BEFORE THE WASHINGTON STATE UTILITIES
AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. WASTE CONTROL, INC., Respondent.	DOCKET NO. TG-140560 PETITION FOR ADMINISTRATIVE REVIEW OF INITIAL ORDER NO. 12 BY RESPONDENT WASTE CONTROL, INC.

June 29, 2015

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I. PRELIMINARY STATEMENT

1 Respondent Waste Control, Inc. ("WCI," "Respondent," "Petitioner," "Waste Control" or "the Company") submits the following Petition for Administrative Review, pursuant to WAC 480-07-825, seeking review of portions of the Administrative Law Judge's Initial Order No. 12 in this matter. All parties support the Partial Settlement approval also announced in Initial Order 12.

II. PETITION FOR ADMINISTRATIVE REVIEW/DECISION-MAKING MODEL/RECUSAL OF COMMISSION ACCOUNTING ADVISOR

2 Footnote 2 of the Initial Order includes the now-familiar reference to the ex parte wall in Commission orders and assurance of fairness under RCW 34.04.455. In that regard, Petitioner notes that the appearance of fairness doctrine would also seem to preclude the accounting advisor to the administrative law judge, Roland Martin, from any role in advising the Commissioners on this Petition. Allowing Mr. Martin to operate otherwise would be analogous to a Superior Court Clerk who assisted in drafting a ruling also aiding the Court of Appeals in the drafting of the appellate decision on the same case. With all due respect to the uniqueness and expertise of the administrative agency quasi-judicial adjudicative model, the appearance of fairness doctrine and RCW 34.05.455 would seem to require a complete separation of the Initial Order authors and advisors for the internal appeal consideration.[1] Attaining an appropriate appearance of fairness standard is also seemingly more difficult in a circumstance where, as here, the public service company has a statutory burden of proof and the presiding officer and opposing side are all employees of the same agency rendering the final decision in this matter.

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[1] "Generally, under the appearance of fairness doctrine, proceedings before administrative tribunals acting in a quasi-judicial capacity are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. Under the appearance of fairness doctrine, it is not necessary to show that a decision-maker's bias actually affected the outcome, only that it could have." *Nationscapital v. Dep't of Fin. Insts.*, 133 Wn. App. 723, 758-759, 137 P.3d 78, 96, 2006 Wash. App. LEXIS 1288, *51-52 (Wash. Ct. App. 2006) (internal quotations omitted).

III. OVERVIEW/THE WCI RATE CASE IN A NUTSHELL

3 This case is really about regulatory policy and who establishes the same: the Commission, through its Final Orders, rules and policy statements, or the WUTC Staff auditors, on an ad hoc, case-by-case basis.[2] Despite WCI's repeated synopses of this case in its Opening and Reply Briefs, the Initial Order never addresses a fundamental dilemma this general rate case Proponent faced throughout this proceeding. Against the backdrop of two current rulemakings,[3] WCI was confronted with novel accounting treatments, "updated" costs of capital and debt measurements and broadly acknowledged first-time theorizing by the new regulatory requirements auditor. Never before in its decades'-long history of regulated operations has Waste Control experienced renditions and proposed dispositions of any of the four disputed accounting issues in this proceeding, (i.e. three-factor allocators for utility expenses, return on affiliate rents, investigation fees, "paring" of rate case costs).

4 Recognizing the difficult odds any contested rate case Proponent faces, not only in burden of proof but in contravening Staff accounting positions advocated for a solid waste collection company, and despite the voluminous record already developed to date in this proceeding, WCI files this Petition for Administrative Review hoping for some resonance with the Commissioners on the procedural hurdles, substantive legal outcomes and the conflicting policy initiatives circulating in this unfortunately contentious and prolonged proceeding. [4] While ever sanguine

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[2] While non-adjudicated cases are technically subject to "recommendation" by the Staff, in reality, Staff positions on individual detailed accounting adjustments, unless adjudicated, are only subject to effective ratification by the Commissioners at the Open Meeting in the case of almost all solid waste general rate filings since, as frequently noted in this record, there has not been a contested solid waste rate case going to Final Order since 1994.

[3] Docket No. A-130355, Rulemaking to Consider Possible Corrections and Changes in Rules in WAC 480-07, Relating to Procedural Rules.
Docket No. TG-131255, Inquiry to Consider Methods for Setting Rates for Solid Waste Collection Companies Pursuant to WAC 480-70.

[4] Attesting as well, in this Petitioner's and the industry's view, as to why SB 6019 in the 2015 Washington State Legislature was particularly flawed in eliminating the option of agency review of Initial Orders.

about conventional prospects for relief and/or reversal of the holdings to date in the context of administrative law realities, Petitioner believes the unique timing of this proceeding in the annals of solid waste case rate filings against the backdrop of key Commission personnel transitions over the past two years, theoretical approaches involving Title 81.77 ratemaking and the two important, formative industry rulemakings provide sufficient traction to support and modify what WCI contends are material errors in Initial Order 12.

IV. CASE PROCEDURAL SUMMARY/OVERVIEW

5 With the noted voluminous record adduced to date in this proceeding, WCI will only briefly here summarize the procedural background to this case. The previous pleadings, including motions by the Parties, interim Orders and most importantly, the Initial and Reply Briefs of the Parties have exhaustively, (and likely exhaustingly for the Commission and all parties), described and detailed the various phases of this general rate case to the present.

6 The Petitioner filed the original docket TG-131794 on September 23, 2013 which was subjected to extensive audit and investigation, suspended in November, 2014 and dismissed in Order 05, on March 25, 2014. The Company refiled its general rate case on April 4, 2014. Staff filed their respective cases in the April-August 2014 interval. The parties then engaged in settlement discussions resulting in a Partial Settlement Agreement which was filed on October 14, 2014. Following the Partial Settlement Agreement filing, the parties agreed to address the four remaining accounting issues on a paper record by providing initial briefs and supplemental testimony[5] with the parties reserving the right to object to information provided in briefing or

[5] Joint Motion to Amend Procedural Schedule of October 27, 2014, ¶9, p. 3.

supplemental testimony. That briefing and supplemental testimony was filed on November 7, 2014.[6]

7 On November 17, 2014 -almost on the eve of the Reply Brief deadline- Staff filed a Motion to Strike WCI's Supplemental Testimony, resulting in nearly a two-month delay to resolve that procedural question. While that Staff Motion was ultimately denied, the procedural schedule was further extended by a subsequent supplemental testimony filing by Staff and a live hearing on the four remaining contested accounting issues on March 11, 2015. Reply briefs were served and filed on March 27, 2015 and the Initial Order 12, to which this Petition is directed, was issued following two extensions of the statutory suspension period and served on, June 8, 2015.

8 "Arduous" is likely an understatement to describe the rate filings for all concerned both in the current docket, TG-140560, and its oft-referenced predecessor filing, TG-131794. Suffice it to say this has been almost a two-year odyssey that is, and hopefully remains, an unfortunate, isolated and unique exception to the standard efficacy of submitting, investigating, auditing and resolving solid waste general rate cases before the Commission under RCW 81.77.030 and RCW 81.28.050.

V. EXCEPTIONS TO INITIAL ORDER 12

9 Pursuant to WAC 480-07-825(3), the Petitioner takes specific exception to the following Findings/Conclusions set forth at pages 31 and 32 of Initial Order 12. Because the administrative law judge did not separately delineate findings of facts and conclusions of law but combined them in a "Findings and Conclusions" section, the Petitioner characterizes the below

[6] While the Initial Order at footnote 13, p. 4 describes that supplemental Company testimony as "unsolicited," that filing was always intended by the Company as part of its presentation on the remaining contested issues and was hardly a surprise to Staff as indeed the administrative law judge herself had previously found in Initial Order 10, ¶14, p. 6.

as either exceptions to findings of fact, mixed findings of fact and law, or conclusions of law, and objects to same specifically as follows:

Exception to Finding/Conclusion (8) at ¶90. With regard to the shared utility expenses adjustment, Staff's three-factor allocation proposal is consistent with generally accepted allocation principles and is more reasonable than WCI's position assigning direct costs as shared expenses.

Exception to Finding/Conclusion (9) at ¶91. We accept Staff's proposed utility expense Adjustment R-6D allocating $15,424 of shared utility expense to WCI's regulated operations as fair, just, reasonable, and sufficient.

Exception to Finding/Conclusion (10) at ¶92. Staff's use of the capital structure and actual costs of debt of Heirborne Investments, LLC (HBI) and Heirborne Investments II, LLC (HBII) is appropriate to calculate the allowed return on equity for the land rents WCI pays to its affiliates HBI and HBII.

Exception to Finding/Conclusion (11) at ¶93. The discounted cash flow methodology proposed by Staff for calculating returns on the land WCI rents from its affiliates is reasonable.

Exception to Finding/Conclusion (12) at ¶94. Staff's approach employing the landlords' actual cost of debt, in this case, 2.2 percent for HBI's rents and 4.3 percent for HBII's rents, is easily verifiable, captures the combined landlords' risk profile, and connects a fair return to that risk profile.

Exception to Finding/Conclusion (13) at ¶95. Staff's three-factor allocator is consistent with the regulatory principle of cost-causation allocation and should be applied to allocate depreciation and average net investment among tenants of HBI and HBII's facilities.

