

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET TG-140560
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	ORDER 10
)	
v.)	
)	ORDER DENYING STAFF’S
WASTE CONTROL, INC. (G-101),)	OBJECTION TO AND MOTION TO
)	STRIKE SUPPLEMENTAL
Respondent.)	TESTIMONY AND EXHIBITS
)	
.....)	

1 On October 23, 2014, the regulatory staff (Staff)¹ of the Washington Utilities and Transportation Commission (Commission) and Waste Control, Inc. (WCI or Company) filed a joint request (Joint Motion) to resolve the four remaining accounting adjustment issues² on a “paper record,” obviating the need for an evidentiary hearing by instead allowing the parties to file initial and reply briefs.³ The Joint Motion specifically provided for the filing of supplemental testimony “on the remaining contested accounting adjustment issues with the parties reserving the right to object to information provided in briefing or supplemental testimony”⁴

¹ In a formal proceeding, such as this, the Commission’s Staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners’ policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. See RCW 34.05.455.

² Joint Motion, ¶¶ 4-8. Prior to filing the Joint Motion, the parties reached a partial settlement agreement resolving all but four issues in this matter: the methodology used to allocate common utility costs, appropriate inputs for calculating affiliate land rents, rate case costs and investigation fees, and reimbursement of the Commission for investigation costs.

³ While the Washington Refuse and Recycling Association (WRRRA) did not explicitly sign the Joint Motion, it did express agreement with the request.

⁴ Joint Motion, ¶ 9.

- 2 The Commission granted the parties' request and issued a Notice Modifying
Procedural Schedule on October 27, 2014. Parties were directed to file simultaneous
initial briefs on November 7, 2014, and simultaneous reply briefs on November 20,
2014.
- 3 WCI filed its initial brief on November 7, 2014, including the supplemental testimony
and exhibits of Layne Demas, Jacqueline G. Davis, and Joe Willis. While Staff and
WRRRA also filed initial briefs at this time, neither filed supplemental testimony or
additional exhibits.
- 4 On November 17, 2014, Staff filed an Objection to and Motion to Strike
Supplemental Testimony and Exhibits (Staff's Motion). The Commission vacated the
procedural schedule in this matter on November 18, 2014, and established the time
for responses and replies to Staff's Motion. WCI and WRRRA each filed responses⁵ to
Staff's Motion on December 5, 2014. Staff filed a Reply to WCI's Response to
Staff's Motion (Staff's Reply) on December 11, 2014.
- 5 **Staff's Motion.** Staff requests that the Commission strike the testimony and exhibits
of Mr. Demas, Ms. Davis, and Mr. Willis in their entirety as "wholly inappropriate,
prejudicial to [Staff], and unprecedented."⁶ Staff argues that the parties in no way
agreed to supplement the record with new evidence at a time when, procedurally,
closing briefs are due.⁷ WCI, according to Staff, also unfairly accuses it of a
"retributive attitude" in its "conduct of these proceedings," makes references to a rate
case filing that was not suspended and is not part of the record, speculates in
testimony as to the capital structure position of a former Staff member, and discloses
confidential settlement discussion details.⁸
- 6 In its reply to WCI's Response, Staff asserts that WCI has supplied new evidence on
brief. Staff repeats its claim that the Company, in Mr. Willis' testimony, has
"include[d] several novel arguments, wholly irrelevant discussions of [its] 2009 rate
case, and even speculates as to former Commission employee perceptions."⁹ For

⁵ We will refer to these filings as WCI's Response and WRRRA's Response, respectively.

⁶ Staff's Motion, ¶ 1.

⁷ *Id.*, ¶ 2.

⁸ *Id.*

⁹ Staff's Reply, ¶ 6.

example, Staff points to page 1 of Mr. Willis' testimony where he discusses WCI's 2009 general rate case filing.¹⁰ By agreeing to a paper record, Staff states that it has waived its right to cross-examine Mr. Willis and is now at a distinct disadvantage.¹¹ Starting on page 3 of Mr. Willis' testimony, Staff alleges the witness mischaracterizes Staff's position on capital structures of affiliate landlords for calculating an overall return for each affiliate landlord.¹² Likewise, Mr. Willis' exhibit, Exhibit No. JW-9, contains information from the Company's 2009 general rate case not previously in the record.¹³ Staff contends WCI had ample opportunity to introduce this exhibit into the record prior to closing briefs, and it can no longer adequately respond to such new information.¹⁴

- 7 Mr. Demas' testimony presents similar difficulties for Staff. Staff argues that his testimony references a new position taken by the Company at this late stage, discusses materials provided to Staff by the Company but does not cite to anything in the record, and includes two new tables and a new proposed calculation.¹⁵ As with Mr. Willis' testimony, Staff recommends that the Commission strike Mr. Demas' testimony in its entirety.
- 8 Staff asserts that Ms. Davis' testimony contains new details, as well as unfair allegations of Staff misconduct, both of which the Commission find inappropriate.¹⁶ In addition, Ms. Davis concentrates much of her testimony on defending the Company's rate case costs.¹⁷ Since Staff is not specifically contesting the totals for the Company's rate case costs, Staff contends that "Ms. Davis' entire supplemental testimony is substantively irrelevant to the present proceeding."¹⁸
- 9 The Commission, according to Staff, should strike the testimonies in their entirety. All parties have had a chance to brief their initial positions, and the Commission

¹⁰ *Id.*, ¶ 7.

