

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

WASTE CONTROL, INC.,

Respondent.

DOCKET TG-140560

COMMISSION STAFF'S REPLY TO
WASTE CONTROL, INC.'S
RESPONSE TO MOTION TO STRIKE

I. INTRODUCTION

I Staff of the Utilities and Transportation Commission (“Staff”) files this reply to Waste Control, Inc.’s (“WCI” or “Company”) response to Staff’s motion to strike the supplemental testimonies and exhibits of Layne Demas, Jacqueline Davis, and Joe Willis, as well as any attachments to those exhibits and any and all references thereto in Waste Control’s Initial Brief. At the outset, it should be noted that Waste Control does not even concede or acknowledge that it has offered new evidence on brief, instead choosing to argue that Staff’s motion to strike leaves the company “to hypothesize what specifically in the supplemental testimony is objectionable to Staff.” Waste Control, Inc.’s Response, at 2. Surely the company is familiar with the substance of its own testimony and exhibits. It could have directed Staff and the Administrative Law Judge to evidence currently in the record demonstrating that its evidence on brief is not in fact new. It could not do so. The company knows full well that the entirety of its supplemental testimony and exhibits is objectionable by any standards. The company further states that it is “forced to parse through esoteric allegations in [an] attempt to understand what material in the supplemental testimony

potentially meets the inferences of the Staff's contentions." *Id.* at 3. This is a nonsensical argument that should be rejected by the Commission.

2 Staff's motion to strike is based on: (1) the Company's misstating of Staff positions and divulging settlement positions, and (2) WCI putting forward new evidence after Staff can no longer adequately respond or conduct cross-examination. The Company's supplemental testimony unduly prejudices Staff, and the Commission should strike all WCI testimony and exhibits filed on November 7, 2014. Alternatively, the Commission should allow Staff to conduct cross-examination of the Company's witnesses within the scope of their supplemental testimonies.

II. BACKGROUND

3 On October 23, 2014, the parties to this matter ("Parties") filed a Joint Motion seeking to amend the Procedural Schedule and resolve the remaining four contested accounting issues on a "paper-only" record. The Parties' request to shift to a paper record necessarily included each party's consent to waive cross-examination. Although the Parties provided that supplemental testimony on the remaining contested accounting adjustment issues could be filed, Staff expressly reserved its right to object to the filing of novel arguments or positions. Because WCI's supplemental testimony references several meetings and discussions not documented in the record, alleges Staff acted unprofessionally, and includes novel arguments and novel positions, Staff filed its motion to strike and this subsequent reply.

III. ARGUMENT

A. Misstating Staff's positions and divulging settlement discussions

4 Staff's positions are fully articulated in the record. There are no other Staff positions, and the Commission should strike the Company's constant speculation and discussion of

Staff's case. For example, Staff has not presented testimony or stated anywhere in the record the position Mr. Demas attributes to Staff in his supplemental testimony for Adjustment R-6D, Utility Expenses. Ms. Davis and Mr. Willis also both misstate Staff's positions and discuss phone calls or informal meetings that are not documented in the record.

5 Because Mr. Demas's testimony relies entirely on a Staff position that is not in the record and derived from settlement discussions, the Commission should strike the entirety of Mr. Demas's supplemental testimony. Similarly, all of Mr. Willis's testimony either expressly describes or relies on meetings that do not exist in the record or his opinions as to his own inaccurate perception of Staff's case. Thus, the Commission should also strike the entirety of Mr. Willis's supplemental testimony. Ms. Davis's supplemental testimony focuses on the informal filing process, actions taken in and just after settlement discussions, and speculates as to Staff's positions throughout the case. Because none of the information on which Ms. Davis relies existed in the record at the time Staff could respond, the Commission should strike the entirety of Ms. Davis's testimony as well.