Exception to Finding/Conclusion (14) at ¶96. The rate case expenses of which WCI has requested recovery are excessive. The Commission finds that Staff's proposal to allow 100 percent recovery of the expenses from the informal audit process in Docket TG-131794 and 50 percent recovery of the expenses from the formal adjudications in Dockets TG-131794 and TG-140560, as described in paragraph 69, is reasonable. The rate case costs will be amortized over a four year period.

Exception to Finding/Conclusion (15) at ¶97. RCW 81.20.020 provides that the public service company subject to a Commission investigation shall pay the costs incurred by the Commission for such an investigation up to one percent of its gross intrastate operating revenues for the preceding calendar year.

Exception to Finding/Conclusion (17) at ¶99. WCI shall pay $43,818.82, or one percent of its intrastate gross operating revenues for calendar year 2013.

Exception to Ordering Provision. In conjunction with its objections to Findings/Conclusion (17) the Petitioner also takes exception to Ordering provision (5), ¶104 at page 33 that says as follows: "The Commission shall render a bill in the amount of $43,818.82 to WCI pursuant to the requirements in RCW 81.20.020."

10 In order to address its exceptions to the Findings/Conclusions and the Order provision, WCI will organize its subsequent arguments and discussion in conformance with the four contested accounting issues and organization in Initial Order 12 on those remaining disputed issues: utility expense allocations, land rents, rate case costs and the statutory investigation fees Staff seeks to impose on WCI.

A. Exceptions To Findings/Conclusions 8 & 9: Contested Accounting Adjustment R-6D, Shared Utility Expenses

11 Utility expense allocation goes to the heart of the dispute over the characterization of affiliated transactions under RCW 81.16.030. In Petitioner's view at this advanced juncture, the present accounting dispute can be boiled down to the following: In circumstances of shared utility expense among properties rented by the regulated entity WCI from the nonregulated affiliates Heirborne ("HB I") and Heirborne II ("HB II"), is the Staff proposal on utility expense allocations reasonable or is the Company's counter-proposal in attempting to true-up the actual aggregate costs of utility expense consumption by the regulated company more rational, logical and reflective of the division of actual cost causation when it comes to utility service consumption on all properties owned and operated by Waste Control and its affiliates?

12 When faced with abrupt disallowance of the previously utilized and accepted methodologies of WCI in its non-adjudicated general rate cases here,[7] both the Company and the Staff examined alternative criteria upon which to fairly allocate utility costs in acknowledgment that shared costs

[7] As with land rents, the historical auditor allowance of a one-third allocation for utility expense is commensurate with the actual space occupied by each of the three companies. *See* footnote 3, Waste Control Reply Brief at ¶7, p. 4.

should be allocated based on cost-drivers. During the discovery process and in the original filings for both the Company and Staff and the rebuttal case, the parties sought to come to agreement on the bases for these allocations. While narrowing the divide, the identified factors for deriving the ultimate cost allocations proved insurmountable. However, in order to resolve the issue and as a basis of compromise to move past this particular dispute, the Company ultimately accepted the Staff's "three-factor allocator, subject to it being applied consistent with the development of the Staff's cost drivers which would include the full amount of those costs."[8] As the Initial Order notes, the Company thus proposed that it be allowed $27,749 in shared utility rates in its Opening Brief.

13 Again, at this late stage of the proceeding, the Company has thoroughly attempted to explain[9] why the selection of Staff's three-factor allocators is wrong, why the compromise proposal is at least partially ameliorative of that Staff error, and finally why the compromised monetary amount with the current insignificant price differential ($27,749 v. $15,424, Initial Order, ¶35) is a far more accurate rendition of truly allocated utility expenses here.

14 Apart from that overall analysis, pertinent to further discussion on review is the Initial Order's Finding at page 12, particularly portions of ¶33, which states in part:

> Any residual should be allocated using a multi-factor formula that recognizes the areas of management concern, including employees, revenues, and plant investment. We find that the Company's final allocation position contravenes this standard because it treats directly assignable costs, *i.e.* costs not shared and only incurred by the non-regulated entity, as indirect costs which WCI proposes to share among its ratepayers and its affiliates.[10]

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[8] Consisting of gross revenues, fixed asset values and number of employees. *See.* Staff Initial Brief, ¶10, Cheesman, TR. 152:11.14 and Initial Order ¶24, p. 10.
[9] And particularly, the Company, in its Reply Brief at pages 8-14.
[10] Initial Order 12, ¶33, p. 12.

15 This central finding fails to acknowledge the inconsistency involved in the Staff allocation methodology selection, omitting to include all utility *costs* incurred by all three affiliates, Waste Control, Inc., Waste Control Recycling ("WCR") and Waste Control Equipment ("WCE"). The flaw in the Initial Order's Finding is that if costs can be directly assignable, so can revenues. The Staff three-factor allocator has an apples and oranges/pick-and-choose element that renders the allocation computation incomplete. Indeed, this means that the calculation of aggregate utility costs is artificial and inconsistent when the non-shared operating revenues, employees and fixed assets of WCR are included, resulting in a diminution of the proportion of true utility costs incurred by WCI allocated to that Company. In Staff's analysis, WCR receives an allocation of all of the utilities related to the transfer station, MRF recycling building, covered parking and employee parking in addition to the majority of the "shared" utility expenses for the office and shop.[11] This cost-driver cannot be consistently and logically applied to a group or category of expenses when a portion of the expenses relevant to the drivers are excluded from the calculation. Moreover, the "excluded" utility expenses paid by WCR and not subject to allocation also include those for the shared covered parking and employee parking facilities utilized by WCI.

16 The Staff would have us understand that this type of formulaic inconsistency in its allocators does not matter in the overall analysis of the workability of Staff's three-factor allocators. As the Company noted in its Reply Brief at pages 11 and 12, the hearing on March 11 revealed some rather startling asymmetric logic relied on by the Staff auditor in defending the three-factor formula particularly with respect to why removal of exclusive-use utility expense, when a nonregulated affiliate solely occupies a facility generating those revenues, could be accurate. In

[11] For references to shared costs involving affiliate properties including utilities *see* Exhibit JD-43, Land Rents Calculations, p. 5 and accompanying general ledger pages and average investment calculations attached.

essence, the Staff simplistically defends the formula on the basis that you cannot isolate any one of the three factors, (here, gross revenues) and derive a logical conclusion of the superiority of the Staff allocation of utility expense versus the Company's proposed compromise. Staff instead contend only in the aggregate would their expense allocators make sense.[12] This equivalent of "throwing things against the wall" for a successful defense of the three-factor formula is jarring.

17 In contrast, the Company's proposed compromise simply modifies the Staff's three-factor formula to include, in the calculation, all aggregate Company expenses (whether generated in exclusive-use buildings or not) and conforms far more logically as an allocator factor that is designed to capture *all* utility consumption costs incurred by the three affected affiliates in proportion to the actual revenues of the affected company. Either all of the affiliate (WCR's) revenues and expenses need to be included for allocation purposes or WCR's revenues, employees and fixed assets should be proportionately reduced to conform to the exclusive-use utility consumption expenses that are removed under Staff's approach.

18 The object of identifying direct cost drivers is to allocate direct costs directly and shared costs indirectly. However, using a methodology or three-factor formula that simply excludes portions of utility expenses either generated or paid for by the affiliate incompletely and inaccurately produces a flawed formula for allocating shared costs.[13]

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[12] Cheesman, TR. 231:6-10.

[13] It is indeed difficult to fathom why the Commission would reject the testimony of an almost 25-year career rate analyst and Commission accounting advisor who has performed scores, possibly hundreds, of general rate cases audits for solid waste collection companies on this topic and adopt instead, an admittedly creatively-hatched methodology by a new rate auditor to apportion shared utility costs with flaws, as found, by Mr. Demas as follows: "Obviously, any allocated formula must instead include an accurate aggregate denominator of total utility costs in order to appropriately arrive at an allocated percentage of costs incurred by the regulated company…As noted, the result of the current Staff formula application is to seriously over-allocate the aggregate utility expense and percentage allocated to WCR by ignoring utility costs incurred exclusively by it yet including 100% of its operations in the allocating formula. This of course then skews the utility expense allocation factor lower for WCI and WCE and results in an inaccurate conclusion, even under the Staff's own three-allocator formula application." (Exhibit LD-2T, Supplemental Testimony of Layne Demas, p. 4, lines 10-22).

19 WCI reluctantly accepted the Staff's three-factor allocator formula in this case despite its disagreement with gross revenues and net book values as two of the three factors as well as its objections to an attempted transposition of an apparent regulated utility allocation model formula (albeit inapplicable and incomplete)[14] in efforts to efficiently and expeditiously resolve the dispute. This concession was qualified only by the proposed modification of the computation in that three-factor formula to make it consistent in utilizing the total amount of the affiliate's revenues as against the allocated costs of shared utility expenses. The Staff position, as now endorsed by the Initial Order, rejects that modest adjustment,[15] which the Company contends is imperative to properly applying the identified cost drivers. Ultimately, the formula must include all revenues, employees and fixed assets and correspondingly allocate all utility costs to the three companies (a formula the Initial Order also rejects), or alternatively, the cost drivers for WCR must be adjusted to reflect only those revenues, employees and fixed assets involved in generating the utility expenses being allocated.