¹¹ *Id.*

¹² *Id.*, ¶ 8.

¹³ *Id.*, ¶ 9.

¹⁴ *Id.*

¹⁵ *Id.*, ¶ 10.

¹⁶ *Id.*, ¶ 11.

¹⁷ *Id.*, ¶ 12.

¹⁸ *Id.*

should not re-open the matter for a full hearing on the four remaining contested issues. Instead, Staff recommends allowing the parties to file closing briefs. If the Commission denies Staff's Motion and convenes a hearing on the supplemental testimony to allow Staff the opportunity to cross-examine Mr. Willis, Mr. Demas, and Ms. Davis, Staff proposes a short proceeding followed by the filing of reply briefs.¹⁹

10 **WCI's Response.** WCI argues that the parties, and in particular, counsel for Staff and WCI, agreed that supplemental testimony could be filed with the initial briefs.²⁰ Staff reserved the right to object to the testimony if it wasn't "new/bringing up novel issues and arguments."²¹ Further, WCI alleges that Staff stated its acquiescence to the Company's filing of a rate case cost update with its initial brief.²²

11 WCI notes that Staff failed to provide specific references to support its claims that the testimony in question should be stricken.²³ In answering Staff's allegation of disclosure of confidential information, the Company states that it is forced to speculate that Staff is referring to the \$1,449 utility expense discrepancy between Mr. Demas' supplemental testimony and Staff's initial brief.²⁴ WCI argues that the discrepancies between the Company's interpretations of Staff's allowed utility expense and Staff's actual position is not only *de minimis* but can hardly be considered the intentional communication of wrongful confidential information.²⁵ The Company, pointing to Staff's higher actual allowed utility expense figure, indicates that its rendition of Staff's position on utility expense was lower than Staff's actual position.²⁶

¹⁹ *Id.*, ¶ 13.

²⁰ WCI's Response, ¶ 2.

²¹ Email from Brett Shearer, Commission, to Dave Wiley, WCI, dated October 22, 2014, attached to Declaration of David W. Wiley in Response to Commission Staff's Motion to Strike Waste Control Inc.'s Supplemental Testimony.

²² WCI's Response, ¶ 10 (citing to email from Brett Shearer, Commission, to Dave Wiley, WCI, dated October 22, 2014, which states that "[i]f the testimony reiterates previous arguments or provides updates to certain costs, it will be a non-issue anyway.")

²³ WCI's Response, ¶ 7.

²⁴ *Id.*, ¶ 11.

²⁵ *Id.*, ¶ 12.

²⁶ *Id.*, ¶ 13.

12 With regard to Staff's objection to the 2009 rate case references, the Company argues that the record is replete with references to this case already.²⁷ Further, WCI states the admissibility of testimony referencing the rate case does not rest on whether the case itself was suspended or approved without an interim suspension order.²⁸ As the Company asserts, "[t]he 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."²⁹ WCI recommends that the Commission convene a live hearing on the four contested accounting issues to address Staff's due process concerns.³⁰ If the Commission schedules a hearing in order to allow Staff the opportunity to cross-examine WCI's three witnesses, the Company would like the opportunity to cross-examine Staff's witness on these same four issues.³¹

13 **WRRRA's Response.** WRRRA argues that, in the interest of a full and complete record, Staff's Motion should be denied. WRRRA states that "the more relevant information and evidence the Presiding Officer, and the Commission itself, consider, the more fair and useful the ultimate decision will be."³² WRRRA also asserts that "[a] comprehensive and insightful decision in this case will be closely studied and followed by both Staff and the regulated companies, probably for years to come."³³ In hindsight, WRRRA states that a paper record, without oral testimony and cross-examination, was "not in the best interests of compilation of a complete record."³⁴ WRRRA recommends that the Commission convene a hearing so that all parties may cross-examine the principal witnesses testifying on the four contested accounting issues.³⁵

²⁷ *Id.*, ¶ 14. WCI cites to testimony filed on February 18, 2014, and April 3, 2014, and the August 20, 2014, filing as examples.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*, n. 2.

³¹ *Id.*

³² WRRRA's Response at 2.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 3.

