

SERVICE DATE

OCT 19 1994

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THE DISPOSAL GROUP, INC., d/b/a)
Vancouver Sanitary Service and)
Twin City Sanitary Service, a)
Washington Corporation (G-65),)

Complainant)

vs.)

WASTE MANAGEMENT DISPOSAL)
SERVICES OF OREGON, INC., d/b/a)
Oregon Waste Systems, a Delaware)
Corporation; and)
T & G TRUCKING & FREIGHT CO., an)
Oregon Corporation;)

Respondents.)

.)

DOCKET NO. TG-941154

ORDER ON PREHEARING
CONFERENCE

A prehearing conference was held on October 17 and 19, 1994, before Hearings Examiner John Prusia, pursuant to due and proper notice to all parties.

APPEARANCES: Cynthia A. Horenstein, attorney, Vancouver, represents the complainant, The Disposal Group, Inc., d/b/a Vancouver Sanitary Service and Twin City Sanitary Service. William K. Rasmussen, attorney, Seattle, represents respondent Waste Management Disposal Services of Oregon, Inc., d/b/a Oregon Waste Systems. Jack R. Davis, attorney, Seattle, represents respondent T & G Trucking & Freight Co. James K. Sells, attorney, Bellingham, petitioned for intervention on behalf of Washington Refuse & Recycling Association ("WRRRA"). Steven W. Smith, assistant attorney general, Olympia, represents the Commission Staff.

PETITIONS TO INTERVENE: Both respondents objected to the petition to intervene of WRRRA. They objected that WRRRA has no direct interest in this matter; that any interest it may have would be adequately represented by the complainant; that its participation would broaden the issues and cause delay and additional cost for the parties. The applicant supported the petition. Commission Staff had no objection to the petition. Counsel for WRRRA represented that the interest of WRRRA's members is, and is limited to, the issue of whether the Commission considers sludge to be solid waste or a recyclable material; that WRRRA does not intend to broaden the issues, will not call any witnesses, and will participate only if and when the definition of the sludge material being transported becomes an issue.

WRRRA's petition to intervene is granted. WAC 480-09-430 directs the disposition of motions to intervene. This section requires a demonstration of either a substantial interest in the subject matter of the hearing or that the participation of the petitioner is in the public interest. WRRRA's concern that the Commission's characterization of the material being transported may affect the interests of its members states an interest sufficient to support general intervention.

PROCEDURAL MATTERS:

1. Extent of Commission Staff's participation: Commission Staff will at a minimum cross examine witnesses and participate in the briefing. It is not advocating a position on the issues at this time.

2. Use of the brief adjudicative process: Mr. Davis, Mr. Rasmussen, and Mr. Smith all expressed some concern with the use of the brief adjudicative process for this proceeding. Their concern relates particularly to their belief that there may be disputed factual issues to be determined at hearing, and perhaps complex issues of constitutional law and federal law as well, and if that occurs a court appeal of the Commission's decision would be likely, in which case they would prefer a formal record. Mr. Davis also expressed a concern that under the Commission's rules a brief adjudicative proceeding does not constitute a full hearing, that the rules do not identify testimony as being part of the record, and that the rules lessen the time for the parties to appeal. Those parties indicated that their concerns would largely be alleviated by the use of a court reporter and the formal taking of evidence and testimony, and by an order that a transcript be prepared and that it become part of the record.

The Complainant supported the use of the brief adjudicative process because it is anxious to move the complaint to resolution as quickly as possible.

WRRRA took no position on the use of the brief adjudicatory process.

The Commission has identified the matter as appropriate for brief adjudication. The presiding officer is not persuaded that the issues and interests involved require the use of a more formal process. The issues involved appear to be primarily legal issues involving interpretation of undisputed facts. The brief adjudicative process offers the speed required given the nature of the complaint, and offers the flexibility of formal procedures at hearing that will afford the parties due process protections.

The presiding officer orders that, if the parties are unable to stipulate to all facts, the brief adjudicative proceeding be in the form of a hearing at which evidence and

testimony are formally taken, that a court reporter be used, that a transcript of the brief adjudication be prepared, and that the transcript shall be part of the record in the proceeding.

3. Time and place: The parties agreed that the noticed time and place for the brief adjudicatory proceeding, October 25, 1994, at 10:00 a.m. at the Commission's headquarters in Olympia, are acceptable.

4. Agreed facts; witness affidavits; documents:

Discussion: The Commission's order setting a brief adjudication requested that the parties consult among themselves with a view to developing a stipulated factual record for decision, and to report on that discussion at the prehearing conference.

Because of the nature of this proceeding, its apparent emphasis on legal issues rather than factual disagreements, the need for an expedited order, and the limited hearing time available, the parties are encouraged to offer evidence in summary or narrative form, preferably in writing upon agreement; to focus on the points that are relevant to the issues raised in the complaint and essential to support the legal theories they advocate; and to minimize evidence of limited relevance, to eliminate duplicative or repetitive evidence, and to secure agreement as to the nature of testimony to be presented, in ways that will eliminate unnecessary evidence and cross examination.

