BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION Complainant, vs. WASTE CONTROL, INC., Respondents.	Docket No. TG-140560 INTERVENOR WASHINGTON REFUSE AND RECYCLING ASSOCIATION'S ANSWER TO PETITION FOR ADMINISTRATIVE REVIEW OF INITIAL ORDER NO. 12 BY RESPONDENT WASTE CONTROL, INC.

COMES NOW Intervenor Washington Refuse and Recycling Association (WRRA) and, pursuant to WAC 480-07-825(4), respectfully submits the following Answer to the Petition for Administrative Review filed herein by Respondent Waste Control, Inc. (WCI).

INTRODUCTION: WRRA has held Intervenor status in this matter from its inception, has filed responses to Motions and has filed Opening and Reply Briefs in relation to the hearing held on March 11, 2015. WRRA took an active role in the hearing, particularly in the questioning of Staff's auditor Ms. Cheesman

Intervenor's role here has been limited to addressing two of the four issues which remained at hearing. That will continue to be the case here. The primary parties have exhaustively and competently dealt with the technical and accounting issues, and we trust they will continue to do so. Intervenor, while obviously in support of WCI's position in its Petition, also believes it is imperative in a case like this that any ruling's effect on the regulated solid waste industry as a whole be considered. This Order has a potentially far-reaching impact on how

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rates are set and, therefore, involves every regulated company (and every recipient of service) in our state.

Those two issues, of course, are found in Findings/Conclusions 14, 15, 17 and the proposed Order relative to 17.[1] By this point, it should be clear that Intervenor strongly disagrees with the Initial Order's rulings on rate costs and assessment of a "penalty" pursuant to RCW 81.20.020.

There is a third issue which has recently been discussed, and that is the role of the expert advisor to the Administrative Law Judge. Specifically, there appears to be what Intervenor considers to be justified concern that the same person may well be the advisor to the Commission itself in its deliberations over WCI's Petition. This issue is well addressed in WCI's Petition, but Intervenor will discuss it as well, perhaps in a larger view, on behalf of the industry.

RATE COSTS: This filing has been arduous and expensive for everyone involved, but much more so for WCI. Although it appears that Staff has apparently invested substantially more hours in the matter, WCI has been forced by these circumstances to invest its resources in "outside" professional services whereas Staff, of course, are employees of the Commission and presumably receive the same compensation whether involved in this action or not.[2] This results in an "apples and oranges" situation when comparing time and expenditures. It does seem clear, however, that if the same 700 hours more in accounting time accrued by Staff through June 2014 were to be billed in the "outside" world (along with attorney's fees at normal rates), WCI's expenditures would pale in comparison. This is not to suggest that the time invested by Staff is inappropriate, only that it has been at least equal to (and probably much greater) than that of WCI. The only difference, of course, is that WCI must pay its attorneys, accountants and experts independently, while Staff does not. Thus, it is difficult to understand Finding/Conclusion (14)'s conclusion that WCI's rate case expenses are "excessive," when it is clear that if the same standard of payment were to be applied to Staff, Staff's expenses would clearly be far greater.

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[1] Like WCI, Intervenor will refer to what appear to be a mixture of Findings of Fact and Conclusions of Law as "Findings/Conclusions."

[2] There is no indication that Staff consulted with outside professionals nor, if they did, these people were compensated by the Commission.

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The result of this unequal treatment in the Initial Order is not only unfair but not in keeping with prudent rate making standards. In the future (and in the Final Order here), we strongly suggest that the Administrative Law Judge, as well as the Commission itself, make a "market rate" comparison of rate costs incurred by both "sides" before concluding that one or the other's expenses are excessive or imprudent.

There has been something of a "blame game" being played here concerning why this matter has taken so long, thereby dramatically increasing costs. This issue has been addressed extensively already, but it is important that the Commission keep in mind that, due to circumstances, some unforeseen, some foreseeable, Staff must bear responsibility for much of the delay. This is not to place "blame," but to respond to Staff and the Initial Order's treatment of rate costs. The Initial Order seems to, at least partially, base its approval of Staff's unique rate cost proposal on various delays in the proceedings.