14 **Decision.** The Commission’s rules allow for the exclusion of evidence, including testimony, which is “irrelevant, repetitive, or inadmissible.”³⁶ Parties objecting to the inclusion of evidence must state the grounds for the objection at the time the evidence is offered.³⁷ Failure to object constitutes a waiver of the right to object.³⁸ Staff’s overarching objection to the Company’s filing of testimony, that it is inappropriate at this phase of the proceeding, is puzzling.³⁹ As is evident from the email exchange between counsels for both parties, the filing of testimony by WCI should not have come as a surprise to Staff. It was agreed to, even if conditionally.

15 *Mr. Willis’ Testimony.* Mr. Willis does, as Staff alleges, reference a 2009 rate case filing in his supplemental testimony. This is not a new reference and is easily found in both his and Ms. Davis’ testimony from Docket TG-131794, filed on February 18, 2014. Staff specifically requested the inclusion of all testimony, exhibits, and orders arising from Docket TG-131794 within the record of the instant matter. The time to contest the inclusion of such information has passed. Staff is correct, however, that it has not had an opportunity to contest WCI’s arguments involving the 2009 rate case. This inequity, however, can easily be remedied by allowing Staff the opportunity to file limited testimony in opposition to Mr. Willis’ arguments and allowing all parties the opportunity to cross-examine the proffered witnesses.

16 Staff also takes issue with WCI’s mention of information it obtained through informal discussions it had with Staff⁴⁰ and the involvement of a former Director of Regulatory Services in the 2009 rate case, arguing that both have been offered without any support in the record. Still, Staff has not asserted that they are irrelevant. Ultimately, if WCI’s arguments are without support, the Commission will consider that in weighing the entire record before us.

³⁶ WAC 480-07-495(1).

³⁷ *Id.*

³⁸ WAC 480-07-490(7).

³⁹ It is fair to say we were underwhelmed by Staff’s Motion. In a mere two paragraphs, Staff made sweeping statements that lacked any supporting citation to the testimony at issue. Staff, in an attempt to cure these deficiencies, provided more detail and some citations to the testimony in its Reply. This is not the typical role of the reply, and we will not look favorably on a motion with such scant detail in the future.

⁴⁰ In its Motion, Staff originally characterized these discussions as “confidential settlement discussions.” In its discussion of Mr. Willis’ supplemental testimony, Staff’s Reply noted the discussions were “informal” without any reference to them taking place in a settlement context.

- 17 Further, if WCI's characterization of Staff's position on a consolidated capital structure is inaccurate, Staff will have the opportunity to rebut this characterization by offering its own testimony, cross examining Mr. Willis, or both. We will accord the appropriate weight to each position based on the full evidentiary record.
- 18 *Mr. Demas' Testimony.* As with Staff's complaints against the testimony filed by Mr. Willis, much of Staff's difficulties can be addressed by allowing it to file testimony, cross-examine Mr. Demas, or both. In at least one instance, Staff alleges that Mr. Demas' testimony is based on information he acquired through settlement negotiations. Staff does not, however, cite to a specific reference made by Mr. Demas in his testimony. Without more particularity, we cannot find in favor of Staff on this allegation.
- 19 *Ms. Davis' Testimony.* Once again, most of Staff's misgivings associated with Ms. Davis' supplemental testimony can be remedied with an opportunity for it to file testimony, cross-examine Ms. Davis, or both. Staff can address any new positions it believes the Company has taken in either forum. While Staff alleges WCI has engaged in personal attacks, it does not point to any specific detail in Ms. Davis' testimony. While Ms. Davis does acknowledge Staff's zeal in auditing the Company,⁴¹ this hardly seems to be a "personal attack." In addition, rate case costs/investigation fees and reimbursement of the Commission for investigation costs are two of the four contested issues remaining in the matter. Thus, it's difficult to understand why Staff would find irrelevant Ms. Davis' testimony relating to the time and expense involved in WCI's preparation of the rate case.
- 20 It has become fairly obvious to the Commission that the remaining four contested issues cannot be addressed on a paper record only. With the filing of testimony by WCI, Staff and WRRRA should be afforded a similar opportunity to present their cases on these issues. Further, all parties should have the opportunity to cross-examine the witnesses that have been proffered to address these four issues in an evidentiary hearing. Parties would be limited to cross-examination of the witnesses that have filed testimony on the content of that testimony as it relates to the four contested issues. The Commission will set a time for the filing of testimony by Staff and WRRRA and work with the parties on an appropriate hearing date shortly after this order is entered.

⁴¹ Davis, Exh. No. JD-50T, at 6:3-5 and 6:20-24.

ORDER

21 THE COMMISSION ORDERS THAT The Objection to and Motion to Strike Supplemental Testimony and Exhibits is denied.

DATED at Olympia, Washington, and effective January 7, 2015.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.