At the October 17 prehearing, Ms. Horenstein indicated that the parties had exchanged proposed stipulated facts, but had not yet had an opportunity to thoroughly review or discuss the respondents' proposals. The parties agreed that Ms. Horenstein would coordinate continued efforts to reach agreement on factual issues and on other matters that might shorten the proceeding.

At the October 19 prehearing, Ms. Horenstein reported that the parties had been working very diligently and had come up with several pages of stipulated facts, and that they had just completed a conference call in which they had reached agreement as to a majority of the facts. She reported that the parties had not yet determined whether they would want to present additional testimony at a live hearing next week. The other parties agreed with Ms. Horenstein's statement as to progress on stipulated facts.

Mr. Rasmussen stated that he would be submitting affidavits from someone for Oregon Waste Systems and someone from RUST Remedial services by the end of this week, and that the other parties, after reviewing the affidavits, might decide that live testimony was indicated.

Mr. Davis stated that he may submit an affidavit on behalf of T & G Trucking, depending on the final statement of stipulated facts.

Ms. Horenstein reported that the parties had agreed that the affidavits of the respondents would be circulated to all the attorneys by Friday morning; that after the other parties reviewed them they would contact Mr. Rasmussen and Mr. Davis on Friday to let them know whether they wanted the respondents' witnesses present at the hearing for cross examination.

Mr. Smith stated that he does not intend to submit anything, and will participate by cross examination if that becomes necessary after he sees the affidavits.

Mr. Rasmussen raised the question of what other evidence the parties intended to introduce in addition to simple affidavits, and when the parties should notify one another of that, because other evidence might give rise to the need to cross examine somebody. There has been an informal exchange of documents, but there remains a question of which ones will be formally submitted for the record. He may need to have witnesses testify as to the meaning of documents or what they intended, if certain documents are introduced into evidence. He has documents that he intends to introduce, and that also may give rise to the need for other parties to cross examine witnesses.

Ms. Horenstein stated that she probably will ask the Commission to take judicial notice of the local solid waste management plan as well as a DEQ guidance document that she circulated. She will argue that the local solid waste plan does not address certain things. Mr. Smith also may want the plan in. Following some discussion of whether the local solid waste plan should be made an exhibit, the parties agreed that because of its volume there would not be an objection to the Commission taking notice of it and allowing the parties to quote what portions they wish, rather than having it introduced as an exhibit.

The timing of the submission of document lists, witness lists, and affidavits was discussed at length. The parties agreed that the following orders be entered:

Orders:

By the end of the business day on Thursday, October 20, 1994, each party shall file with the Commission and serve upon all other parties a document in which it lists and briefly describes the documents it intends to introduce, and in which it identifies the primary witnesses it intends to call at the hearing on October 25. By the same deadline, each party shall provide all other parties with a copy of every listed document, to the extent a party does not already have a copy.

By the end of the business day on Friday, October 21, 1994, each party shall provide all other parties with a copy of every witness affidavit that the party intends to offer; it is permissible to provide telefaxed signatures.

Every party has the right to call rebuttal witnesses and submit rebuttal documents after it receives the lists of primary witnesses, lists of documentary exhibits, and affidavits.

By 12:00 noon on Monday, October 24, 1994, each party shall notify every other party and the presiding officer, in writing, of any additional witnesses it intends to call, any additional documents it intends to offer, and whether it no longer intends to call a witness, offer an affidavit, or offer a document that it previously identified as one it intended to call or offer.

The Commission waives its rule prohibiting filings by telefacsimile device for these submissions.

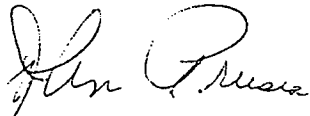
5. Opening statements: If the hearing scheduled for Tuesday, October 25 is held, any party who at that time advocates a position is requested to make a brief opening statement in which it indicates its theory of the case and what it believes the evidence will show.

6. Briefing: Pre-hearing legal memoranda are not required or expected. Parties are requested to submit post-adjudicative memoranda or briefs. The scheduling of post-hearing briefs will depend on whether a hearing occurs on October 25 and on what sort of transcript there is. The briefing schedule will be determined no later than the close of the hearing on October 25.

FURTHER PREHEARING CONFERENCE: The parties agreed to get together on the Commission's teleconference bridge line at 1:00 p.m. on Monday, October 24, 1994, to discuss whether any party still intends to present live witnesses, and other matters relating to the need for or nature of the hearing scheduled for October 25. Each party shall call the Commission's conference bridge number, (206) 664-3846.

DATED at Olympia, Washington and effective this 19th day of October 1994.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION


JOHN PRUSIA
Hearings Examiner