

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

WASTE CONTROL, INC.,

Respondent.

DOCKET TG-140560

WASTE CONTROL, INC.'S  
RESPONSE TO COMMISSION  
STAFF'S MOTION TO STRIKE  
SUPPLEMENTAL TESTIMONY AND  
EXHIBITS

**RELIEF REQUESTED**

1 By its Response, Waste Control Inc. ("Company," or "Respondent") asks that the Commission, on review of the original Motion to Strike and this Response, deny the Staff Motion to Strike Supplemental Testimony and Exhibits on the basis of the below showing.

**STATEMENT OF FACTS**

2 As pertinent to this Motion, the parties to this matter, on or about October 23, 2014, filed a Joint Motion seeking to Amend the Procedural Schedule and resolve the remaining four contested accounting issues on a "paper-only" record. As the Staff Motion to Strike acknowledges and as ¶ 9 of that Joint Motion reflects, the parties also expressly provided that supplemental testimony on the remaining contested accounting adjustment issues could be filed, with the parties reserving the right to object to information provided in the briefing or supplemental testimony. The Company filed its Opening/Initial Brief on November 7, 2014 as the Commission had prescribed, with Staff filing its Initial Brief the same day. The parties then proceeded to prepare reply briefs which, three days before the deadline, were interrupted by Staff's Motion, asserting various claims in its two-page Motion to Strike all of the Company's Supplemental Testimony and references thereto in the Company's

Opening Brief. On November 18, 2014, the Administrative Law Judge issued her ruling which suspended the remaining procedural schedule and allowed a Response and a further Reply to Staff's Motion. It is to that Motion and allowance of time to December 5, 2014 that the Company files the following Response.

### **QUESTION PRESENTED**

3           Should the Commission strike the Supplemental Testimonies of Jacqueline Davis, Layne Demas, Joseph Willis and the attachment thereto based on the assertions of Staff that the testimony introduced new evidence implicate, and rely upon, *inter alia*, confidential settlement discussions in presenting its Opening/Initial Brief on the remaining contested accounting issues in this proceeding?

### **EVIDENCE RELIED UPON IN RESPONSE**

4           In opposition, the Company relies on its prefiled, rebuttal and supplemental testimony and all exhibits attached/appended to those submittals, the Staff testimony of witness Melissa Cheesman (Exhibit MC-1), its Opening Brief, the Commission Staff's Initial Brief and the attached Declaration of David W. Wiley in Opposition to the Motion to Strike and the Exhibits to that Declaration.

### **STATUTES AND RULES**

5           WAC 480-07-375(1)(d) and (2), Civil Rule 12(f), RCW 34.05.437, RCW 81.28.010 and RCW 81.04.250.

### **ARGUMENT IN OPPOSITION TO MOTION TO STRIKE**

#### **1. The Company is Generally Left to Hypothesize What Specifically in the Supplemental Testimonies is Objectionable to Staff.**

6           By its overall Motion, Staff provides insufficient and incomplete references other than bare assertions of inappropriateness, prejudice to the movant party, and unfairness to yield a meaningful Response to its Motion. Ironically, Staff files and serves an "evidentiary" motion but largely omits any evidentiary references to support it.

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Under WAC 480-07-375(2), the Commission often looks to the Civil Rules for Superior Court in addressing and resolving motions such as the instant Motion to Strike. Washington appellate case law generally suggests movants provide some level of support when moving to strike. *See, Gorre v. City of Tacoma*, 180 Wn. App. 729, 751 (2014), which support is often through citation to authority and supporting declarations/affidavits. *Morello v. Vanda*, 167 Wn. App. 843, 847 (2012).<sup>1</sup> While the Commission has not so expressly required by its rule, the result of the generalized assertions/allegations in Staff's Motion is that the Respondent is forced to parse through the esoteric allegations in attempt to understand what material in the Supplemental Testimony potentially meets the inferences of the Staff's contentions. This "bidding against oneself" characteristic for a response is neither a fair nor reasonable approach, even in notice pleading jurisdictions like Washington.

