

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MURREY'S DISPOSAL COMPANY, INC.

Complainant,

v.

WASTE MANAGEMENT OF WASHINGTON,
INC., WASTE MANAGEMENT DISPOSAL
SERVICES OF OREGON, INC., AND MJ
TRUCKING AND CONTRACTING, INC.,

Respondents.

NO. TG-200650

COMPLAINANT'S RESPONSE IN
OPPOSITION TO RESPONDENTS'
MOTION FOR LEAVE TO FILE REPLY

I. INTRODUCTION

I Pursuant to WAC 480-07-370 and 375, Murrey's Disposal Company, Inc. ("Murrey's") files this Response in Opposition to Respondents' Motion for Leave to File Reply filed by Waste Management of Washington, Inc., Waste Management Disposal Services of Oregon, Inc. and MJ Trucking and Contracting, Inc. (collectively "WM" or "Respondents").

**COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION
FOR LEAVE TO FILE REPLY - 1**

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II. ARGUMENT

2 After first preemptively and prematurely seeking leave to file a reply before a response had been filed, WM filed their Motion for Leave to File Reply Brief in Support of Motion to Dismiss on three grounds: (1) a reply is always permitted in Court, (2) alleged legal error in Murrey's arguments in support of its Response to WM's Motion to Dismiss, and (3) an argument that WAC 480-07-370(5) does not apply. Based upon these grounds, Respondents ask to be permitted more time to prepare a reply they failed to include with their Motion for Leave than Murrey's was afforded to prepare its Response. By these arguments, WM wholly fail to demonstrate why their Motion to Dismiss should not be considered on the grounds and arguments set forth therein as is contemplated by the Commission's rules.

i. The Commission is not required to apply court rules, nor did it omit the right to a reply by mistake

3 As noted, Respondents argue that a reply should be authorized here because a reply in support of a Motion to Dismiss is always permitted in Court. The Commission's procedural rules are set forth in WAC 480-07 *et seq*, not in the Civil Rules for Superior Court and it does not automatically apply court rules in reaching procedural determinations. Thus, this alone fails to support the necessity of a reply brief here. Moreover, had the Commission intended for a reply to be available for all dispositive motions, it certainly knew how to draft procedural rules permitting that and would have so stated. Indeed, it provided such a right under WAC 480-07-825(2)(d) to permit a party an opportunity to respond to new challenges raised in a response to a petition for administrative review. Thus, because WAC 480-07-380, does not authorize a reply at all, much less automatically, the Commission clearly did

not intend to authorize a reply merely to enable an additional round of legal argument on the same facts or legal theories.

ii. Replies at the Commission are permitted to respond to new legal theories and factual assertions, not to ambush opponents

4 When the Commission does permit a reply in support of a motion, it has typically applied the requirements of WAC 480-07-370(5),¹ which requires that good cause be shown, including that new facts or legal theories were raised in the response. For example, in *In re Verizon Northwest, Inc.*, Dkt. UT-050778, Order 05 (Mar. 29, 2006), the Commission barred the filing of a reply in support of a motion for leave to add parties, ruling:

In addition, Petitioners' Motion for Leave to Respond to the response filed by Verizon is denied. The Commission did not direct or invite a reply to the responses filed by Verizon and Commission Staff. *WAC 480-07-370(1)(d)(iii)*. A party may not file a reply without authorization from the commission, upon showing of cause." *WAC 480-07-370(1)(d)(i)*. Petitioners' motion fails to address whether Verizon's response raises new material requiring a response, or state other reasons why a reply is necessary. *WAC 480-07-370(1)(d)(ii)*.

¶ 17 (italics in original). *See also*, *In re Pac-West Telecomm, Inc.*, Dkt. UT-053036, Order 16 (Jul. 17, 2012), ¶ 4 (applying WAC 480-07-370(5) to permit a reply to a motion for leave to amend based upon new material in a response); *In re Bremerton-Kitsap Airpporter, Inc.*, Dkt. TC-110230, Order 02 (Sep. 27 2011), ¶ 4 (applying WAC 480-07-370 to permit a reply to a response in opposition to a motion for leave to amend that raised new material).

