’n v. Waste Control, Inc.*, Dockets TG-140560, Order 12, (June 8, 2015); *King County Dep’t of Pub. Works, Solid Waste Division v. Seattle Disposal Co.*, Docket TG-940411, Third Supplemental Order (Sept. 14, 1994).

³⁴ *Wash. Utils. & Transp. Comm’n v. Puget Sound Energy, Inc.*, Docket UE-031725, Order 14, ¶ 65 (May 13, 2004).

Commission that would be recorded in a number of online databases: either a decision on the merits, the acceptance of a settlement, or the withdrawal of the complaint. Murrey's can readily find those orders on the Commission's website or with legal research tools, and, indeed, would likely use the exact same tools as Staff to do so. The discovery it seeks is thus more conveniently available through those methods.

25 Data Request Nos. 1(e), 2(c), 7(a), 7(b), and 8(c) seek information about any solid waste rate cases docketed in that last three or five years in which the Commission has allowed solid waste collection companies to recover in rates costs associated with severance pay, employee meals, or temporary employees, or "granted any rate normalization adjustments"³⁵ Staff does not keep a digest of such matters. But, if the Commission has authorized such recovery or granted a rate normalization adjustment, it has done so by order, and, as discussed above, Murrey's can find those orders as readily as Staff can. If the Commission has not specifically authorized recovery or granted the rate normalization adjustment by order, then the matter is definitionally legally irrelevant to the inquiry here,³⁶ which, again, concerns Murrey's expenses and Murrey's proposed rates.

D. Data Request No. 4 seeks information that is irrelevant

26 Data Request No. 4 seeks information about the suspension of filings and which staff members were involved with the suspension of Murrey's filing. That information is

³⁵ Roberson Decl., Attachment A, at 1, 2, 3, 4.

³⁶ *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994) (reasoning that "[in] cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised" and parenthetically citing *Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925), for the proposition that "questions which merely lurk in the record, but are neither brought to a court's attention nor ruled upon, are not considered to have been decided so as to constitute precedent.").

irrelevant, and the data request is not reasonably calculated to produce relevant, admissible information. The Commission should reject it for multiple reasons.

27 First, solid waste rate filings at the Commission proceed on one of two tracks. On the first track, the parties present the Commission with an agreement on revenue requirement, rate spread, and rate design, and the Commission allows the agreed upon rates to become effective either by operation of law³⁷ or by vote of a majority of the Commission.³⁸ On the second track, the parties reach no agreement and Staff recommends suspension of the filing,³⁹ which the Commission must approve by majority vote.⁴⁰

28 Data Request No. 4 concerns the second track, but the fact that this filing was suspended is irrelevant. Suspension is a procedural tool. It stays the effective date of a tariff change while the Commission investigates the tariff change.⁴¹ Suspension does not make the tariff change more likely to be fair, just, reasonable, and sufficient; nor does it make it less so. Whether the tariff change meets the fair, just, reasonable, and sufficient standard depends on the evidence supporting the rate or rule changes, and that all relates to the carrier's practices, not on the procedure used by the Commission.

29 Further, Data Request No. 4 is not reasonably calculated to lead to the discovery of admissible evidence. Staff recommended suspension here because it did not reach agreement with Murrey's before the tariff's effective date. To the extent that Data Request No. 4 seeks information, it could only seek information about the settlement negotiations between the parties and why they failed. But the statements and offers exchanged during those

³⁷ See RCW 81.28.050.

³⁸ See RCW 80.01.050; RCW 81.01.010.

³⁹ RCW 81.04.130.

⁴⁰ See RCW 80.01.050; RCW 81.01.010.

⁴¹ RCW 81.04.130.

negotiations, the ones necessarily involved in what Murrey's apparently seeks, are inadmissible per Commission rule.⁴² That rule is of a type with ER 408 and CR 68,⁴³ all of which are intended to encourage parties to explore settlement without fear that doing so will prejudice them if they fail to reach accord.⁴⁴ The Commission's open meeting process will look substantially different if parties cannot rely on that encouragement, and the Commission should excuse Staff from answering Murrey's questions on that basis.

VII. CONCLUSION

30 The Commission should grant Staff's motion and issue a protective order excusing Staff from answering the DRs to which it objects in this motion.

DATED this 14th day of March, 2024.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General

/s/ Jeff Roberson, WSBA No. 45550
Senior Assistant Attorney General
Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 522-0614
jeff.roberson@atg.wa.gov

⁴² WAC 480-07-700(6)(a).

⁴³ *E.g.*, ER 408, CR 68, CR 53.4; RCW 5.60.070, .072; RCW 7.70.070, .080; RCW 26.09.015.

⁴⁴ *See generally* Karl B. Tegland & Elizabeth A. Turner, 5A WASH. PRAC.: EVIDENCE LAW & PRACTICE, § 408.1 (6th. ed., Aug. 2023 update).