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What general references Staff's Motion does provide are overbroad, unspecific and littered with oblique references. Again, the Company in Response should not be in a position of "coloring in" or filling in the gaps in the Staff's showing, thereby potentially lending more depth or credibility to the blunt, unsubstantiated allegations in the abbreviated Motion. Nor is it a cure for the Staff to eventually support the specific statements in the Supplemental Testimony to which it objects in its upcoming Reply to which the Company has no opportunity to respond, particularly here, as a general rate case proponent with the statutory burden of proof.

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<sup>1</sup> For instance, in King County Superior Court, the common practice is to attach the objectionable material in an Exhibit to the Motion to Strike with strikethrough of the allegedly offending material or assertions.

**2. The Motion’s Reference to “New Evidence,” including “Rate Case Costs” is a Prime Example of the Vagueness and Lack of Specificity in Staff’s Pleading.**

9 ¶7 of the October 23, 2014 Joint Motion to Amend Procedural Schedule specifically addressed rate case costs and investigation fees and also included a reference to “...assuming any updated amounts of time are reasonable...” Despite the Staff’s present Motion’s reference to rate case costs as examples of “new evidence,” this provision in the Joint Motion clearly suggests a future showing of rate case costs incurred after the Staff and Company rebuttal cases were filed.

10 The topic of rate case cost supplementation was also unquestionably communicated to the Staff in telephone calls and email (*see* as an example, the attached Exhibit No. 1 to David W. Wiley Declaration). Moreover, in the October 22, 2014 email communication, the Staff expressly notes “...[i]f the testimony reiterates previous arguments or provides updates to certain costs, it will be a non-issue anyway” [emphasis added]. Ms. Davis’s Supplemental Testimony was solely directed to updating the rate case cost issue by highlighting the additional, material professional costs incurred in response to the Staff July 18, 2014 case on separated Kalama operations, and was unquestionably previewed as the source of the supplemental testimony on rate case costs to Staff’s counsel both by telephone and email communication more than two weeks before the filing. That supplemental testimony description, like other topics addressed in the email Exhibit No. 1 to the attached Declaration, was an express condition precedent to the Company’s agreement to a “paper-only” proceeding phase by the Company. Internal communication lapses or strategic

rethinking by Staff, if any, after the fact, are obviously not the responsibility of the Company.<sup>2</sup>

**3. The Staff's Accusation of Revelation of Confidential Settlement Information is Characteristically Difficult to Pinpoint Here and the Company's Guess as to What that Refers to Does not Involve a Material Dollar Distinction.**

11           The Company is obviously dismayed by this type of pejorative allegation and once again, in "reading between the lines," believes that this isolated, unspecific charge must relate to the positions' of the parties after the filing of the Company rebuttal case where it had understood the "paper-only" position of the parties started from an agreed-upon revised position for **utility expenses**, in contrast to land rents, rate case costs or the investigation fee disputed accounting issues. It would appear, however, that the Supplemental Testimony of Layne Demas and the Staff's Initial Brief reflect an approximate \$1,449 discrepancy in the parties' rendition of the Staff position.<sup>3</sup> No one on the Staff side ever suggested to the Company that its good faith understanding of the Staff's current position was incorrect until this Motion was filed, as noted, ten days after the Opening Briefs were served.

12           Moreover, as the Declaration of David W. Wiley in Response to the Staff's Motion incorporated by this reference presents, it was the Company, not the Staff which had initially questioned this computation discrepancy, assuming it constituted an unintentional error by Staff in its Initial Brief. That would hardly suggest this was a knowing, intentional disclosure by the Company of "information gained through confidential settlement

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<sup>2</sup> The remedy for any lingering due process concerns on the part of Staff or inability to test the showing in supplemental testimony on matters such as updated rate case costs, utility allocations or other indicia of "new evidence," would be to convene a live hearing on the four contested accounting issues. The Company, for its part, is fine with such an outcome if Staff believes the supplemental testimony has somehow prejudiced its current position, however unintended. If that is the preferred remedy, the Company would merely ask that it be afforded the same cross examination opportunity for the Staff witness as that afforded Staff on the Company witness on the four contested accounting issues.

