BEFORE THE WASHINGTON STATE UTILITIES
AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. MURREY'S DISPOSAL COMPANY, INC. d/b/a OLYMPIC DISPOSAL, Respondent.	Docket No. TG-230778 RESPONSE OF MURREY'S DISPOSAL COMPANY, INC. d/b/a OLYMPIC DISPOSAL TO COMMISSION STAFF'S MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

1 Pursuant to WAC 480-07-375(4), Murrey's Disposal Company, Inc. d/b/a Murrey's Disposal, ("Murrey's") Certificate G-9 responds to Staff's Amended Motion for a Protective Order as follows:

2 Staff misstates the governing principles of discovery under WAC 480-07-400, *et seq*. and Washington law. The opening presumption is not that discovery, or data requests, are limited to "relevant evidence" as determined by the responding party (i.e., Staff), but rather that data requests are always appropriate to seek any evidence which "may lead to the production of information that is relevant." WAC 480-07-400(3). That is necessarily determined by the requesting party, with relevance determinations pertinent to admissibility being made by the Commission when evidence is sought to be introduced. *Id*. Our Supreme Court has confirmed the breadth of discovery, stating "[t]he scope of discovery is very broad." *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 695 (2013). Particularly when discovery is propounded by a

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party with the burden of proof – here Murrey's – discovery takes on a constitutional dimension. *Id*., *citing Lowy v. PeaceHealth*, 174 Wn.2d 769, 777 (2012).

3 Staff originally put the issues of severance (Data Request No. 1), employee meals (Data Request No. 3), temporary staffing (Data Request No. 8) at issue by objecting to such expenses, requiring Murrey's to justify whether its expenses in these categories are "beneficial to the ratepayer." Murrey's is entitled to analyze whether the Commission incurs similar expenses, an issue that affects all state taxpayers (which is a broader category than just ratepayers), to analyze how best to account for those expenses under Staff's own principles.

4 One of the motivating factors for both parties in this proceeding is to gain Commission perspective on this important and increasingly common employer tool and Murrey's accordingly is entitled to cast a broad net in surveying the frequency and breadth of employer practices in that regard in both the private and public sectors. Since Staff has proposed removal of that expense it is appropriate for Murrey's to seek to determine whether that is a practice used by its own employer. Staff likewise implicates disallowing large casualty losses, regular but unforeseeable expenses, and so Murrey's propounded Data Request 7, asking whether the Commission has granted any rate normalization treatment to these types of significant losses. Thus, the Commission should deny Staff's Motion for Protective Order.

II. RELIEF REQUESTED

5 Should the Commission decline to enter a protective order for Data Requests 1, 3, 7a and b, and 8 when those requests are necessary for Murrey's to examine policy rationales for allowing or

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disallowing certain types of expenses in ratemaking, and to adjust their own expense policies accordingly?

6 Murrey's withdraws Data Requests 2 and 4.

III. ARGUMENT

7 The "right to discovery is an integral part of the right to access the courts embedded in our constitution." *Cedell*, 176 Wn.2d at 695; *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782-83 (1991) (the right of access is implicated whenever a party seeks discovery). The Commission is therefore guided by Supreme Court precedent analyzing the scope of discovery.

8 Discovery is a "broad right subject only to relatively narrow restrictions." *Id*. at 782. The burden of persuasion rests with the party or person seeking the protective order. *Cedell*, 176 Wn.2d at 696. Staff's Motion essentially seeks to prematurely halt initial fact-gathering by Murrey's, impeding its ability to sustain its burden of proof. Thus, any close questions on making such facts and circumstances available should fall on the side of ordering production of the information, since questions of admissibility can be dealt with at the appropriate evidentiary stage later in the proceeding.

A. The Information Staff is Withholding is Highly Relevant to Murrey's Tariff Revision

9 Data Requests No. 1, 3, and 8 seek information relevant to establishing the grounds for allowing or disallowing specific categories of expenses: severance (Data Request No. 1), employee meals (Data Request No. 3), and temporary staffing (Data Request No. 8). Those data Murrey's seeks ask Staff to provide relevant information on its possible utilization of these types of expenses,

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due to Staff's requirement that Murrey's justify these expenses based on a universal "benefit to the ratepayer" standard. Assessing Staff's treatment of these expenses will assist Murrey's in justifying these expenses, or potentially making changes in how it categorizes and records them

10 The standard of relevance for purposes of discovery is much broader than the standard required under the evidence rules for admissibility at trial, and Washington law provides an extremely broad definition of "relevance." *Gillett v. Conner,* 132 Wn. App. 818, 822 (2006). The only limitation is relevancy to the subject matter involved in the action, not to the precise issues framed by the pleadings (despite what Staff argues in its Motion), and inquiry as to any matter which is or may become relevant to the subject matter of the action should be allowed. *Bushman v. New Holland Div. of Sperry Rand Corp.,* 83 Wn.2d 429, 434 (1974).

11 Staff argues that "[b]oth 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." Staff Motion at 7, *citing* RCW 34.05.452(2); WAC 480-07-495(1). That is true – but also misleading in this context. As cited above, the standard for whether a party may be required to produce information is far broader than whether that information is ultimately admissible. *See Cedell,* supra, *see also Barfield v. City of Seattle*, 100 Wn.2d 878, 886 (1984) ("the standard of relevance for purposes of discovery is much broader than the standard required under the evidence rules for admissibility").

