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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

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COMMISSION

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WASHINGTON UTILITIES AND )

4 TRANSPORTATION COMMISSION, )

)

5 Complainant, )

)

6 vs. ) DOCKET NO. TG-091933

) Volume I

7 WASTE MANAGEMENT OF WASHINGTON, ) Pages 1 - 16

INC., d/b/a WASTE MANAGEMENT )

8 OF SNO-KING, )

)

9 Respondent. )

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10 In the Matter of the Petition of )

)

11 WASTE MANAGEMENT OF WASHINGTON, )

INC., d/b/a WASTE MANAGEMENT OF ) DOCKET NO. TG-091945

12 SNO-KING ) Volume I

) Pages 1 - 16

13 For Rule Interpretation or )

Alternatively For Modification or)

14 Exemption of WAC 480-07-520(4) )

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16 A prehearing conference in the above matter

17 was held on January 22, 2010, at 9:36 a.m., at 1300

18 South Evergreen Park Drive Southwest, Olympia,

19 Washington, before Administrative Law Judge ADAM TOREM.

20 The parties were present as follows:

21 WASHINGTON UTILITIES AND TRANSPORTATION

COMMISSION, by JONATHAN THOMPSON, Assistant Attorney

22 General, 1400 South Evergreen Park Drive Southwest,

Post Office Box 40128, Olympia, Washington 98504;

23 telephone, (360) 664-1225.

24 Kathryn T. Wilson, CCR

25 Court Reporter

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1 WASTE MANAGEMENT OF WASHINGTON, INC., by

POLLY L. MCNEILL, Attorney at Law, Summit Law Group,

2 315 Fifth Avenue South, Suite 1000, Seattle, Washington

98104; telephone, (206) 676-7000.

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WASHINGTON REFUSE AND RECYCLING ASSOCIATION,

4 by JAMES K. SELLS, Attorney at Law, Ryan, Sells,

Uptegraft, 9657 Levin Road, Suite 240, Silverdale,

5 Washington 98383; telephone, (360) 307-8860.

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1 P R O C E E D I N G S

2 JUDGE TOREM: Good morning. Let's be on the

3 record in this consolidated docket of TG-091933 and

4 TG-091945. These cases were consolidated by order last

5 week, and we will be focusing on the 945 docket, which

6 is a petition for a rule interpretation or perhaps

7 alternatively a modification or an exemption for Waste

8 Management of Washington and its Waste Management of

9 Sno-King entity.

10 My understanding is that the open meeting

11 last Thursday, January 14th, had referred this matter

12 to an ALJ for a resolution of the petition in as

13 expedited a manner as possible, so here we are today on

14 Friday, the 22nd of January, 2010. It's a little after

15 9:30 in the morning, and today we are going to try to

16 set a schedule for, I understand, filing of briefs so I

17 can understand both Staff and Waste Management and

18 perhaps the WRRA's positions on how to interpret WAC

19 480-07-520 in conjunction with not only the words on

20 the page but the Commission's recent emphasis on making

21 sure anybody filing a rate case complies with the

22 Commission's rules for all regulated companies, and

23 today, I that rule only applies to solid waste

24 companies.

25 So let me take appearances. I exchanged some

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1 e-mails yesterday as to the commissioners' availability

2 to hear this case having waived parties' rights to an

3 initial order, so we can do that formally on the record

4 today and see how quickly a final order interpreting

5 this rule can be achieved. For the petitioner, please.

6 MS. MCNEILL: Thank you, Your Honor. Polly

7 L. McNeill of Summit Law Group, 315 Fifth Avenue South,

8 Suite 1000, Seattle, Washington, 98104; phone number,

9 (206) 676-7040; fax, (206) 676-7041; e-mail,

10 pollym@summitlaw.com, representing the petitioner,

11 Waste Management of Washington, Inc., d/b/a Sno-King.

12 JUDGE TOREM: Mr. Thompson?

13 MR. THOMPSON: Jonathan Thompson, assistant

14 attorney general representing Commission staff. My

15 street address is 1400 South Evergreen Park Drive

16 Southwest, Olympia, 98504. Phone number is (360)

17 664-1225, and my e-mail is jthompso@utc.wa.gov.