<sup>3</sup> For clarification of this point *see*, Initial Brief of Commission Staff at ¶9, p. 4 v. the Supplemental Testimony of Layne Demas, Exhibit LD-2T, Table 2, p. 6.

discussions.”<sup>4</sup> For the Staff to so characterize this discrepancy in such fashion is not only unfair but wholly inaccurate.<sup>5</sup> At most, this issue amounts to an erroneous understanding of where the parties’ positions had devolved in framing the starting point, “paper-only” party positions on one of the four contested accounting issues.

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Additionally, such a de minimis dollar discrepancy in utility expense positions is hardly indicia of intent to wrongfully communicate information from confidential settlement discussions. On further reflection by Staff, the Company trusts it does not believe there was any intent to breach the confidentiality of settlement discussions and the ostensible example above is in no way proof thereof. Further confirmation of the Company understanding and assumption is evident considering the Company position on Opening Brief is not the higher figure of \$28,926 referenced by the Staff in its Initial Brief at page 4, but a lower figure of \$27,749.29 for “allowed utility expense,” which concomitantly reflects a reduction in the Company’s position of \$1,176.71. In other words, the Company’s understanding of the starting positions of the parties on filing of the Initial Brief was a *lower* figure for the Company utility expense and a higher figure for the Staff position. Finally, if the Staff rendition of allowed utility expense is maintained, there is currently an approximate \$14,951 difference between the parties in contrast to a \$12,325 difference with the Company’s

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<sup>4</sup> Staff Motion to Strike at p. 2.

<sup>5</sup> In *Whatcom County College v. Qwest Corporation*, Docket No. UT-050770, Order No. 1 (Aug 2005), the Administrative Law Judge there, in denying Qwest’s Motion to Strike, in contrast, weighed some very specific allegations in the Motion to Strike that referred to individual subparagraphs of the objected-to Complaint. The Motion contained five separate arguments for striking portions of the Complaint keyed to enumerated paragraphs of the Complaint, including interestingly, an allegation of inappropriate disclosure by the Complainant of compromise offers of the disputed claim. The presiding officer there rejected that allegation, by noting that Washington law limits the preclusive scope of such to formal mediations where a third party mediator is participating. Docket No. UT-050770, Order No. 1 at p. 7, footnote 8.

The instant Motion not only lacks the specificity of Qwest’s pleading, but as discussed, *infra*, there was no intent whatsoever to reveal offers of compromise whether or not that “disclosure” were protected by pertinent law and/or the parties’ informal agreement.

rendition, which again, is not a consequential differential in the context of the overall monetary dispute on the remaining accounting adjustment issues.

**4. The Accusation the Company References a 2009 Rate Case that was not Suspended and “...to Details that are not a Part of the Current Record...” is yet Another Example of the Vagueness of Staff’s Motion Impeding Any Practical Response.**

14           The current record is replete with references to the 2009 rate case.<sup>6</sup> The fact that it was not suspended should in no way estop the Company principals from testifying as to outcomes, accounting treatments, asset disposition or any other circumstances to which its representative witnesses can personally attest. Indeed, not to do so would be a fiction, in that many of the Company positions and/or objections to Staff accounting treatments here were formatively shaped by prior rate case outcomes. Further, the fact that a solid waste general rate case is approved without an interim suspension Order does not suddenly mean the Company’s documentation of or subjective experience with that filing is inadmissible, vacated or evaporates. And again, there is witness sponsorship in the current record through prefiled testimony from the February 18, 2014, April 3, 2014 and the August 20, 2014 filings which all address or allude to the prior case.<sup>7</sup>