An example of the fundamental unfairness of this approach concerns the more than two-week delay in the progress of the case in May, 2014. Apparently the assigned Assistant Attorney General abruptly retired and this, we are told, was a surprise to Staff, and we have no reason to disbelieve that. This was a problem for all involved for a variety of reasons, most beyond either party's control. What was within Staff's control, however, was the ability to advise WCI what was happening. Instead of doing so, Staff simply ignored the case for two weeks, despite the fact that, at that point, regular communication between the Staff auditor and WCI's lead accountant, Mr. Davis, was ongoing and crucial to possible resolution of contested issues. Staff auditor, Ms. Cheesman, was asked by the undersigned about this at hearing (Tr., Vol. II at p. 292-293):

> Q. During that two or so week time, did you make any communication with Ms. Davis, or anybody at the – I'm sorry, anybody at the Company, saying "We've got a problem up here. We can't return your calls. We don't have a lawyer," whatever it was?
>
> A. It's not my – no, I didn't.

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Thus, WCI's expert went for two plus weeks with no communication from Staff, yet the Initial Order seems to hold WCI fiscally responsible for delay in the process. That is not the way rate making should be done.

Another example is Staff's "Motion to Strike" which led to Order 10. This was an ill-advised and completely unnecessary exercise which was rightly and clearly rejected by the Administrative Law Judge. The point, of course, is that WCI had no choice but to expend time, energy and attorney's fees to (successfully) respond to the Motion. To now find that these expenditures, and others like them, are "excessive" is disingenuous at best. Both parties here bear some responsibility for delays.

Perhaps Intervenor's biggest concern here is the Initial Order's adoption of the "percentage" allocation of rate costs advocated by Staff and adopted by the Initial Order in Finding/Conclusion (14).[3]

The obvious question is, "Where did this come from?" Staff acknowledges that WCI's attorney and expert have made significant and voluntary reductions in billings, and has no objection to the hourly rates charged. This truly extraordinary proposal which finds its way into the Initial Order has no basis whatever in law, rule or Commission precedent. To the contrary, it seems to have come out of thin air. During cross-examination of the Staff auditor by the undersigned, the following exchange took place:

Q. The 50% on the rate case costs, who came up with that 50%?

A. I did.

Q. Anybody else involved in that decision?

A. Well, I talked with several different staff members to think – just discuss, kick around, the re – reasonality (*sic*) of that fifty percent.

Q. So it was your idea though?

A. Yes, sir.

Q. Okay. How come 50 percent? Why not 40? 60? 70? 30?

[3] Although WCI has agreed partially to a percentage reduction, that is a gesture to simplify this stage of the proceeding and, perhaps, offer an "olive branch" to Staff. It should not be construed in any manner to endorse this approach either by WRRA or, presumably, WCI.

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A. Again, and that's highlighted in my supplemental testimony, we were just talking about that.

. . .

Q. What is your answer here today?

A. My answer here today is that 50% of one failed litigated rate case and 50 percent of this complicated rate case makes one – the cost of the one – the cost of the fully litigated rate case, and then also in my – my dir – testimony filed July – July 18th, 2014, we are also trying to balance both the ratepayer and the Company's interests.

Q. Very well.

Is that – was that based upon any rule, any policy, any memorandum here within the Commission, that's something that should happen, the 50%

A. No, sir.

Q. Was it based upon any portion of the Washington Administrative Code?

A. No, sir.[4]

In the industry's view, the two most important factors in rate making are consistency and predictability. If one has those, a rate filing can be resolved by discussion, sometimes concessions are made, but the conclusions are always based upon the law, the rules, Commission Policy Statements and precedent. We may not always agree with the results, but at least we can be confident that the "rules of the game" will not be unilaterally modified by the referee. That is why there have been so few rate filings going to hearing over the years, which is as it should be. There are no winners, rate payers included, when a case like this goes as long as it has, simply because an auditor "kicked around" some unsupported and unprecedented theories which were, incredibly, adopted by Staff and the Administrative Law Judge. This ruling should be as frustrating to the Commission as it obviously is to the industry.