1. <u>Recommended Findings/Conclusions on Accounting Adjustment 6-D</u>.

WCI therefore recommends the Following Revised Findings and Conclusions:

> **<u>Recommended Finding/Conclusion (8).</u> Regarding the shared utility expense adjustment and utilizing the Staff's three-factor allocators for this proceeding only, Commission finds that because the calculation of revenues, employees and assets used in the Staff's allocators includes revenues, employees and fixed assets in all properties owned by all three Waste Control companies and because some utility expenses paid by WCR are for the**

The Initial Order ignores this apparent contradiction simply by finding that the Company's approach "treats directly assignable costs, i.e., costs not shared and incurred only by the non-regulated entity, as indirect costs which WCI proposes to share among its ratepayers and its affiliates." (*See* Initial Order ¶33, p. 12). What the Initial Order omits explaining though is how the ultimate allocation of shared utility costs the Staff proposes be performed on a three-factor analysis basis is accurate, (one of which factors again is revenues), if, i.e., all the revenues generated by the three affiliate companies are not included. In isolating only the costs portion of the equation, the Initial Order, like the Staff, effectively picks and chooses elements of the formula in reaching its goal of allocating costs but in the process ignores the correlation of the featured three-factor relationships to arrive at that conclusion.

[14] S*ee also,* fn. 17, WCI Reply Brief, ¶24, p. 13.

[15] *See,* Table 2, LD-2T.

benefit of WCI (i.e., for shared covered parking and employee parking utilities), all utilities paid by the three companies must be included in the allocation formula to derive an accurate allocation for shared utility expenses so as not to under allocate actual utility expenses to WCI.

Recommended Finding/Conclusion (9). We therefore accept the Company's recommended adjustment to the revenue element in the Staff's three-factor allocator here and find utility costs should properly be $27,749 in accounting adjustment 6D. Attributing that revised amount accurately reflects the total allocated expenses generated by WCI and its nonregulated affiliates in the test year period for which utility expenses were incurred.

B. Exceptions to Findings/Conclusions 10, 11, 12 and 13: Accounting Adjustment R-6E, Return on Land Rents.

20 The dispute on land rent **returns**, and what will be allowed in rates to the regulated affiliate, WCI, for reasonable rents again epitomizes the previous premise here for the Company as to who sets regulatory ratemaking policy: The Commission or the individual assigned staff auditor? In this regard, WCI has operated for decades as a tenant in commercial properties owned by its affiliates. WCI's owner explained that owning real estate was relatively risky for a regulated company in the solid waste collection and disposal industry.[16] While all WCI assets are cross-collateralized for bank loan purposes and particularly for the 2006 bond offering that allowed for the construction of the county transfer station facility owned by the Heirborne affiliate, prevailing commercial lending practices require borrowers and all their corporate and, typically, individual affiliates to cross-collateralize debt offerings to maximize lender security.[17] Neither the ownership of property occupied by WCI nor the structuring of the sizeable bond offering or the bank debt incurred by its affiliates to acquire additional properties utilized for regulated operations is a first-time revelation, nor was it ever concealed from or overlooked by previous audit staffs. In fact, Waste Control's Certificate G-101 was actually the subject of a mortgage application with accompanying debt circulars and indenture agreements in 2007 following the

[16] Willis, TR. 82:7.
[17] Willis, TR. 88:12-14, TR. 95, 96:22-25, 1.

bond offering. Under Docket No. TG-070396, the Commission vetted and approved the underlying transaction, including the pledging/mortgaging of WCI's property rights in its solid waste certificate.

21 Indeed, the subjects of the ownership of rental properties, the cross-collateralization of debt and the theoretical utilization of WCI affiliate capital structures were also the subject of a later Staff audit initiative for the purposes of deriving a revenue requirement under Lurito-Gallagher in WCI's last general rate case in 2009.[18] As reflected in Exhibit JW-9, "Top of the File Memorandum," the issue of imputing/utilizing affiliate capital structures for Lurito-Gallagher ratemaking was ultimately rebuffed by the Company which relied on the 1991 *Sno-King* Final Order[19] and the uncontroverted rejection of the Staff theory by then Regulatory Requirements Chief, Anne Solwick,[20] to calculate allowed revenue margin under Lurito. But clearly, the concept of aggregating capital structures for WCI ratemaking purposes, unbeknownst to WCI, was not dead. With the change in Commission Staff management personnel, it re-emerged in a modified form in the current rate case, now, not for the purposes of deriving a revenue requirement under Lurito, but in calculating return on rents to be allowed in rates to the regulated tenant-affiliate, WCI.

22 The 2009 rate case used a modified return on investment plus costs return methodology and set affiliated rents at approximately $80,250 before Kalama.[21] Since that case was resolved in January 2010, WCI has added new rental properties used and useful for regulated service

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[18] Docket No. TG-091653.
[19] *WUTC v. Sno-King Garbage Company WUTC v. Northwest Garbage Company*, Docket Nos. TG-900657 and 900658 (Jan. 1991).
[20] Willis, TR. 87:4-6.
[21] Exhibit JD-1T, p. 12.

including a paint warehouse, covered parking for trucks and a new shop facility.[22] While these facilities are regularly utilized by the Company, the new auditor's three-factor allocation methodology and "temporal updates" to costs of debt and return on equity utilizing the nonregulated affiliates' capital structure in the test year now yield less than $5,000 more in allowable rents under the new Staff recommendation than the Company's much smaller rental property profile in 2009. That allowance represents a substantial roll-back in allowable rents when considered on an individual rental property parcel basis and reverses the prior pattern of pro rata rental return methodology used by previous Staff auditors.

23 Land rents and the controversy surrounding restating adjustments thereto were thoroughly addressed in the Company's Reply Brief beginning at page 14 and continuing to page 24. For the specific analytical threads of that analysis, Petitioner expressly incorporates by reference that analysis here. That detailed discussion received rather short shrift in the Initial Order, at least in its relatively truncated dismissal in the pertinent discussions/decision section.[23] In essence, the Initial Order, while purportedly summarizing the argument of the Company in immediately previous pages, appears to abruptly dismiss WCI's position on land rents as "not supported" and as not "offer[ing] a reasonable justification for using the capital structure of the tenant instead of the landlord to calculate a fair return on rents charged by the landlord affiliates."[24] Once again, the Staff position, now adopted wholesale by the Initial Order, substantially overlooks the theories, analogous case law facts and arguments supporting the Company's position here.[25]

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[22] *See* Exhibit JD-41T, pp. 18, Exhibit JD-44, pp. 3, 4.
[23] Beginning at page 19 of the Initial Order and continuing to the top of page 21.
[24] Initial Order 12, ¶53, p. 19.
[25] It also overlooks Exhibit MC-15 and the detailed 2009 Staff analysis of land rents and buildings which among other factors used an approximate 1/3 allocator (WCI 34%, WCE 31%, WCR 34%) based on square footage, noted an underpayment of rents by WCI, and set forth a cost plus return/return on investment methodology all of which formulas and conclusions were rejected out of hand by the current case auditor (*see* particularly Waste Control, Inc.

24 To briefly summarize those arguments, the Company recaps the following points:

- There is no evidence whatsoever in this record that utilizing an asset-specific capital structure, as WCI alternatively proposed to the audit staff and endorsed in *Bremerton-Kitsap Airporter,*[26] would result in equity shifting to regulated properties and debt encumbrance to nonregulated affiliates.
- The pledging or cross-collateralization of assets by corporate debtors is to be distinguished from outright mortgaging of assets. Contingent liabilities are not the same as actual, guarantors are not direct borrowers and the reality that conventional lenders take blanket security interests in total company assets does not convert the cross-collateralized obligor into a primary debtor.
- Lurito-Gallagher has never sanctioned consolidation of nonregulated assets of sister companies to establish returns on rental properties nor does the imputation of debt loads on a specific property have any bearing on either the use of the property or its actual capital profile.
- Analogies to and reliance upon regulated utility rate cases for calculating costs of debt and return on equity for rental returns for small, privately-held companies is a slippery slope. As the Company's Reply Brief at p. 22 quotes, Dr. Lurito's testimony in the 1991 *Sno-King* case was developed in knowing contrast to costs of debt, costs of equity, risk profiles and allowable returns in the publicly-traded marketplace and broadly rejects use of such factors in regulating the rates of Washington solid waste collection companies.
- The Initial Order compounds the Staff's error in this regard here by favorably citing the Staff's discounted cash flow ("DCF")-based cost of equity factors which utilize huge publicly traded real estate conglomerates (i.e., "REITs") and also by adopting the Commission's historic approval of dynamic costs of capital in establishing returns on equity for large public utilities.
- Dr. Lurito specifically rejected analogies of the comparative risk factors of small, privately-held garbage companies to public utility companies, finding returns on equity and cost of debt to be considerably higher in inherently riskier businesses, i.e. Washington privately-held solid waste collection companies. The Staff auditor specifically did not examine comparative risk premiums in recommending her ROE factors nor does the Initial Order discuss this factor, either.[27]
- There is no precedent in any Final Order adjudicated Title 81 cases for the update or "modernization" the Staff seeks to engraft in calculating returns on affiliate rental properties in this case. Any such temporal update or comparisons to public utilities' costs of capital pronouncements should await consideration in pending rulemaking Docket TG-131255.