18 JUDGE TOREM: Mr. Sells?

19 MR. SELLS: Thank you. James Sells appearing

20 on behalf of proposed intervenor Washington Refuse and

21 Recycling Association, 9657 Levin Road Northwest, Suite

22 240, Silverdale, 98383; phone, (360) 307-8860; fax,

23 (360) 307-8865; e-mail, jimsells@rsulaw.com.

24 JUDGE TOREM: Our first order of business

25 should be the parties' reaction to Mr. Sells' petition

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1 to intervene. Mr. Sells, I think the petition speaks

2 for itself. Did you want to add anything to it at this

3 time before I see if there are objections?

4 MR. SELLS: No. I will reply if there is any

5 objections, Your Honor.

6 JUDGE TOREM: Ms. McNeill, any objections?

7 MS. MCNEILL: I have no objections as long as

8 there isn't any delay in the schedule from the

9 intervention. I have Mr. Sells's assurance there won't

10 be, so I have no objection.

11 JUDGE TOREM: Mr. Thompson?

12 MR. THOMPSON: Staff has no objection.

13 JUDGE TOREM: Seeing as the WRRA has

14 intervened in just about every case, as Mr. Sells has

15 pointed out, since the dawn of the UTC, we don't want

16 to break that trend now, so petition granted.

17 Let's turn to the other business at hand

18 then. I believe, Ms. McNeill, I've already reviewed

19 your petition and the other paper that's in the case,

20 and as you know, I've now listened to the majority of

21 the open meeting recording, so it's not a need to

22 rehash today your statements to the commissioners and

23 your company's concerns with what you see the solid

24 waste division here making a change in how its

25 enforcement rule, not just a ratcheting up of its

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1 demands for compliance with the niceties. We can deal

2 with that on brief. I think that's now already a part

3 of the record and can be referred to.

4 Let's focus on how quickly we can get this

5 accomplished. Yesterday I gave you a very optimistic

6 and ambitious schedule with briefs coming in perhaps as

7 soon as a week from today, if we are going to have a

8 responsive date, with a second filing being Wednesday

9 the 3rd of February, with a hope that the week of the

10 8th of February, the Commissioners and I can meet, have

11 a decision conference, and perhaps have an order

12 drafted, if not issued, as soon as the 12th of

13 February.

14 I'll say that I can't promise you will get a

15 result by then, but that's the most optimistic and

16 aggressive schedule I can see given that the

17 Commissioners will be out of town for the NARUC

18 meetings the following week. There is probably a most

19 realistic chance that the order won't be issued until

20 they get back from NARUC if they don't feel they've had

21 a sufficient time to consider everything they need to

22 in setting this rule interpretation straight for not

23 only your company but the entire industry.

24 So what is your reaction to that proposed

25 schedule?

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1 MS. MCNEILL: Thank you. My reaction is that

2 I think it's ambitious, but it is doable, and

3 Mr. Thompson, I will let him speak for himself, but we

4 have discussed this, and I believe we are amenable to

5 meeting those scheduled demands with Mr. Thompson

6 filing.

7 I'm willing to say that our petition can

8 stand as the opening brief. Mr. Thompson then would

9 file a reply with perhaps affidavits or declaration on

10 a paper record by Friday the 29th, or a response by

11 Friday the 29th, and then we would do our reply by

12 February 3rd. We are very interested in getting a

13 decision on this petition so our rates are not held in

14 abeyance any longer than they need to be.

15 I really, really appreciate Mr. Thompson's

16 willingness to abide by that. I know how demanding

17 that is, but I think my reply is also pretty demanding,

18 so I think we are both willing to make this work.

19 JUDGE TOREM: Mr. Thompson, what's your

20 thoughts on how many affidavits or factual-based items

21 you might have to dredge up in the next week?

22 MR. THOMPSON: On the strict legal question

23 of how the interpret the requirements of the rule,

24 which I would boil down to basically does "Company"

25 mean corporation or legal entity, or can it mean

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1 business units within a corporation, doesn't really

2 require any factual basis at all. It's a legal

3 argument, but then the second issue of what exemption

4 might be appropriate from the filing requirement does

5 get into facts some.

6 Since the Company is relying on its initial

7 filing in which there are some kind of assertions of

8 fact that aren't really based on affidavits or

9 anything, I would appreciate some leeway in that regard

10 to sort of treat this more like a brief adjudicative

11 proceeding where we are giving a statement of the case

12 and have some leeway to state the facts without having

13 any sworn testimony behind it. That would be my

14 proposal.