15           The Company is at any further loss to understand what “other details” it might have improperly referenced the Staff asserts are not a part of the current record, particularly when one considers that the parties jointly, on November 7 and 13, 2014, formally requested that the current record include almost all submissions from Docket Nos. TG-131794 and TG-

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<sup>6</sup> For 2009 rate case references in the record *see, i.e.*, Exhibit JD-1T, pp. 10, 11, 12; Exhibit JD-7 and Exhibit JD-8; Exhibit JW-1T, pp. 5, 6; Exhibit JD-11T pp. 7, 8; Exhibit JD-41T, pp. 19, 20, 25.

<sup>7</sup> Moreover, there is a current rulemaking *In re* Docket A-130355, where solid waste general rate case procedural rules, including workpaper and other requirements and what specifically constitutes a complete case filing issues are being actively addressed, critiqued and commented upon. The ultimate anticipated goal of that proceeding would be clarifying the effect of procedural status such as suspension, delays prior to Open Meeting consideration, completeness of filings, maximum intervals for rate filing rejections, etc.

140560.<sup>8</sup> To immediately thereafter, by adversarial Motion, attempt to force the Respondent to justify all of the unidentified positions and contentions in its Opening Brief and supplemental testimony which are contained in the current record is not only anomalous, but requires that the Company disprove a negative. This once again shifts the obligation to the Company to carry the movant party's burden of going forward in its Motion to Strike in a highly inequitable fashion. To hazard a guess again here as to what Staff is precisely alleging is an untenable exercise in futility. The Staff cannot now have it both ways, i.e., asking that almost all documents submitted in the previous and current general rate case records be included in the adjudicative file while simultaneously broadly contending that the Company has improperly referred in its Opening Brief to material not contained in that expansive file.

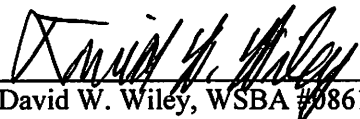
#### CONCLUSION

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For all of the above reasons, the Staff's Motion to Strike is incomplete, inaccurate and flawed, and as witnessed by the foregoing, requires speculation and extrapolation to even attempt to answer. The Company asks that as a result, the Commission grant its requested relief in denying the Motion to Strike, or alternatively, set an abbreviated hearing on the four remaining contested accounting issues to resolve any lingering due process concerns on same that were originally attempted to be articulated in the current "paper-only" phase of this lengthy proceeding.

DATED this 5<sup>th</sup> day of December, 2014.

RESPECTFULLY SUBMITTED,

By   
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Attorneys for Waste Control, Inc.

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<sup>8</sup> See, Joint Motion to Admit all Documents et al. of November 7, 2014 and Amended Joint Motion of the Parties to Admit all Documents Previously Filed in TG-131794 et al. of November 13, 2014.



## CERTIFICATE OF SERVICE


I hereby certify that on December 5, 2014, I served the original and two (2) copies of the foregoing document to the following address via first class mail, postage prepaid to:

Steven V. King, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
Attn.: Records Center  
P.O. Box 47250  
1300 S. Evergreen Park Dr. SW  
Olympia, WA 98504-7250

I certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to: [records@utc.wa.gov](mailto:records@utc.wa.gov)

and an electronic copy via email and first class mail, postage prepaid, to:

Marguerite Friedlander, Administrative Law Judge Washington Utilities and Transportation Commission P.O. Box 47250 1300 S. Evergreen Park Dr. SW Olympia, WA 98504-7250 Email: <a href="mailto:mfriedla@utc.wa.gov">mfriedla@utc.wa.gov</a>	Brett Shearer Office of the Attorney General Washington Utilities and Transportation Commission 1400 S. Evergreen Park Dr. SW PO Box 40128 Olympia, WA 98504-0128 Email: <a href="mailto:bshearer@utc.wa.gov">bshearer@utc.wa.gov</a>
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