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supporting schedules "Land and Building Rents," WAC 0252\Excel\Rate Case\copy of STAFF Land Rents RE taxes insurance Analysis xls.rent" originally included as part of Staff Response to Company Data Request No. 1, Docket TG-140560.

[26] *WUTC v. Bremerton Kitsap Airporter, Inc.* ("BKA"), Docket TG-001846, Fifth Supplemental Order (Aug. 2002).

[27] Cheesman, TR. 210:23.

- The proposed 15% return on equity for WCI here on rental properties was ratified not only in the *Bremerton-Kitsap Airporter* case, the prior WCI 2009 general rate case, but also, as noted in Mr. Demas' testimony, his review of 12 recent solid waste rate cases through examination of the workpaper files.[28] While present Staff relied on public utility rate of return rate cases for developing returns on equity and costs of debt here, the Company cited to previous solid waste general rate cases treatment and apparently the only Title 81 adjudicated case, *Bremerton-Kitsap Airporter,* where comparable returns on equity and cost of capital were used to derive returns on rents.
- The wholesale transfer of the three-factor allocators not only to shared utility expense but also in Staff's allocation of depreciation and net investments in calculating return on rental properties does not include cost drivers relevant to the cost being allocated. Staff's three-factor analysis for depreciation and net investment for land rent allowance does not include allocation to all buildings occupied by WCI, WCR and WCE. In using 100% of an individual company's drivers for allocations when only an insignificant portion of that company is actually occupying shared space with other affiliates, an unreasonable rent is derived, allocating to the larger company (WCR), facilities where it is occupying only a negligible portion of the shared space. WCI has never been subjected to calculation of land rents based on the net depreciation value of real property assets. Instead, its allowable rents have been calculated on a conventional return on investment scenario.
- Clearly, Staff's analysis to establish return on investment based on depreciation and average net investment transparently allows only the smallest of returns on older, depreciated buildings where, just ironically, equity in the asset-specific capital structure of the property is the highest.
- Transposing company capital structures and impressing affiliate company-wide capital structures on a regulated company's properties with no relation to their use by that regulated company, while implementing untested allocations of depreciation and average net investment to establish returns on those rents all have a singular purpose: achieving a substantially reduced revenue requirement by unilaterally imposing return on rent theories that are both unprecedented and wholly contrary to past treatment of this and any other previous solid waste general rate case proponent.

25 Aside from its threshold overarching objection to the unprecedented establishment of land rent returns based on the nonregulated affiliates' capital structures, WCI, its prior WUTC auditor-expert, Layne Demas, and its outside accountant with over 22 years of practice experience, Jackie Davis,[29] all pointed to a gaping hole in Staff's threshold analysis of capital structures and nonregulated WCI affiliate debt: the fact that only two of the five properties HBI and HBII rented to WCI were in fact encumbered by debt. Deflecting this fact, Staff proceeded to

[28] Exhibit LD-1T, p. 2, lines 15-27.
[29] Prefiled Direct Testimony of Jackie Davis, Exhibit JD-1T, p. 1; Rebuttal Testimony of Layne Demas, LD-1T, p. 3, lines 19-21.

aggregate all of the cumulative debt of the nonregulated affiliate and simply impose that individual calculation on all properties owned by either HBI or HBII. While rejecting any label that this was "hypothesizing" the capital structures,[30] this is unquestionably a hypothecation of the individual property's actual debt structure where the result of the calculation, for example, impresses a debt structure on an unencumbered piece of property.

26 There can also be no dispute that affiliated rents are, by their nature, asset-specific, with each individually-leased property or parcel having a unique capital structure profile. Because of this fact, the Company cited *BKA* as a relevant Final Order Title 81 precedent for the calculation of affiliate land rents on an asset-specific basis when the previously-accepted rate case allocations for land rents were rejected by the auditor.[31] The Staff auditor, in contrast, cited no Title 81 case precedents to support the novel theory for land rents for regulated solid waste collection companies unceasingly pressed here.

27 The Staff and Company fundamentally disagree on whether it is appropriate to separate the actual rental property debt structure at issue from the landlord-affiliate's capital structure. Staff blithely dismisses that concern based on the balance sheet transparency of the landlords. But Staff also acknowledged repeatedly throughout its live testimony that the depreciated cost rather than the cost plus return formula utilized by the Staff here in relying on the affiliates' capital structures for return on rent calculations was wholly unprecedented in the regulated solid waste arena.[32] While the Initial Order approvingly describes Staff's approach as "using the actual capital structures of WCI's affiliates and the property landlords, Heirborne Investments, LLC

[30] Cheesman, TR. 180:23-25; Cheesman, TR. 180:8, 181:4-13.
[31] *See* again 2009 workpapers in Exhibit MC-18.
[32] Cheesman, TR. 175:3-14.

("HBI") and Heirborne Investments II, LLC ("HBII")"[33] it singularly dismisses consideration of *Bremerton Kitsap Airporter* as having any bearing on this proceeding despite the fact that "airporter case"[34] involved an industry ratemaking regulatory model far more akin to Lurito-Gallagher and solid waste ratemaking than the regulated utility rate of return model which observation or analysis is conspicuously missing from the Initial Order's Findings.

28 The Initial Order next uses both the lack of "contemporary vitality"[35] and a reliance upon Commission energy rate proceedings' DCF cost of equity factors[36] to reject the Company's proposed 15% ROE factors on land rents. There are two problems with this rationale. First, the Commission has never announced that for solid waste ratemaking it would transplant returns on equity from contemporaneous large capital markets for publicly traded REITs or their equivalents to capture ROEs for nonregulated, affiliated-owned properties of regulated, privately-held solid waste companies. Secondly, doing so completely overlooks the comparative risk factor criteria Dr. Lurito examined both in the original TG-2016 et al. (1988) ratemaking proceeding and specific testimony offered by Dr. Lurito in the *Sno-King* case cited by the Company in its Reply Brief[37] where the Commission's expert noted fair rates of return for riskier companies would be higher than those for less risky ones. It is not a huge leap in presumption to suggest that a publicly-traded energy company is less risky than a Class B privately-held solid waste company and should command a higher ROE factor for land rent returns, accordingly.

29 Finally, in resolving the land rents allocation issue the Commission should ask itself a question posed to the Staff auditor at the hearing, which is: "Did you ever consider adopting that

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[33] Initial Order 12, ¶36, p. 14.
[34] Initial Order 12, ¶53, p. 19.
[35] Initial Order 12, ¶56, p. 20.
[36] *Id.*
[37] WCI Reply Brief ¶38, pp. 21, 22.

[previous negotiated rate case allocation method] in establishing land rents in this case and advising the Company, in your opinion, to develop more relevant allocators in any future filing?[38] The 2009 rate case unequivocally adopted the 1/3 allocation methodology as Exhibit MC-15 and the underlying Staff response to Company Data Request No. 01 in TG-131794 (reconfirmed in TG-140560 by Staff) had established. With the test year period long concluded and after being informed by the new auditor that the previous 2009 methodology was "unsupported" and "overly simplistic," the Company then proposed the methodology of land rents established in the *Bremerton-Kitsap Airporter* case. Rather than accept the 2009 negotiated rate case treatment or the Commission's adopted analysis of affiliated land rents in *BKA,* the Staff instead embarked on brand new theorizing by initiating scores of Data Requests and deriving a wholly original theory which also retroactively involved analysis of test year data that was not compiled in conformance with or awareness of the awkward three-factor analysis or the Staff's unrecognized, unilateral "temporal updates" to factors such as return on equity, cost of debt and other perspectives that so detrimentally impacted land rent calculations for WCI here. [39]

30 In WCI's view, the "regulatory compact" under which the Commission operates in rate filings requires considerably more notice and dialogue with regulated companies than has occurred in

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[38] Cheesman, TR. 226: 14-17.