15 JUDGE TOREM: I think Chairman Goltz in the

16 open meeting addressed the flexibility of the

17 administrative adjudicative process. I'm more than

18 happy to adjust that as long as the factual basis on

19 which the Commissioners make the decision is fully

20 fleshed out, not only to the parties' satisfaction but

21 to the Commission, so if we need more time to hammer

22 out those facts, then we have to extend the schedule.

23 There may be that there can be a stipulation

24 of fact between you and Ms. McNeill to better support

25 what's in the initial filing, and maybe that would come

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1 in at the same time as your brief next week so that

2 everybody will have the table set fully with all the

3 agreed facts and anything else you are bringing to the

4 table that might be disputed facts.

5 MR. THOMPSON: I don't think there are going

6 to be any disputes in fact. I think it's going to be

7 more of a matter of argument over what type of

8 information is required from a company and why for

9 purposes of auditing a company, so it's not really

10 specific to this particular situation. It's kind of

11 universal rate-making concepts.

12 JUDGE TOREM: I see from reading

13 Ms. McNeill's petition and listening to the open

14 meeting though that there was also a question of the

15 Commission's past practice and the enforcement of this

16 rule and its previous interpretations perhaps that

17 setting a precedential custom of how it would not only

18 treat Ms. McNeill's client but all other companies

19 depending on how that would be defined.

20 So I don't know if there will be a factual

21 dispute or a stipulation as to previous rate cases for

22 Sno-King or other divisions within waste management

23 that all sides could agree it's past history. How it's

24 being interpreted now -- to all the solid waste

25 companies regarding the new approach to enforcing the

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1 rule more strictly. Whether that should be part of the

2 factual record in this case I don't know, but it seems

3 as though that's been one of the relevant points to

4 dispute.

5 MR. THOMPSON: I think Staff conceives that

6 it has operated differently in the past, but I don't

7 think there is any argument on the Company's part that

8 Staff is somehow estopped or something from --

9 JUDGE TOREM: You have that little disclaimer

10 that past performance is no guarantee of future

11 results?

12 MR. THOMPSON: I just don't think we will be

13 appearing, but I don't think necessarily getting into

14 that aspect.

15 MS. MCNEILL: I do agree. I don't actually

16 think that there is any dispute about the way this rule

17 has been applied in the past, and we can be sure to

18 perhaps come up with some stipulation that could be

19 included with Mr. Thompson's submittal on the 29th to

20 package that up, but I don't think there were any

21 statements we made in our petition that would be the

22 subject of controversy, and no, we aren't arguing

23 estoppel. The only argument we would have is that past

24 practice may be shared interpretation, but we are not

25 arguing that they are estopped from changing that.

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1 JUDGE TOREM: Exactly. That's the angle I

2 was suggesting. I didn't think you would bring a case

3 that the Commission was estopped from correctly

4 enforcing the regulations. I got the impression that

5 the industry wanted to be sure that it wasn't just

6 better compliance being demanded but not in its place a

7 new interpretation of the rule or a modification of the

8 words to mean something than they have in the past.

9 Asking for dotting the i's and crossing the

10 t's would be one thing, but having you change what's

11 required for that change in the rule is another, and I

12 thought that was the thrust of the Company's petition.

13 MS. MCNEILL: That's correct. That's part of

14 our position, and again, we simply feel that the past

15 practice is reflective of a legitimate and supportable

16 interpretation of the regulation, and as you said at

17 the beginning, not just a ratcheting up of enforcing

18 the stated and clearly unambiguous requirements but

19 actually a change in terms of what the regulation is

20 being interpreted to mean.

21 But again, I'm sure that John would point out

22 that doesn't foreclose them. It's just because we

23 didn't stop you from going 90 the last week and a half

24 doesn't mean we can't stop you from going 90 now. He

25 would make some sort of an argument like that, I

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1 assume, and I would not oppose that. That's a

2 legitimate argument to make.

3 JUDGE TOREM: So if I understand correctly,

4 the Company as the petitioner and Staff will work

5 together to have some filing on any stipulated facts

6 that you deem necessary; that Staff will file its own

7 response to the petition a week from today. Mr. Sells,

8 did you want to file a response to the petition or wait

9 to join in the reply?

10 MR. SELLS: We would wait until the reply,

11 and if we file anything, it will be a reply to the

12 response.

