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6 BEFORE THE WASHINGTON STATE
7 UTILITIES AND TRANSPORTATION COMMISSION

8 WASHINGTON UTILITIES AND
9 TRANSPORTATION COMMISSION

10 Complainant,

11 vs.

12 WASTE CONTROL, INC.,

13 Respondents.

Docket No. TG-140560

14 OPENING BRIEF OF
15 INTERVENOR WASHINGTON
16 REFUSE AND RECYCLING
17 ASSOCIATION

18 **COMES NOW** Intervenor Washington Refuse and Recycling Association
19 (WRRRA) and respectfully submits the following:

20 **SCOPE OF BRIEF:** WRRRA will address just two of the issues remaining in
21 this action; specifically, those of Investigation Fees and Rate Case Costs. The
22 other unsettled issues are much more case specific and will be thoroughly
23 examined by the primary parties. The issues of Investigation Fees and Rate Case
24 Costs, however, are of significant interest to WRRRA and its member companies,
25 particularly smaller and rural companies which simply do not have the assets or
26 the in-house expertise to engage in an extended rate filing dispute such as we
have here. Nor, if they did, could they do so with the "cloud" of having to pay
investigation fees and/or not being able to recover their costs hanging over their
heads. These two issues are of significant importance to the industry as a whole.

INVESTIGATION FEES: Staff seeks reimbursement from the Company of
some \$43,000.00 for its "investigation costs" in this action. This is based upon

Opening Brief of Intervenor Washington
Refuse & Recycling Association - 1

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1 **RCW 81.20.020**, but apparently not upon any Commission precedent that either
2 Staff or the Company could locate. In its response to Waste Control's Data
3 Request No. 18 (answer prepared August 7, 2014 by Melissa Cheesman), Staff
4 responded that:

5 Staff is unaware from memory of an instance in which Staff
6 recommended and the Commission approved imposition of
7 investigation costs upon a regulated solid waste company.

8 Not only is Staff "unaware" of such an instance, so are counsel for Waste Control
9 and WRRRA.¹ There must be a reason for this; and that would be that either the
10 Commission/Staff agree with the industry that such an action could have a
11 serious and definite chilling effect upon the free exchange of information between
12 Staff and a company including, by the very nature of a rate case, disagreements
13 over allocations, expenditures and the like. Staff must, and should, make a
14 thorough investigation, and the Company must, and should, respond to these
15 legitimate and necessary inquiries. This takes time and effort on both "sides,"
16 and the Company should not have to operate under the fear that just because it
17 fully and fairly presents its case, it may be responsible for Staff's costs,
18 particularly in a case like this where the Company has religiously paid regulatory
19 fees since inception.

20 The Commission and Staff must also understand and appreciate that the
21 statute (RCW 81.20.020) is permissive, not mandatory, and that it "limits" itself
22 to a one-year period when comparing regulatory fees paid and investigatory costs.
23 In exercising discretion here, both Staff and the Commission should be aware of,
24 and seriously consider, the fact that rate cases (or any other special regulatory
25 action) do not happen every year. In most years that Waste Control has been in
26 business and paying regulatory fees, there have been no rate cases, and certainly
no enforcement actions. The regulatory fees are paid just the same in those
"quiet years." That must be given due consideration by the Commission; and, in
fact, may well be a reason why the Commission has apparently never imposed
investigation fees in a rate case. The industry is of the firm belief that imposition

¹ The Data Request was limited to imposition of investigation costs in rate cases, as opposed to enforcement action.

1 of these fees is only appropriate where there is a clear and proven intent by the
2 regulated entity to, in some manner, defraud, mislead or somehow stray outside
3 the limits of the law. That clearly is not the case here, and no such allegation
4 has been made. A monetary "punishment" for simply presenting one's argument,
5 and responding to voluminous discovery requests, participating in seemingly
6 endless telephonic and e-mail conversations, and meeting whenever requested to
7 do so, is neither appropriate nor fair in this situation, and clearly is not reflective
8 of the intent of the statute.

8 **RATE CASE COSTS:** This issue is unique in the undersigned's memory,
9 and certainly presents the Commission with a new, and perhaps novel, take on
10 ratemaking costs by Staff. As we understand, Staff's position is that only 50% of
11 actual costs that were incurred after December 24, 2013 should be recoverable.
12 Waste Control seeks recovery of all rate case expense incurred, starting with the
13 filing of the "original" case (TG-131794) in September of 2013, utilizing a four-
14 year amortization schedule.

14 To an Intervenor such as WRRRA, Staff's position appears not only arbitrary
15 (where did the 50% come from?); but indicates a desire to somehow "punish" the
16 Company for doing just what the Commission has urged solid waste companies
17 to do. That is, file for rates on a regular basis in order for these very rates to be
18 examined and approved (or disapproved) on a regular basis.

18 Unless there is some statutory or precedential basis for the "50%," it is, by
19 definition, arbitrary. An arbitrary action in the law is one that is ". . . without
20 adequate determining principle" and/or is ". . . not acting according to reason or
21 judgment."² Perhaps even a more simple definition is one of common sense, that
22 being that no regulatory agency can or should simply pull something like the
23 "50%" out of thin air and expect that it will not be challenged by the regulated
24 entity. Again, where did this percentage come from, and why does it start on
25 December 24, 2013? No rational explanation has ever been offered, other than it
26 is consistent with the First Prehearing Orders. The Commission should not
enforce arbitrary decision making by Staff (or anyone else). Its regulatory role is,

² Black's Law Dictionary, 5th ed. at p. 96.