[39] In addition to the earlier critique of the Initial Order's ROE factor rationale, the Initial Order also announces at ¶55, page 20 that the 15% ROE advanced by the Company for its return on equity proposal is not supported by precedent . . . "for ROE decisions the Commission makes today in solid waste rate cases." In so flatly stating, the Initial Order overlooks a recent study commissioned by the WUTC which confirms Staff's recent tendency to view returns on equity as being excessive in solid waste rate cases as opposed to other industries' allowed returns. As that study for the Lurito-Gallagher rulemaking suggests, "[p]urely from the standpoint of comparing the L-G model's ROEs to other studies that use the standard definition of ROE, the reported 'ROEs' of 24%-42% should be adjusted by these multiples, bringing the true return on shareholder equity down to the teens or lower." *Solid Waste Ratesetting Methodology*, Bell & Associates, Inc. and Sound Resource Economics, Docket TG-131255, (Dec. 2014), page 4. Obviously, there are some fairly erroneous assumptions circulating amongst Staff about ROE concepts in the solid waste industry and for now, 15% would appear, contrary to the Initial Order's findings, reasonable and quite fair as suggested by the recent *Bell* study. Again, higher risk factors necessitate higher returns on equity and large energy companies ROEs are inapposite. Timing of the conclusions of that study also implicate support for avoiding such broad conclusions or potentially erroneous "temporal updates" in individual solid waste rate cases pending the outcome of the industry-wide rulemakings.

the affiliate land rent return dispute here. For instance, rejecting previously accepted approaches in prior negotiated company rate cases and unilaterally dismissing previous Title 81 case law Final Orders based on age or other cursory theories of inapplicability, labeling those approaches as "unsupported," (particularly 6-18 months after a test period closes) should not suffice to engrain or otherwise establish a whole new paradigm on land rend returns in solid waste general rate cases. Again, the ideal forums for considering any novel methodological theories for solid waste rate proponents are now before the Commission in the Lurito-Gallagher ratemaking, and potentially, the general rate case procedural rule review. The Commission has repeatedly endorsed a broader industry/stakeholder approach to such ratemaking reviews rather than an anecdotal or generic use approach and Waste Control, Inc. and the WRRA strongly support concepts like land rent returns being considered there. Once again, the Company suggests the theoretical Staff trailblazing for accounting adjustments advocated in this case is premature and potentially preemptive of the Commission's overarching role in balancing the interests of ratepayers and regulated companies in convening related rulemakings and ultimately, maintaining a viable and dynamic state regulated solid waste collection industry.

1. **Recommended Revisions to Findings/Conclusions on Land Rent Adjustment 6-E.**

   Recommended Finding/Conclusion (10): Use of the capital structure costs of the debt of nonregulated landlords Heirborne Investment, LLC ("HBI") and Heirborne Investments II, LLC ("HBII") has heretofore been unrecognized in a Final Order of the Commission for calculating returns on affiliate land rents to be allowed in rates for regulated solid waste collection companies and merits considerable further examination in the now pending rulemaking in Docket No. TG-131255 before being adopted here.

   Recommended Finding/Conclusion (11): The discounted cash flow methodology proposed by Staff for calculating returns on land rents is also unprecedented, lacks an accompanying weighted cost of debt study and merits more evaluation particularly in the context of the pending Lurito-Gallagher rulemaking proceeding and the use of analogous "control" or

industry groups appropriately correlated to the levels of risk and operational characteristics of the Company's affiliates activities and investments.

Recommended Finding/Conclusion (12): Similarly, Staff's approach utilizing the landlord's actual cost of debt in this proceeding at 2.2% for HBI rentals and 4.3% for HBII rentals is not inclusive of all of the costs of debt for these companies and should await refinement in the larger construct of the methodology for land rent return calculations for the regulated solid waste industry in Docket No. TG-131255. The traditional cost of debt method proposed by the Company as set forth at Table 1, Exhibit LD-1T, which use 2.635% and 5.2% for debt and which includes both the amortization of loan fees and swap interest rate costs of the actual encumbered properties is now accepted, pending analysis of appropriate cost of capital metrics in that rulemaking and closer evaluation of comparative industry and company risk factors in establishing costs of debt. The Staff's return on equity factors of 12.5 percent for HBI and 13.1 percent for HBII, understates the risk factors for solid waste collection companies as opposed to transferring temporal updates based on ROEs for energy companies and growth factors for publicly traded real estate companies and their relevant dividend yields. For now, the ROE factors here should remain at the long-accepted 15% level as allowed in the Company's last rate case, the *BKA* case, and as suggested as an existing reality benchmark in the recent survey of Washington solid waste collection companies as reported in December, 2014 by the Commission's consultants.

Recommended Finding/Conclusion (13): Staff's three-factor allocator is not consistent in applying its cost drivers to all costs being allocated as found above in addressing the three-factor allocators for utility costs in recommended Finding/Conclusion (8). The Staff's allocator must be revised to reflect only revenues generated from shared facility operations and the corresponding number of employees and fixed assets working or contained in those facilities in order to be consistent and to avoid unreasonable allocation of additional rent expense to the nonregulated affiliate company which is not actually occupying space utilized in the Staff's calculation. In short, Staff's three-factor allocator theory is not proven to be either internally consistent or accurate for allocation of shared expenses and the parties are again directed to further explore and refine such allocation theories in the ongoing Lurito-Gallagher rulemaking where expert opinions and alternative theories can be vetted prior to adoption or application in isolated solid waste general rate cases.

C. Exceptions to Findings/Conclusions (14): Rate Case Costs

31 WCI also takes strong exception to Finding/Conclusion (14) at ¶ 96, where the Administrative Law Judge finds that WCI's rate case costs in this proceeding were "exorbitant" and broadly

concurs with the Staff recommendation that WCI recover only half of the rate costs incurred since December 24, 2013.

32 In theory, "[t]he costs of litigating commission and court proceedings arising in the normal course of business, including penalty actions and prudence reviews are generally allowed..."[40] WCI well understands and concurs with the premise that a litigant's costs are nevertheless fully reviewable by the Commission and may be disallowed where they are "exorbitant and imprudent."[41] Here, however, WCI's expenses in prosecuting this case, although sizeable, were not imprudent and should be recoverable in full. As described below, the only plausible alternative for limiting rate case costs is in the first, not second rate proceeding.

33 No one disputes that this was a protracted, heavily contested case. To date, as well, Staff has not had any issue with the number of hours expended nor the rates assessed by professionals to defend WCI's position.[42] Indeed, as noted in briefing, Staff would be hard pressed to challenge the reasonableness of the amount of work WCI expended in pursuing this case, given that Staff's own accountants had spent nearly 700 hours more in accounting time alone than WCI's accountants in this matter through June 2014.[43]

34 Another reality of rate case costs is quite pertinent here. WCI is a relatively small, family-owned solid waste collection company which lacks the in-house professional resources of other investor-owned public service companies with whom the Commission deals in the vast majority of its contested rate cases. Thus, all of the rate case marshalling and defense costs here were handled entirely by outside accountants and lawyers which concentrates the line item of rate case

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[40] Goodman, The Process of Ratemaking, (1998), Volume I, p. 329.
[41] *See* TG-900657, *Washington Utilities and Transportation Commission v. Sno-King Garbage Company, et al,* Fifth Supplemental Order (Dec. 1991), at 19. (Even in that case, WCI also notes a lack of imposition of any statutory investigation fee).
[42] Joint Motion to Amend Procedural Schedule, ¶7, p. 2.
[43] WCI's Initial Brief, fn. 27, p. 12.

costs in a particularly myopic fashion and also has the tendency to magnify those expenses in relation to other test year expenses. Where those professional resources are in-house, presumably they are addressed and/or imbedded in a company's rate base and/or identified in corporate overhead expenses in contrast to their isolation here. Additionally, no one has described the expenses incurred on both sides of this once-in-a-generation case as anything but "unusually high" nor has any party done anything but regret their size.[44] Thus, simply labeling them as "exorbitant" oversimplifies not only the cost size but the significance and development of the contested issues' evolution in this case.

35 Ironically, "oversimplification" and "unsupported" could also characterize the Staff position on rate case cost allowance. The ALJ has however now summarily agreed with the Staff recommendation, reasoning that WCI's costs should be reduced by 50% after December 24, 2013 because WCI and Staff should share equal responsibility for the protracted nature of this litigation.[45] However, neither Staff nor the administrative law judge offers any legal support for the conclusion that cost recovery must be cut in half because a case is drawn out, complicated, contentious and/or extraordinarily expensive.

36 Honoring at least part of the above admonition in the Initial Order about shared responsibility for the protraction of this proceeding, however, the Company is willing to offer what it views as a reasonable alternative proposal on this Petition for Administrative Review. It is now willing to accept the Staff premise of 50% reduction in rate case costs in Docket No. TG-131794 for the interval between the prehearing conference Notice of December 24, 2013 and the unfortunate

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[44] And the Petitioner has also alluded to concrete steps to mitigate those costs through conservative resource management and unsolicited and ongoing professional fee discounts and reductions (Revised Exhibit JD-48). Staff, in contrast, has been unconstrained in resources to advance their litigation position.

[45] Initial Order 12, ¶74, p. 26. The concept of "splitting the liability for the time and expense" incurred in these dockets though is theoretical, not quantitative and, particularly for TG-140560, is not based on any analysis of conduct by the Company in the TG-140560 proceeding.

dismissal circumstances and the refiling of the dismissed rate case on April 4, 2014. In that interval, $62,922 in attorney's fees and $32,722 in accounting costs were incurred for a total of $95,644. 50% of that amount is $47,822 which WCI now offers as a plausible reduction in rate case costs which, when coupled with the unilateral professional fee reductions reflected in updated Exhibit JD-48, total over $100,000 in rate case expense concessions by the Company.