13 JUDGE TOREM: I took it from your petition to

14 intervene that you were supporting Ms. McNeill's

15 approach to this.

16 MR. SELLS: As I understand it at the moment.

17 Our situation is we do, in fact, have some members who

18 have similar, not identical, business structures on a

19 much, much smaller scale, and we are here to make sure

20 that we know what the rules are too. That's basically

21 it.

22 JUDGE TOREM: Excellent. So we will set

23 January 29th as the response date for the petition and

24 any stipulation that is necessary, because it may prove

25 to be none, so I don't want to set a deadline for a

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1 stipulation that will never appear, but if there is

2 going to be stipulation on or at the same time as the

3 Staff's response, the date then for the reply will be

4 February 3rd, and I'm hoping that if you can hold up

5 that end of the schedule, then I will be able to get a

6 memo to Commissioners by later that week, and our

7 internal decision process can get started earlier on

8 the week of the 8th as early as possible and hopefully

9 be well in the works by the end of the week, and if

10 everything lines up and other things don't leap out of

11 the woods at as, then perhaps as soon as by the 12th.

12 If you want to check in with me on the

13 afternoon of the 12th if you haven't seen something as

14 to what the predictions are when it might be published,

15 feel free, but I won't make any promises. I'll tell

16 you it's either in the works or a decision conference

17 has or hasn't occurred, but I can't tell you how it's

18 going to come out, but I can try to tell you when. At

19 that point, it will be a question of the Commissioners

20 being on one end of the country and me being in another

21 time zone that week of President's Day, so we will be

22 getting things across the Internet to get things signed

23 and not have to wait until everyone is back. That's

24 the best prediction I can tell you on schedule.

25 When you file the response, Mr. Thompson, if

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1 you could make sure you not only address the rule

2 interpretation but also Staff's position if the rule

3 interpretation is held up and Staff might argue whether

4 or not you would support an exemption or some sort of

5 modification as was requested in the petition.

6 MR. THOMPSON: Right, and I plan to do that.

7 I think I can even give you a little information in

8 advance that Staff would support at least a partial

9 exemption. There are two subparts of the rule, D and

10 H, that are at issue, and I'm getting them confused,

11 but we've already agreed that one of them ought to be

12 exempt, the detailed depreciation schedule, which I

13 think is H, so I think the dispute is really in the

14 details where the devil resides in D.

15 JUDGE TOREM: Is there any other issues we

16 need to take up this morning then? We've agreed on

17 this overly-ambitious schedule.

18 MS. MCNEILL: The only other thing I would

19 point out is I would certainly work and take the lead

20 on the stipulation for drafting that for us to have an

21 agreement to provide with Staff's response, but until

22 we see Staff response, I don't know whether there may

23 be any additional facts that we would want to put into

24 the record by either affidavit or declaration, and I

25 will do my best to run them by Staff before they are

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1 actually filed so that we can minimize any dispute

2 about anything that we may say in our reply that is

3 factually based, but I wouldn't want to foreclose the

4 opportunity to actually add additional facts to the

5 reply if they are important to respond to what Staff

6 files.

7 JUDGE TOREM: Sounds good, and Mr. Thompson,

8 in that regard if additional facts do come in and

9 Commission staff wants to quickly file a surrebuttal or

10 reply at that time, you will know Wednesday afternoon

11 the 3rd when you see it if that's the case. I would

12 hope, given the schedule, you would be able to file a

13 petition requesting as much and maybe an agreed

14 petition from the other parties that the Commission

15 should consider Staff's second filing and hopefully try

16 to get that in by the 5th so that it's all in hand when

17 I hope to meet with the Commissioners on the 8th or

18 9th. If additional facts do present themselves for

19 some reason after next Friday, that we've anticipated

20 that as well.

21 My hope is that the record will be complete

22 enough on the facts and the argument that there won't

23 be a need for Bench requests after the decision

24 conference, but if we need to use that tool, we will

25 try to give you about a 48-hour turnaround after

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1 reading all the materials. Is there anything else to

2 do today?

3 MR. THOMPSON: I don't think so.

4 MS. MCNEILL: I think we've addressed

5 everything we've purported to address.

6 JUDGE TOREM: We will adjourn this

7 prehearing conference.

8 (Prehearing conference adjourned at 9:57 a.m.)

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