B. WCI's supplemental testimony consists entirely of novel arguments and positions

1. Testimony of Joe Willis

6 Mr. Willis's testimony includes several novel arguments, wholly irrelevant discussions of the Company's 2009 rate case, and even speculates as to former Commission employee perceptions. Mr. Willis did not include this material in his prior testimony or anywhere else in the record. Staff waived cross-examination of Mr. Willis on the basis that his prior testimony was substantively complete. Mr. Willis's attempt to supplement his testimony with novel arguments and a new exhibit prejudices Staff's case. Staff can neither cross nor rebut Mr. Willis's arguments. Because Mr. Willis's entire testimony either expressly describes or

relies on new information, the Commission should strike the entirety of his supplemental testimony from the record.

7 Beginning on page 1 of his supplemental testimony filed on November 7, 2014, Mr. Willis discusses his perceptions of the Company's 2009 rate case, includes details and assumptions about informal discussions with Staff, and speculates as to the involvement of the former Director of Regulatory Services.¹ There is nothing in the record to support these statements. The Company has had ample opportunity to offer information into the record prior to the filing of initial briefs. WCI did not ask to include 2009 WCI's general rate case in the record and had not provided these details in its previous testimony. Again, Staff agreed to a paper-record and waived its right to cross-examination of Mr. Willis on the basis that his testimony was substantively complete. Mr. Willis's attempt to provide the Commission with novel arguments and positions after Staff agreed to waive cross-examination prejudices Staff's case and violates due process. Therefore, the Commission should strike that portion of Mr. Willis's supplemental testimony that discusses the Company's 2009 rate case.²

8 Beginning at page 3 of his supplemental testimony filed on November 7, 2014, Mr. Willis states, "Here, Staff is advocating commingling the capital structures of the affiliate landlords for calculating the overall rate of return factors on the leased properties."³ There is nothing in the record to support this statement. As detailed in Staff's testimony, Staff used separate total company capital structures for HBI and HBII, as affiliate landlords, for calculating an overall return for each affiliate landlord.⁴ Mr. Willis significantly mischaracterizes Staff's position and then uses the remainder of his supplemental testimony to

¹ Supplemental Testimony of Joe Willis, Exhibit No. __ (JW-8T), page 1, line 18 through page 3, line 17.

² Mr. Willis's testimony discusses the Company's 2009 rate case from page 1, line 23 through page 3, line 17.

³ Supplemental Testimony of Joe Willis, page 3, lines 5 through 7.

⁴ Testimony of Melissa Cheesman, page 20, lines 1 through 3.

opine on the effects of his previously inaccurate description of Staff's recommendation. At the very least, Mr. Willis's discussion on pages 3 through 5 of his testimony is irrelevant because it does not reasonably correspond to Staff's position or the present case. More importantly, Mr. Willis added these novel arguments after Staff waived its right to cross-examination. The Commission should strike pages 3 through 5 of Mr. Willis's testimony based on the grounds of prejudice to Staff and irrelevance.

9 In Mr. Willis's supplemental testimony, filed on November 7, 2014, he includes Exhibit JW-9. This exhibit contains information from WCI's 2009 rate case not previously included in the present record. As stated above, the Company has had ample opportunity to offer information into the record prior to the filing of initial briefs. The Company did not ask to include this exhibit in the record. Moreover, a "top of the file" memo refers to a consolidated capital structure, but Staff is not proposing a consolidated capital structure and the remaining disputes in the present docket have nothing to do with the Lurito-Gallagher model. Thus, the Company's proposed exhibit is neither timely nor relevant. The Company's attempt to enter evidence after Staff can no longer adequately respond prejudices Staff. In short, the Commission should strike Exhibit JW-9.

2. **Testimony of Layne Demas**

10 The supplemental testimony of Mr. Demas, filed on November 7, 2014, provides new rationale and new positions for Adjustment R-6D, Utility Costs. On page 1, line 13 of his supplemental testimony, Mr. Demas states as the purpose of his testimony, "To address discrete issues on one of the remaining contested adjustments in this matter *that have not been resolved* by the proposed partial settlement in this proceeding." (Emphasis added). Mr.