37 No one contests full allowance of rate case costs incurred in TG-131794 prior to December 24, 2013. The Company has just offered, in reference to the Staff and Initial Order's 50% reduction recommendation in rate case costs, a 50% decrease in those costs for the balance of Docket TG-131794, until the filing of the present proceeding. Any remaining dispute would then center on the 50% reduction in rate case expense recommendation of Staff from April 4, 2014 to the present and whether such recommendation is defensible. The Company contends that such a reduction is wholly indefensible and that there is a complete lack of meaningful evidence in this record to suggest that rate case costs in TG-140560 should not all be allowed. The following factors support the Company's opposition to rate case costs reduction in this docket:

1. The Staff has neither contested the quantity of time or the rates assessed by the Company's professionals, nor has it contested the fact that it has incurred as much and more in professional time in presenting its case than the Company's outside professionals.[46]
2. The original technical conference mandated by Prehearing Conference Order No. 02 in April, 2014 (Appendix A, p. 5) set a technical meeting for the parties to resolve

[46] For instance, the Staff auditor testified that she alone had been spending "20 to 40 hours a week" on this case since fall 2013. Cheesman, TR. 257:16-18. Over 20 months, this amounts to a minimum of 1,600 to a maximum of 3,200 hours. We already know that the 1,600 hours estimate is likely understated since 11 months before May, 2015, by her answer to Company Data Request No. 4 in TG-140560, Staff had logged 1,595 hours through June 30, 2014 (*accord*, Exhibit MC-17).

formatting issues in schedules and spreadsheets filed with its case by the Company or exchanged between Company and Staff in discovery. That technical conference was to be held May 15 and 16, 2014 in Longview at the Company's accountants' office. However, Staff canceled that conference and converted it to a phone conference the day before it was to convene which cancellation of in-person meeting unquestionably prolonged lingering discovery disputes about rate case formatting issues, culminating in discovery cross-motions being filed a month later.[47]

3. As the over 20 separate exhibits and communications between April 16, 2014 and June 3, 2014 reveal,[48] early in this proceeding the Company attempted to resolve, in good faith, ongoing discovery disputes and communication concerns that were largely ignored or deflected by Commission Staff. The Commission Staff was forced to formally acknowledge and defend the same at the conclusion of its case filing on July 18, 2014.
4. The timing of the Staff's period of non-communication was particularly significant and costly in impeding resolution of various technical discovery disputes, leading to an outright admitted "blackout"/"embargo" period of non-communication by the Staff in the second half of May 2014.
5. That non-communication required the Company to file a Motion for Discovery Conference in early June 2014 to attempt to resolve the discovery issue impacts. The first formal communication in response from Staff in that time period was not informal communication, but actually a cross-motion Motion to Compel which, in the Company's

[47] As the administrative law judge noted in subsequent Order 05 on those discovery issues: "...the Commission understands WCI's frustration with Staff's decision to participate telephonically in a technical conference that was clearly meant to be conducted in person. Part of the confusion and delay relating to WCI's failure to provide responsive information to Staff must fall on Staff's shoulders," Order 05, TG-140560, ¶22, p. 9, (July 2014).
[48] Attached to the "Declaration of David Wiley in Support of Waste Control, Inc.'s Motion for Appointment of a Discovery Master and Alternatively Scheduling a Discovery Conference."

view, does not reflect the expectations of WAC 480-07-425 and the good faith, informal resolution approaches that the Commission's procedural rules direct and has always been the Company's experience.

6. Up to the mandated discovery conference, the Company had received responses to discovery requests often with objections indicating that the position of the Staff on specific accounting and revenue requirement issues would be revealed in their case filing. That eventual case filing contained many first-time position revelations, including arguments for the imposition of investigation fees, rate case cost paring and an initial recommendation to the Commission that it find the Company actually overearning based largely on a reconstructed route study that the Company was forced to recommission in rebuttal and which largely reconfirmed the prior allocations and results.
7. The Staff's case filing on those newly-revealed challenges caused the Company to incur significant additional costs in August and September, both for its rebuttal case and for additional settlement discussions, ultimately leading to the partial settlement agreement filing in October.
8. Finally, the ill-founded Motion to Strike Supplemental Testimony on November 17, 2014 to which the Staff had previously expressly stipulated [49] derailed this proceeding on the eve of the Reply filing deadline. That halt forced an almost two-month delay for a decision on the procedural motion which, in Order 10, rejected Staff's motion but also included a subsequent two-month delay for live hearing on the supplemental testimony

[49] "Joint Motion to Amend the Procedural Schedule," October 23, 2014, ¶9, p. 3.

and added additional months to the decision timetable, resulting in now two extensions of that statutory suspension period.[50]

38 All of the above factors individually and in the aggregate triggered substantial increased rate case costs in TG-140560, many of which could have been avoided and hardly serve as a basis for lopping off 50% of the Company's costs in this proceeding. Any of the "blame" that the Company theoretically shares for the protraction of this proceeding and duplication all relate to Docket No. TG-131794. With the sole exception of the hard code controversy in spreadsheets which was the subject of the successful discovery conference on July 10, 2014 sought by Respondent, there is no evidence in this record that WCI has ever been uncooperative, non-communicative or is otherwise culpable for increasing rate case costs in its defense of the filing in TG-140560.

39 There is thus an utter absence of support for Staff's proposal to slash rate case costs recovery in the current proceeding. Indeed, at the live hearing, the Staff auditor was asked how she happened to come up with the proposed 50% reduction in rate case costs. While admitting that Staff had originated that percentage, she also said: "Well, I talked to several different Staff members to think—just discuss, kick around the re - - reasonability of that 50%."[51] In follow-up, the witness was asked "Why not 40, 60, 70 or 30% as well?" Other than referring to previous written testimony filed in July 2014, the Staff had no effective rejoinder other than a vague attempt to "balance" the ratepayer and the Company's interests.

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[50] The Staff's Motion which totaled two pages, was thinly supported. Disposition of that Motion also entailed a live hearing on the supplemental testimony and added numerous months to the decision timetable. As Initial Order 10 characterized that effort in footnote 39: "[i]t is fair to say we were underwhelmed by Staff's Motion."

[51] Cheesman, TR. 295:4-6.

40 The Company believes that such a premise is not only contrary to the general rule allowing rate case cost recovery but yields an arbitrary amount to be codified in this proceeding in a completely subjective and illogical fashion. The Company has now alternatively proposed a significant reduction in rate case costs. The Staff's previous response, adopted by the Initial Order, is to broadly characterize alleged flaws and complications in this general rate case filing issues which WCI believes could have been solved by simple communication and internal resolution overtures on the part of Staff in spring 2014. In that regard, the Company again points to Exhibit JD-42 as an example, where the earlier February interchange between Company and Staff counsel that was never responded to by Staff might have averted the whole issue of the original rate case dismissal in March, 2014 had so Staff desired.[52] Again, the Company is willing to accept part of the penalty and blame for the protraction and/or duplication in that proceeding. Staff's approach in eliminating 50% of rate case costs in TG-140560 though has never been proven and is not based on any analysis of how those costs were incurred or why

[52] With the alternative proposal to halve rate case costs in the December 24, 2013 to April 3, 2014 interval, it is perhaps academic now to continue to debate the issue of the original case dismissal and the attribution of blame leveled by the Staff on the Company. The Initial Order, (Initial Order No. 12, ¶72, p. 26), appeared to miss the point on what the Reply Brief was advocating on this premise. (WCI Reply Brief, ¶¶50, 51, pp. 28-30). The apparent practice in removing solid waste workpapers by the Record Center has now been formally reversed by the Notice of June 24, 2015 ("Notice of Treatment of Workpapers of Water and Solid Waste Companies… letter from Steven V. King to all affected parties, June 24, 2015"). That letter highlighted the deeper predicament the Company was having, in early 2014, in attempting to communicate with the Staff about the status of a solid waste rate filing prior to filing its testimony, i.e., because it a solid waste filing, as opposed to an energy company filing, is not accompanied by formal testimony at the time of the filing yet subject to extensive audit, review and Staff-Company negotiations prior to assuming an adjudicative posture (Exhibit JD-42). Unbeknownst to this company and its undersigned counsel, none of the numerous overtures in framing the unusual posture of a solid waste case almost six months into its review were ever assumed to be based on an adjudicative file lacking the Company's initial filing support, including key documents like proposed results of operations, proposed company adjustments, Lurito-Gallagher calculations, returns on investment under Lurito, etc. The Company was not arguing in its Reply Brief that the existence of the workpapers would have sufficed for its case testimony filing, only that with that knowledge, its original case filing in February would have been calibrated very differently with far more explanation of the original filing versus incremental accounting adjustments which might have more sharply framed not only the issues in dispute, but provided narrative context for the filing with far greater explanations. Again, this premise is unfortunately now rather academic. However, the Company believes the past practice of Record Center solid waste rate case workpaper removal and what as a result, was or was not contained in the official adjudicative file is clarified prospectively. That will hopefully avoid any future misunderstandings involving informal practices v. codified rule requirements which befell the Company here, and in its view, unquestionably contributed to the circumstances and complications attendant to the original case dismissal.

carrying over that punitive 50% recommendation into this proceeding is logical or supported by the record.

41 Further, WCI particularly disagrees with the Initial Order's rationale on rate case costs that "…a prudent business person has to consider whether the amount it is expending is producing a prudent or efficient result. To expend approximately the same amount of money as your rate request tests the bounds of logic."[53] While this may be true in isolation, a Company that makes successive contested rate requests due to inconsistent treatment of certain expense items due to subjective, individual auditor judgments could potentially benefit from actively pursuing a case to Final Order to achieve a coherent basis for future filings. Petitioner would also question, for instance, whether a water company rate case proponent is confronted with this reality in a typical contested water case under Title 80, where the average requested revenue requirement and rate case litigation costs might often diverge.