12 Disputed expenses in this proposed tariff increase again include severance, employee meals, and temporary staffing. Data Requests No. 1, 3, and 8 seek information on Staff's policies and procedures for these expense categories to assess the policy rationale for allowing or disallowing

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those types of expenses. When Staff apparently makes "benefit to the ratepayer" a key metric by which it measures the reasonableness of these expenses, Murrey's should be entitled to investigate whether and how Staff treats the same expenses as part of preparing its tariff revision request – after all, Staff must ultimately justify its own expenses to the taxpayers of this state eventually through agency legislative budget appropriations.

13 Thus Staff's additional objection that it is not comparable to Murrey's is true, but only to the extent that its expense policy likely faces a *higher* standard than that of Murrey's. Even if expense policies were not central to the tariff revision in question, they would nevertheless still be discoverable under the broad scope allowed in discovery, much broader than the relevance test that Staff urges. That perspective simply does not immunize Staff from producing those records. At this stage, whether and how Staff's own expense policy is admissible is an entirely separate analysis from whether it is relevant to Murrey's overall defense of its tariff revision.

14 Here, the expense policies of Staff are central to Murrey's ability to understand how Staff will recommend adjustments to Murrey's tariff in this proceeding. At the very least, they are reasonably calculated to lead to the discovery of admissible evidence and so again, Staff should be required to fully respond to Data Requests No. 1, 3, and 8.

B. Staff Provides No Evidence of Undue Burden Except that it will Have to Search its Own Records

15 Data Request No. 7 in turn is necessary for Murrey's to assess whether Staff has previously recommended large casualty losses to be included in rate normalization by amortizing the costs into rates over a reasonable period of time. Staff objects and asserts Murrey's is equally capable of searching the WUTC website to find the information as Staff itself. That "you can find it

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yourself" defense is simply inapplicable here. The idea that Staff's recordkeeping, as the primary custodian of its own records and policies, implicates an equivalent burden by the party with the records (Staff) as with the party requesting the records (Murrey's) is not reasonable. But even if it was, that is not a legal defense to production.

16 WAC 480-07-420(3) provides that a special order may be entered to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." This is virtually identical to Washington's Civil Rule 26(c), "Protective Orders" and thus the ample case law assessing what defines an "undue burden" under the discovery rules is helpful in determining whether Murrey's request here constitutes an undue burden.

17 That question is generally determined by considering whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from another *more* convenient, *less* burdensome, or *less* expensive source. *Gillett v. Conner*, 132 Wn. App. 818 (2006).

18 The question here is not whether Murrey's could find the information through other means, but if those other means are *less burdensome* than the means used by Staff. Meaning, if the burden is felt equally (and it clearly is not), then the discovery rules still require Staff to produce those records. WAC 480-07-400(3). Only if Staff can show the information is available (to Murrey's) from a less burdensome source can it avoid producing the records. Murrey's obviously does not have an easier, less expensive method of searching for records of matters that did not lead to adjudicative orders from an administrative law judge or the Commission, responsive to Data Request 7, since the data request seeks administrative records held, compiled, or otherwise in possession by Staff. Thus, Staff should be required to respond fully to Data Request 7.

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C. If Staff Will Not Produce Records in Response to Data Requests, Murrey's Might be Required to Employ a Public Records Request which Provides Unnecessary Delay when Discovery is available Instead

19 Finally, Staff's position that it need not produce the records in response to Data Requests 1, 3, 7, and 8 (Murrey's has, as noted, now withdrawn Data Requests 2 and 4) under these rules flies in the face of the Public Records Act ("PRA"). While WAC 480-07-400 is intended to facilitate the exchange of information between Staff and a regulated company, nothing in that rule, or Title 81 RCW, limits Murrey's ability to obtain this information under the PRA. *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702 (2011).

20 Again, the burden must fall on Staff to demonstrate the records are not subject to production. The PRA is a strongly worded mandate for broad disclosure of public records. *Burt v. Dep't of Corr.,* 168 Wn.2d 828, 832 (2010) (quoting *Soter v. Cowles Publ'g Co.,* 162 Wn.2d 716, 731, (2007)); RCW 42.17A.001(11). Agencies are required to disclose any public record on request unless it falls within a specific, enumerated exemption. RCW 42.56.070(1). There, burden is on the agency to show a withheld record falls within an exemption, and the agency is required to identify the document itself and explain how the specific exemption applies in its response to the request. RCW 42.56.550(1); *Sanders v. State,* 169 Wn.2d 827, 845–46 (2010).

21 RCW 42.56.070(8) lists exemptions: none apply here. Nothing in the PRA limits Murrey's from obtaining information pertaining to (1) Staff's expense policies for severance, employee meals, or temporary staff, and (2) accounting policies for large casualty losses for rate normalization. Likewise, no exemption exists for a "you can find it yourself" defense to production, such as that asserted for blocking production of Data Request No. 7.

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IV. CONCLUSION

22 For the foregoing reasons, Staff's Motion for a Protective Order as to Data Requests 1, 3, 7 a and b and 8 should be denied. Staff should be required to fully respond to Data Requests No. 1, 3, 7a and b, and 8 as soon as possible.

DATED this 21st day of March, 2024.

/s/ *Sean D. Leake*
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