1 and has always been, enforcement of statutes and rules, not a tacit acceptance of
2 a completely quizzical theory which has no basis in either the controlling statute
3 or its own rules.³

4 It certainly appears that with Staff's position on this issue, and the
5 Investigation Fee issue as well, Staff's position is designed to somehow "punish"
6 Waste Control, first, for bringing this rate request and, secondly, for
7 professionally and actively presenting its position. Whether this "punishment
8 motive" is conscious or unconscious really does not matter; the end result, if the
9 Commission accepts Staff's position, will be the same. That is, Waste Control will
10 be financially punished for actively pursuing its rate case, with the majority of
11 that activity responding to Staff's voluminous information demands (formal and
12 informal), and meeting and communicating with Staff.

13 Perhaps the difference in views here involves the basic dichotomy between
14 the public and private sectors when expert services are required. Staff has a
15 distinct advantage; the attorneys, auditors and accountants are salaried state
16 employees. They are in place and can, and do, devote the necessary full time and
17 effort to a case like this within their employment responsibilities. On the other
18 hand, the owners of Waste Control (and other solid waste companies) are
19 business people, "garbage men," neither lawyers nor auditors nor accountants.
20 Therefore, when embroiled in a matter like this, they must hire, and pay,
21 professionals – particularly attorneys and accountants. This costs money, and
22 the more issues raised by Staff, the more money it costs. It is essential for the
23 Company to present its case and respond correctly and appropriately. The
24 Commission expects nothing less, nor should it.

25 It appears that Staff does not contest either the legal or accounting rates
26 nor totals incurred here by Waste Control. (See Joint Motion, Oct. 23, 2014).
Nor should they. If there is no argument with the actual rate case costs, then

³ It is tempting to add the word "capricious" to "arbitrary" to throw a much used APA term into the mix. We have not done so because there is no evidence that Staff has been capricious here, and we trust that is not the case. An action by any agency can be arbitrary without being capricious, but the end result is the same – the action can be neither justified nor upheld.

1 why would it be appropriate to slice the majority of them in half? The answer is
2 that it is not.

3 What perhaps Staff needs to give more consideration and thought to here
4 is the effect that disallowing half of these costs will have on the Company, its
5 employees and, eventually, the ratepayers. Although regulated, Waste Control is
6 a for profit corporation. It provides its employees with competitive wages and
7 benefits and serves its ratepayer customers with excellent and affordable service.
8 (Check for complaints – there are none). Rate cost recovery, even amortized over
9 four years, is an important part of the financial structure of this, or any other,
10 regulated solid waste company. As with any business, costs here have to be
11 recouped, or the corporation itself, its employees and, eventually, its customers,
12 will have to "make it up." Waste Control simply asks that it be allowed to recover
13 its costs incurred in what has become an extraordinarily expensive exercise; and
14 one which is a reality when operating as a regulated public service company.


15 It is difficult to exaggerate the chilling effect approval of Staff's proposal
16 would have on the industry, particularly, as noted, upon the smaller local
17 companies. These folks simply cannot afford to retain the expertise needed to file
18 and follow through with a rate case if there is a question concerning full
19 allowance of the reasonable costs thereof. It is doubtful the Commission would
20 consider 50% of a filing, yet that, in essence, is what Staff seeks. It is not for
21 Staff to judge the Company's preparation and presentation of its position; just as
22 it is not for the Company to question how Staff prepares and presents its case.
23 Allowing Staff to "pick and choose" a percentage of cost recovery would create an
24 atmosphere of suspicion and confusion which, ironically, would create even more
25 costs for the Commission and the Company.

26 **CONCLUSION:** While the remaining unsettled issues, not addressed here,
appear to represent legitimate disputes over accounting and auditing methods,
these two do not. They seem to have "come out of nowhere" with neither
statutory nor precedential bases. It is as if the rules of the game have changed
and no one told the industry. This is particularly true for the cost recovery
allocation. The idea of giving Staff (or anyone else) the ability to unilaterally

1 recommend a percentage for allowance just makes neither legal nor regulatory
2 sense. This time it's 50%; what will it be next time, 40%, 60% or whatever a
3 particular auditor may come up with? That is no way to create and maintain an
4 effective and consistent regulatory structure.

5 Rate filings should not be or become an adversarial action in which Staff
6 tries to set rates at the lowest possible number, or the Company tries to set them
7 as high as possible. The purpose is to set rates at a level which is fair to the
8 consumer and compensable to the Company. That is the very nature and basis
9 of rate regulation. That is also why there has not been an adjudicated rate case
10 in at least 20 years. Staff's position on these two issues, if accepted, would
11 introduce an entirely new dynamic to rate filings, one with no winners,
12 particularly the ratepayers.

13 Respectfully submitted this 7th day of November 2014.

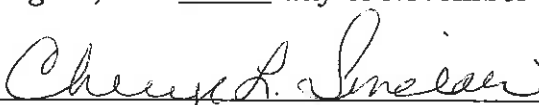
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15 JAMES K. SELLS
16 WSBA No. 6040
17 Attorney for Washington Refuse and
18 Recycling Association

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by the method as indicated below, pursuant to WAC 480-07-150.

Washington Utilities and Transportation Commission 1300 S. Evergreen Park Dr. SW PO Box 47250 Olympia, WA 98504-7250 360.664.1160 records@utc.wa.gov	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email
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DATED at Silverdale, Washington, this 7th day of November 2014.


Cheryl L. Sinclair