42 However, in the more pertinent and present solid waste rate filing context, this rather abrupt pronouncement ought to give the Commission substantial pause. Is the Initial Order saying that once the costs of defense achieve a certain level, a "tipping point" is reached at which the regulated company should "throw in the towel" and capitulate because otherwise it should expect its subsequent (or possibly even previous) rate case costs will almost assuredly be disallowed as "imprudent and exorbitant?" How would this not incentivize the Staff and/or other opposing party simply to run up the costs on a company with the knowledge that, directly or indirectly, once that particular point is reached, the company will be forced to concede, settle or otherwise acquiesce to the Staff positions or possibly even withdraw its filing completely? In contrast, the Staff has apparently no external check on its investigation costs and litigation strategy which

[53] Initial Order 12, ¶69, p. 25.

costs are paid by the regulated industry and by state taxpayers. The concept of a regulated company's costs reaching a "tipping point" is thus particularly disturbing if it directly or indirectly implicates an automatic point of disallowance of successive rate case costs or forces the strategic hand of the Company when it maintains Staff positions remain unfair, unjust or unreasonable. This suggestion would also institutionalize an imbalance of resources which the Company perceives already exists between the rate case proponent and Staff. The Company must justify its rate case costs, the Staff has no such articulable burden and establishing such a "tipping point" would further disincentivize cooperation and efficiency in contested cases if Staff, without financial resource limitations, could decide to force the party with the burden of proof to the financial brink in recognition that the Commission will cut off all subsequent rate case cost recovery.

43 WCI therefore respectfully requests the reversal of Finding/Conclusion (14) and allowance instead of full recovery of Company rate case costs less the $47,822, 50% reduction in costs in TG-131794 in the referenced interval from December, 2013 to April, 2014. It also specifically asks that the Commission reject any notion (express or implicit) of a generalized "rate case cost tipping point" (point of no return) on this subject as suggested by the Initial Order.

1. **<u>Recommended Revision to (and Substitution of) Finding/Conclusion (14)</u>:**
   The rate case expenses for both the Staff and the Company have been unusually high in this contested solid waste general rate case filing which both sides regret. The Staff has not challenged either the amount of time or the rates charged by the Company's outside accountants and lawyers in this proceeding. Unlike most companies involved in contested general rate case proceedings, the Company has no in-house accounting and or legal staff which could be subject to inclusion in the rate base or in the corporate overhead percentage. Because of the extensive time period these proceedings have been extant, and due to discovery and various procedural issues, both the Company and the Commission Staff spent substantial time and resources in defending their respective positions in this matter. Normally, the costs to

defend general rate cases are recoverable in rates. Despite their relatively high level, the Commission notes the Company's rate case costs have been partially mitigated by unilateral reductions by the professionals in their monthly invoices. The Commission accepts the Company's premise to reduce rate case costs in TG-131794 in the December 2013 through April 2014 interval. However, Staff's approach to reduce 50% of rate case costs after the initial pre-hearing conference was issued in TG-131794 on December 24, 2013 forward, is arbitrary and unreasonable in light of all of the facts and circumstances of this case. There is no basis for a reduction in rate case costs in TG-140560 which would unduly punish the Company in exercise of its basic ratemaking rights and responsibilities and jeopardize its ability to generate "just, reasonable and compensatory" rates pursuant to RCW 81.28.230 in the process. The Commission therefore allows the Company to recover its legitimate rate case costs in TG-140560 amortized over four years.

D. Exceptions to Findings/Conclusions (15) and (17) and Parallel Order Provision: Imposition of Investigation Fee.

44 Perhaps the most disturbing Findings and Conclusions in Initial Order 12 are not the ones involving the highest dollar amount, but instead the ones most directed to sanction WCI. Those are Findings/Conclusions (15) and (17) and parallel order provision (5), all of which seek to impose investigation costs of $43,818.82 on WCI. Since this suggestion was first formally floated in the Staff's case filing of July 18, WCI has been completely perplexed as to precisely why an investigation fee should be imposed. The Initial Order's interpretation of the governing statutes, the Commission's alleged lack of discretion in that regard, and an equivalent constructive notice/due process and maximum fee calculation findings are all in error in WCI's view. Further, public policy does not support the award of an investigation fee here.

45 The Initial Order accurately quotes RCW 81.20.020, which provides that the Commission shall assess the costs of an investigation against a public service company in an amount not greater than one percent of the company's gross operating revenues from the prior year. Interestingly, though, the administrative law judge overlooks RCW 81.20.020's title, which states: "Cost of investigation **may** be assessed against company." [Emphasis added].

46 Because the statute and its title are in conflict as to whether investigation fees must be imposed on a company, the statute is subject to more than one reasonable interpretation. As a result, the statute is ambiguous, and the Commission may use principles of statutory construction, legislative history, policy preferences, and relevant case law to interpret it.[54] Additionally, the title of the act may properly be referred to in ascertaining legislative intent.[55]

47 Statutory Construction Analysis

RCW 81.20.020 provides:

> [w]henever the commission…shall deem it necessary…to investigate the books, accounts, practices and activities…of any public service company…such public service company shall pay the expenses reasonably attributable and allocable to such investigation.

Although "shall" generally means imperative, this is not necessarily always true if a contrary legislative intent is shown.[56] Because the legislative intent, as evidenced by the legislative history, is in part directed to mitigate the effects of the fee provision upon public service companies, the Commission should find here that the imposition of costs is discretionary to it.

48 Legislative History

RCW 81.20.020 has been revised several times. Prior to 1933, the statute allowed the Commission's predecessor to conduct investigations of public utilities but provided that the cost would be borne by the taxpayers.[57] In 1933, at the height of the Depression, the Legislature amended the statute to shift the investigation costs onto public service companies. *Id.* at 185-86. The Washington Supreme Court, however, on review, held that the act as written was unconstitutional because it authorized the department to charge public utility companies for

[54] *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).
[55] *Wash. Optometric Ass'n v. Pierce Cnty., City of Tacoma*, 73 Wn.2d 445, 438 P.2d 861 (1968).
[56] *Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011).
[57] *State v. Northwestern Elec. Co.*, 183 Wash. 184, 187, 49 P.2d 8 (1935).

investigation costs without any limiting factor.[58] Moreover, it left utility companies subject to favoritism or discrimination.[59]

49 In 1969, the Legislature finally amended the statute to include a limitation. The amended statute provides:

> the total amount which any public service company shall be required to pay under the provisions of this section in any calendar year shall not exceed one percent of the gross operating revenues derived by such public service company from its intrastate operations during the last preceding calendar year.

This amendment suggests that the Legislature's further intent was to mitigate any discriminatory imposition of investigation costs for public utility companies.

50 Moreover, statutes relating to recoupment of money spent for investigation, valuation, appraisal or services connected with public service corporations are taxing statutes.[60] Such statutes are strictly construed against the state and in favor of the corporation.[61] Because the current version of RCW 81.20.020 was enacted to better protect utility companies, and because the statute is ambiguous as to whether investigative fees are mandatory, that ambiguity should be construed in favor of WCI, and investigation fees should not be here imposed.

51 Selective Enforcement

Additionally, to the parties' knowledge, the Commission has never enforced the investigation fee cost provision of RCW 81.20.020 against a solid waste collection company general rate case proponent which the administrative law judge now announces as mandatory.[62] Indeed, the Staff

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[58] *Id.* at 188-89.
[59] *Id.* at 189.
[60] *State v. Pac. Tel. & Tel. Co.*, 27 Wn.2d 893, 181 P.2d 637 (1947).
[61] *Id.*
[62] The Initial Order at ¶79, p. 28 seems to suggest that the "mandatory" imposition of fees is also logical here because this is the first fully litigated case before the Commission in more than 20 years and that an investigation of WCI would therefore be expected. This rationale is misplaced. First, investigation of books and records of public

admits that it does not recall an instance where an investigation fee was actually imposed on a solid waste company, nor any occasion where the Staff actually even advocated for imposing the fee.[63] Although investigation fees have not been assessed in the past, in a typical proceeding, the company is notified that it may or will be "assessed investigation fees" for the rate case audit investigation.[64] Here, the Commission did not include any routine admonition of possible investigation costs.[65] While the Initial Order reaches to find "constructive notice" here by virtue of the fact that the *Staff* raised it in its testimony and because the topic was a contested issue at the March 11 hearing, this hardly suffices as formal notice from the *Commission* that the fee would be imposed. The fact that Staff cannot recall an instance where investigation fees were assessed on a solid waste general rate case proponent [66]combined with the lack of actual notice to WCI that fees might be assessed further suggest that the imposition of investigation fees is permissive, not mandatory.

52 Even if the Commission finds that the imposition of investigation costs is mandatory, it is not required nor is it mandatory to impose the maximum dollar amount of the investigation fee.