Demas goes on to refer to: (1) materials provided to Staff without citing to the record,⁵ (2) change the Company's proposal,⁶ and (3) include two new tables with explanations and a new proposed calculation.⁷ Mr. Demas's entire testimony presents a new position and argument. Staff waived its opportunity for cross-examination on the basis that Mr. Demas's testimony was substantively complete. The Company's provision of new arguments and positions at this stage is prejudicial to Staff's case. Therefore, the Commission should strike the entirety of Mr. Demas's supplemental testimony.

3. Testimony of Jacqueline Davis

11 Ms. Davis's supplemental testimony filed on November 7, 2014, focuses entirely on the Company's rendition of accounting adjustments related to non-regulated operations.⁸ Ms. Davis's supplemental testimony goes beyond restating the Company's position and updating the amount of rate case costs. Staff waived its right to cross-examination on the basis that Ms. Davis's prior testimony was substantively complete. WCI's filing of Ms. Davis's supplemental testimony includes new details, the Company's chronology of events, and allegations of Staff misbehavior. Provision of this information after Staff can no longer respond is prejudicial to Staff's case. Therefore, the Commission should strike the entirety of Ms. Davis's supplemental testimony.

12 Equally important, the point of Ms. Davis's supplemental testimony is that the Company spent a significant amount of time and resources, particularly in its rebuttal case, discussing adjustments related to its non-regulated operations. Given that Staff has not

⁵ Supplemental Testimony of Layne Demas, Exhibit No. ___ (LD-2T), page 2, line 24 (Nov. 7, 2014).

⁶ Id. at p. 3, lines 20-22, pp. 5-6 and Table 2 at p. 6.

⁷ Id. at pp. 5-6, Table 1 and Table 2.

⁸ Ms. Davis's supplemental testimony expressly states that its purpose is to "update the rate case cost issue by highlighting additional, material professional costs incurred in response to the Staff July 18, 2014 case on separated Kalama operations."

specifically contested the amounts and hours of the Company's rate case costs, Ms. Davis's entire supplemental testimony is substantively irrelevant to the present proceeding.

Furthermore, Ms. Davis's personal attacks on Staff alleging retributive or punitive behavior are irrelevant and without support in the record.

C. The Commission should not re-open for full hearing

13 The Commission should not re-open this case for a full hearing. The Parties previously agreed to a paper record and waived the right to cross-examination. The Parties have also already filed initial briefs on the remaining contested issues. The initial briefs provide a full account of each Party's positions. Staff has not filed any new testimony or additional information, so the circumstances surrounding WCI's arguments in its brief and its decision to waive its right to cross-examination have not changed. Staff's initial brief still accurately captures Staff's position and there is no reason for the Commission to conduct a full hearing and require another round of initial and reply briefs. The Commission should simply grant Staff's motion to strike the Company's supplemental testimony and allow the Parties to file reply briefs. However, should the Commission decide to convene an opportunity for Staff to respond to the Company's supplemental testimonies, a short proceeding during which Staff could cross-examine WCI's witnesses on the basis of their most recent supplemental testimony would suffice. The Parties could subsequently file reply briefs.

IV. CONCLUSION

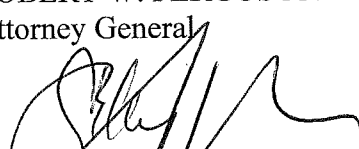
14 The Company's supplemental testimony relies on settlement discussions and presents new arguments and positions. The provision of new information at this late point in the proceeding prejudices Staff. The Commission should strike the supplemental testimonies and

exhibits of Layne Demas, Jacqueline Davis, and Joe Willis, as well as any attachments to those exhibits and any and all references thereto in Waste Control's Initial Brief. At a minimum, the Commission should schedule a brief hearing during which Staff could cross-examine the Company's witnesses regarding their supplemental testimony and exhibits filed on November 7, 2014.

DATED this 11th day of December 2014.

Respectfully submitted,

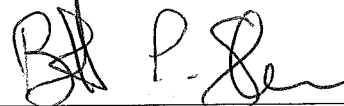
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