Of equal concern is the Initial Order's apparent conclusion that the "bounds of logic" are tested when a company finds itself spending as much on a

[4] Tr. Vol. III, pp. 294-297.

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rate case as it may receive in increased revenue.[5] What this "Conclusion" neglects to address is the simple fact that this, and every other regulated solid waste company, will be back for further rate adjustments as time goes by. What would be imprudent would be to "quit" halfway through the process, leaving unsupported, unfair and statutorily incorrect positions to stand without a complete airing before the Commission itself. WCI's Petition for Administrative Review describes this as a "tipping point" where, to justify its theories, Staff could run up the Company's costs to the point the Company may not even hope to "break even." The solution is not for the Company to "quit." the solution is for the Company and Staff to work together frankly, competently and economically to reach a fair result. The burden of proof may be upon the Company, but the burden of fairness rests with everyone involved. The object of any regulated activity is to achieve fairness and balance, a good example being the allowance of temporary rates, subject to refund.

The Commission should approve WCI's voluntary acceptance of reduced costs in TG-131794 as outlined in its Findings/Conclusion (14), and allow the remaining costs as requested. To do otherwise would severely test the bounds of arbitrary and capricious standards.

INVESTIGATION FEES: The application of RCW 81.20.020 by the Initial Order resulting in what is, in essence, a penalty of $43,818.82 assessed continues to baffle Intervenor for several reasons.

First, this is the first time anyone involved in this matter, Staff included, can recall this law being applied in a general rate case. It simply has never been an issue because no one has ever sought its application. This has been described by WCI as "selective enforcement" which certainly seems an apt description.

Secondly, when the statute is read along with its title, it can only be described as either permissive (not mandatory), ambiguous, or both.[6] What is clear is that when the legislative history, wording of the title and complete lack of

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[5] Initial Order 12, at p. 25, par. 9.

[6] WCI's Petition for Administrative Review thoroughly covers the case law on this issue and there is no reason for this Answer to recite the same law.

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enforcement are considered, this law was never intended to be applied in a situation such as we have here. It is (or was), in fact, intended to be punitive and perhaps was appropriate and even necessary for that purpose at the time to "punish" wrongdoers who were guilty of some transgression in a Commission proceeding or were discovered to be in willful noncompliance of Commission laws and/or rules in an enforcement action, which clearly is not the case here.

The Staff has never accused WCI of acting in bad faith or skirting the law; just the opposite is true. During cross-examination of Ms. Cheesman, the following exchange took place:

> Q. Are you saying here today that the Company acted in any manner in bad faith in either of these dockets?
>
> A. No, I – I am not implying any negative connotation of (*sic*) the Company's character.
>
> Q. All right. No cheating, no trying to get something by the ratepayers?
>
> A. No, sir.
>
> Q. Just a disagreement on what is appropriate as far as rate setting and these other peripheral issues?
>
> A. Yes, sir.

The Company has the right and the obligation to file for periodic rate adjustments. Staff has the right and the obligation to review and audit the filing, which almost always results in an agreement on appropriate rates. Here, the process resulted in a partial agreement as evidenced by "Appendix A (partial Settlement Agreement)" attached to the Initial Order. The lack of a complete settlement because of professional disagreements between Staff and the Company should not be the cause of imposition of an "administrative fine" upon the Company.

Third, and of significant interest to WRRA, is the issue of notice, or lack thereof. The statute was not quoted in its entirety in the Initial Order.[7] The following sentence was left out:

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[7] Initial order 12, p. 27, para. 76.

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> . . . The Commission shall ascertain such expenses, and after giving notice and an opportunity to be heard, shall render a bill therefor by registered mail to the public service company, either at the conclusion of the investigation, valuation, appraisal or services, or from time to time during its progress . . . . (Emphasis added).

A reading of the entire statute, in particular the emphasized language, makes it clear that two things must happen; first, there has to be "notice" and, secondly, there must be the "opportunity to be heard." Neither has happened here. There is no provision for "constructive notice" via argument in a rate case, nor has WCI been given the "opportunity to be heard" on this particular, and obviously important, issue. Both of these things must take place before the Commission can assess these costs. If the Commission wishes to pursue this, notice must be given and a hearing scheduled and held. Neither has happened yet.