Assuming, *arguendo*, that the imposition of investigation costs is mandatory, the Commission is nevertheless not required to impose the full $43,818 amount in investigation fees. The statute clearly provides that "the total amount which any public service company shall be required to pay under the provisions of this section in any calendar year shall not exceed one percent of the

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service companies always occur both before and after suspension. RCW 81.80.020 has not been triggered simply due to a Staff investigation of the Company's accounts before or after suspension. Secondly, no one is asserting the Staff's thorough investigation here was improper, rather, that imposing a huge fee upon the general rate case proponent for same is not mandatory, is unwarranted under these facts, and in singling out WCI for the fee imposition, is unprecedented and inconsistent with treatment of any other previous general rate case respondent, including the *Sno-King* respondents in Orders 4/5, TG-900657, TG-900658, *In re WUTC v. Sno-King Garbage Company; WUTC v. Northwest Garbage Company*, (Dec. 1991).

[63] Cheesman, TR.. 239:2; 240:8.

[64] WCI Opening Brief, fn. 15, p. 7 (citing transportation cases where those warnings are included as examples).

[65] *See* Orders No. 01 in TG-131794 and TG-140560.

[66] Cheesman, TR. 239:20.

[company's] gross operating revenues." RCW 81.20.020 (emphasis added). Under the statute, the Commission may not impose a fee greater than one percent of the Company's gross annual operating revenues. The statute however, does not require the Commission to impose a one percent fee.

53 As noted above, the statute's legislative history contrary to the Initial Order's finding suggests that the Commission has discretion and is not required to impose the maximum amount. Indeed, the prior language of RCW 81.20.020 was struck down in part because it failed to sufficiently protect public service companies and provided a potential blanket authorization for the Commission to impose all investigation costs it deemed necessary and reasonable upon the company.[67] In response, the Legislature eventually imposed a ceiling which limited the Commission's imposition of fees to a maximum of one percent. Again, contrary to the administrative law judge's ruling, the Commission does have discretion not only as to whether it imposes a fee at all but also in determining the amount of the fee to impose. In that regard, there is also absolutely no sign here that the Company has violated any laws or rules in pursuing this rate case. Indeed, the Staff auditor testified "I'm not implying any negative connotation of the Company's character."[68] There is no indication that the maximum allowable fee should be imposed under the facts here or that doing so would somehow correct inappropriate behavior.

54 Imposition of the maximum investigation costs is contrary to the public interest.

Imposition of the maximum amount allowable under RCW 81.20.020 is also particularly harsh upon a small, privately-held Class B solid waste company like WCI, which has served Cowlitz County for decades. As noted, the record is devoid of any allegation of violation of Commission

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[67] *See State v. NW. Elec. Co.*, 183 Wash. 184, 49 P.2d 8 (1935).
[68] Cheesman, TR. 297: 10, 11.

law and rule by WCI. Here, WCI simply pursued a statutorily-authorized general rate case filing in exercise of basic due process rights and Commission law and rule. It is wholly inequitable to impose the statutory maximum investigation fee in this circumstance.

55 Here, the $43,818 maximum under the statute would impose a significant hardship on the Company. $44,000 is roughly 8% of the overall revenue requirement originally sought in this proceeding which also cannot be recouped in rates under the Staff's recommendation.[69] Again, there is no factual, legal or policy reason why the investigation fee under RCW 81.20.020 should be imposed here.

56 Moreover, the recommended imposition of the maximum statutory amount of the investigation fee here is unjustified, unexplained by either Staff or the Initial Order, and is contrary to the public interest. WCI has consistently argued that RCW 81.20.020 is discretionary and wholly inapplicable to these facts. Other than serving to "chill" any due process rights exercised in contesting Staff rate case treatments through suspension, there is no identified purpose served by such a punitive recommendation and sanction. WCI strongly urges the Commission to reject this requirement here.

1. **<u>Recommended Revision/Substitute Findings/Conclusions to (15), (17) and Ordering Provision (5)</u>.**
   RCW 81.20.010 provides that a public service company subject to a Commission investigation may be assessed costs incurred by the Commission for such an investigation in an amount up to one percent of its gross intrastate operating revenues for the preceding calendar year. The Commission finds both that the statute is discretionary, particularly as here for a general rate case proponent, and that the 1% fee is a maximum and not an automatic quantification of the fee to be imposed. The Commission has not traditionally imposed this fee on suspended solid waste rate general case

[69] Since no one suggests that the approximate $44,000 fee imposition is intended as a penalty, the Petitioner also questions why a statutory investigation fee, even if it somehow would be imposed here could not be recouped in rates particularly where the Staff has also usually argued for punitive measures to reduce allowed rate case cost expense to the Company.

filings and finds that it is inconsistent with the public interest to do so here based on the record developed in this proceeding. [Finding/Conclusion (17) and Ordering Section (5) are likewise removed in their entirety].

E. Waste Control, Inc. Revised Table 2 from the Initial Order's Determination of Issues.

57 Attached in summary to this Petition is Waste Control's response to the Determination of Issues/Results of Operations, Table 2, p. 30 of the Initial Order, setting forth all the Company's proposed quantifications of the remaining disputed accounting adjustments and revenue requirement impacts outlined above.

VI. CONCLUDING STATEMENT

58 The Company unquestionably regrets the protraction, significant costs and divisiveness of this general rate case proceeding as discussed above. It would obviously have preferred to avoid such a circumstance and to have resolved the sharp issues on the remaining accounting adjustments without formal adjudication and yet more process. It has nevertheless been forced to continue to defend itself in objection to the isolated application of untried ratemaking theories, including the attempted adoption of other regulated industry ratemaking models in the midst of two very momentous rulemakings that are occurring in the ubiquitous background of this filing. As frequently noted above, both the overall mechanics and the substance of solid waste general rate filings are being examined and evaluated in industry-wide stake holder forums which are the first such examinations in many years. The timing of the disputes here is not only inauspicious but distracting and potentially conflicting with outcomes of those proceedings, all in an interval in which key personnel changes at the agency have been some of the most numerous in memory.

59 WCI asks that material changes to Lurito-Gallagher tenets and solid waste general rate case requirement interpretations await the outcome of those proceedings thereby avoiding ratifying here unprecedented accounting treatments (three-factor allocators, etc.) which cannot be

anticipated nor exhaustively studied in the context of a single isolated routine general rate filing. WCI is committed to adapting to and complying with Commission directives on various regulated accounting methodologies and theories, it merely asks at this critical juncture that it be afforded access to the broader industry-based analyses and potential expert reviews that the Commission has envisioned in initiating the Lurito-Gallagher and solid waste rate case procedure reviews. It therefore asks that the Commission sustain the Company positions on the four disputed accounting issues in Docket No.TG-140560 and enter an Order finalizing this long, tortuous exception to solid waste industry general rate case filings for regulated solid waste collection companies.

Dated this 29th day of June, 2015 at Seattle, Washington.

RESPECTFULLY SUBMITTED,

By _____
David W. Wiley, WSBA #08614
dwiley@williamskastner.com
Attorneys for Waste Control, Inc.

Waste Control, Inc.
Revised Table 2
From Commission Determination of Issues
Test Year Ended June 30,2013

Revised by Waste Control, Inc.

	Adj No.	Total Operating Revenues	Total Operating Expenses	Net Operating Income	Operating Ratio	Net Investment
Per Books Actual		$4,033,016	$3,899,633	$133,383	96.69%	
Uncontested Adjustments:						
Restate Depr to Actual			-38,747	38,747		
Allocate Refunds				0		
Reclass Payroll Benefits				0		
Eliminate Interest Expense			-50,614	50,614		
Reclass Taxes & Licensing				0		
Eliminate Other Expenses:			-40,903	40,903		
Office Supply			-5,458	5,458		
Actual Bad Debt			-11,799	11,799		
Other Expenses			-6,652	6,652		
Tires			-9,647	9,647		
Properly Taxes			-3,122	3,122		
Spare Truck				0		
Eliminate Fuel Surcharge		-45,570		-45,570		
Discontinued WCR Contract Hauling		-154,085	-154,085	0		
Reclass Payroll			1,161	-1,161		
Reclass Disposal Fees				0		
Payroll			86,527	-86,527		
			18,000	-18,000		
Adjust Fuel			-27,192	27,192		
Disposal Fees		138,598	180,885	-42,287		
			138,598	-138,598		
Subtotal Uncontested Adjustments		-$61,057	$76,952	-$138,009		
Contested Adjustments						
Utilities			-32,074	32,074		
Land Rent			26,303	-26,303		
Rate Case Cost			122,947	-122,947		
Subtotal Contested Adjustments			$117,176	-$117,176		
Total Uncontested and Contested Adjustments		-$61,057	$194,128	-$255,185		
Adjusted Results before Rev Req Increase		$3,971,959	$4,093,761	-$121,802	103.07%	$1,548,613
Revenue Requirement Increase		523,224				
		$4,495,183	4,093,761	-121,802	91.07%	$1,548,613
Less Rev. Req. Increase Allocation to Kalama		34,271				
Net Regulated Revenue Requirement Increase		$488,953				

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2015 I caused to be served the original and five (5) copies of the foregoing document(s) to the following address via U.S. Mail 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(s) via the WUTC web portal e-filing service.

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

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Dated at Seattle, Washington this 29th day of June, 2015.

Maggi Gruber

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