¹ WAC 480-07-370(5) is a more stringent version of the former WAC 480-07-370(1)(d). *See* Dkt. A-010648, General Order No. R-510 for the former WAC 480-07-370(1)(d).

5 Here, Respondents have not attempted to show good cause, which cannot be established by mere disagreement on legal authority. If disagreement about the application of law demonstrated good cause, the Commission could easily have permitted an automatic right to reply in support of a motion to dismiss under WAC 480-07-380(1)(a), since a dispute about the legal right to assert a claim would exist in every instance. Nor have WM asserted that new material was raised in Murrey's Response, which would be wholly incorrect had it been so asserted. Murrey's Response addressed the pleadings on file and the same legal arguments raised by WM in their Motion to Dismiss. Instead, Respondents assert that they should be authorized to file a reply to respond to alleged erroneous legal argument arguing that WAC 480-07-380 does not apply, and citing to the Presiding Officer's email as its basis, rather than legal authority.

6 The Commission does not typically authorize a movant to file a reply to issues it raised in its initial motion, nor should it here, when Respondents assert they anticipated Murrey's legal arguments and thus apparently reserved additional legal argument for a reply. *See* Respondents' Motion for Leave, ¶ 5 ("As anticipated by Respondents, the determinative issues of federal law raised by Murrey's claims warrant thorough briefing to the Presiding Officer.").

7 Not only did WM fail to support their Motion for Leave with good cause to file a reply, they failed to file their proposed reply. Had they done so as the rule requires, the Commission could assess whether Respondents truly intend to respond to new issues (of which there were none), or instead, use a reply as an opportunity to confront Murrey's with legal

argument they held in reserve for the reply they anticipatorily requested. Without the proposed reply in hand, authorizing one merely invites a request for additional responsive briefing by Murrey's to arguments raised for the first time in reply or in a subsequent motion to strike. Rather than again extending the briefing schedule on a motion to dismiss designed to preclude discovery of the facts relating to a topic that federal agencies and courts have ruled can only be determined on a case-by-case basis,² the more prudent course here would be to require WM to comply with WAC 480-07-370 *before* authorizing a reply. If that should result in a denial of WM's Motion to Dismiss, WM will suffer no prejudice because the Commission will fully adjudicate this proceeding on the same legal issues Respondents hope to address in an unjustified reply. Conversely, if Respondents are permitted to raise additional new issues in their unfiled proposed reply and their Motion to Dismiss is then granted, Murrey's will have been denied due process.

III. CONCLUSION

8 WM failed to demonstrate that there is any justification to be authorized a reply here, much less good cause based upon new material raised by the Response. If Respondents believe extensive briefing on the legal issues will be required, they will have multiple additional opportunities to present them in the course of this proceeding.

² In ascertaining whether a transload facility was providing "rail transportation," the Third Circuit disregarded a party's contract, noting that it can look past the parties' contracts to determine the true nature of the relationship. *See New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 250 (3d Cir. 2007). Here, WM should not be permitted to avoid the application of WAC 380-07-370 to support their Motion to Dismiss, which they in turn use as a shield to

RESPECTFULLY SUBMITTED this 24th day of August, 2020.

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avoid discovery under WAC 480-07-400 (2)(b)(ii) upon which the true substantive nature of the Respondents' relationships may well be determined.

**COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION
FOR LEAVE TO FILE REPLY - 6**

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CERTIFICATE OF SERVICE
TG-200650

I hereby certify that on August 24, 2020 I served the attached documents via E-mail to the following parties:

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Signed at Seattle, Washington this 24th day of August, 2020.

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**COMPLAINANT’S RESPONSE TO RESPONDENT’S MOTION
TO DISMISS - 7**

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