If the Initial Order is upheld on this issue, Staff could simply argue for a cost assessment in every contested rate filing, settled or not. That is why the Commission itself must give proper and adequate notice of its intent and hold a hearing. There are some very good reasons why this 1939/1961 statute has apparently never been utilized in a solid waste rate case.[8]

APPEARANCE OF FAIRNESS: This is an issue which may or may not arise, but was addressed in WCI's Petition at page 1, and has caused WRRA to consider the concerns raised by the Petition. Apparently Mr. Roland Martin, a Commission employee, advised the Administrative Law Judge regarding the technical and accounting issues in this matter. This, of course, is not unusual and is probably an essential component of a case with so many technical issues and use of sometimes obscure accounting and rate making language and concepts.

The potential problem is that Mr. Martin apparently may be called upon to advise the Commissioners in considering WCI's Petition for Administrative Review. While WRRA certainly does not question Mr. Martin's competence,

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[8] This is not to imply that the Commission should not have authority to assess something like this penalty in appropriate circumstances; meaning wrongdoing, deliberate inaccuracy of books and records, obfuscation and the like. WRRA would certainly be willing to participate in clarification and modernization of the statute to avoid this situation in the future.

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professionalism or ethics, this would, as WCI points out, present a clear "conflict of interest, appearance of fairness" situation. We must agree. This matter should be decided on the law and its merits, not on an important, but peripheral issue of conflict or appearance of fairness. While realizing there are budgetary and staffing issues to be considered here, WRRA strongly urges the Commission to utilize another expert and avoid this issue altogether.

CONCLUSIONS: Obviously WRRA supports this Petition and WCI's arguments in support of same. The Initial Order simply ignores the facts and legal/precedential arguments made by WCI and WRRA. It essentially imposes punishments upon WCI, despite any evidence whatever of wrongdoing, as clearly stated by Staff's own auditor in her testimony. The Initial Order simply penalizes WCI for presenting its case professionally, truthfully and competently, only because that presentation differed on some issues from that of Staff.

WRRA urges the Commission to review this entire record and perhaps hear oral argument on its own Order pursuant to WAC 480-07-825(6). This is not the way a seemingly simple rate case should have gone.

Finally, as WCI's Petition concludes, there are important rule makings ongoing which cannot help but be affected, in one way or the other, by the Commission's Final Order in this Docket. Perhaps everyone involved has learned lessons which may well be useful in the rule making process. It is indeed unfortunate that this particular case came along before those rule makings reach completion. But it is equally unfortunate that a seemingly routine rate filing has led us to this point.

This action has been unusually contentious and litigious, much more so than the undersigned has experienced in any rate filing in some 30 years of practice before the Commission. This is unfortunate for a variety of reasons, not the least of which is the increase in costs to both parties by reason of endless discovery requests, motions and just plain disagreement over so many issues which, in other filings by this very company, have been resolved fairly and expeditiously. Whatever "went wrong" here needs to be fixed.

In Intervenor's view, this situation could well have been avoided had the two rule makings been completed and the new rules, or as WRRA has many

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times referenced as a "roadmap", were in effect and followed by all involved. In lieu of that, Staff should not have singled out one filing to set its own new course for rate filings. Until new rules are adopted, if they are, rate filings should be conducted in the same manner, and under the same assumptions, as they have been for these many years. WRRA was asked to support the rule making process as opposed to, for example, the conduct of a "generic rate case," and continues in that support. This support is in no small way based upon an understanding with the Commission that, pending adoption of the new rules, the "old rules" and Commission precedent would continue to be uniformly applied in individual filings. Obviously we feel that has not happened here. The Commission's ruling in this Docket can, and should, get this process back on track, as well as send a message to everyone involved that rules are made by the Commission, not by Staff or an applicant, and are to be fairly applied in every case.

Respectfully submitted this 10th day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by the method as indicated below, pursuant to WAC 480-07-150.

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DATED at Silverdale, Washington, this 8th day of July 2015.

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