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1 CLARK COUNTY, by BRONSON POTTER (via bridge
2 line), Deputy Prosecuting Attorney, Civil Division of
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5 397-2478.

6 WASHINGTON REFUSE & RECYCLING ASSOCIATION, by
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0031

1 PROCEEDINGS

2 JUDGE MOSS: Let's be on the record. This is
3 Dennis Moss at the Washington Utilities and
4 Transportation Commission. I'm an administrative law
5 judge, and this case has been transferred to me with
6 the advent of Theo Mace leaving our employ for other
7 pastures, whether green or otherwise.

8 As I understand the status of the case, we've
9 had one prehearing conference. There have been a few
10 pleadings back and forth, and the purpose of our
11 prehearing today is essentially to set out procedural
12 process going forward.

13 The first order of business will be to take
14 appearances, and for those of you here in the room, I
15 believe you have already entered an appearance, so you
16 can tell me your name and the name of your client.
17 Mr. Bronson, you are on the bridge line?

18 MR. POTTER: Yes.

19 JUDGE MOSS: I'll ask you to enter your full
20 appearance, address, phone number, and so on and so
21 forth since I believe this is your first personal
22 appearance on the record; is that correct?

23 MR. POTTER: It is. I had another deputy in
24 my office representing the County at the first
25 prehearing conference.

0032

1 JUDGE MOSS: I'll ask you to do that as a
2 matter of formality when we get to you, and I'll take
3 you last. You will be fourth. So let's go ahead, and
4 we should start with Complainant, I suppose.

5 MR. WILEY: David Wiley appearing today on
6 behalf of Waste Connections of Washington, Inc., and my
7 address and fax and e-mail remain the same.

8 MS. MCNEILL: Polly McNeill appearing today
9 on behalf of Waste Management Disposal of Oregon, Inc.,
10 and Enviro/Con and Trucking, Inc. There is two
11 Respondents.

12 JUDGE MOSS: So I'll likely refer to them as
13 "Respondents." Mr. Sells?

14 MR. SELLS: If Your Honor please, James Sells
15 appearing on behalf of intervenor Washington Refuse and
16 Recycling Association.

17 JUDGE MOSS: Mr. Potter?

18 MR. POTTER: P. Bronson Potter, Clark County
19 prosecuting attorney's office representing Clark
20 County. My mailing address is PO Box 5000, Vancouver,
21 Washington, 98666. Telephone is (360) 397-2478, and
22 e-mail is bronson.potter@clark.wa.gov.

23 JUDGE MOSS: I have read the file in this
24 case, and I think I even skipped my way through the
25 prehearing conference transcript. If memory serves,

0033

1 there was some discussion early on about resolving this
2 case by dispositive motion, and so the first question
3 that I have is whether the parties remain of the view
4 that that's the way we should proceed. Mr. Wiley?

5 MR. WILEY: I don't think it's going to -- I
6 think we should set a dispositive motion deadline, but
7 I don't think at this juncture -- I don't mean to speak
8 for Ms. McNeill, but I don't think either of us feel
9 that it's fully resolvable without some testimony on
10 it.

11 JUDGE MOSS: Do you share that view,
12 Ms. McNeill?

13 MS. MCNEILL: Thank you, Your Honor. The
14 process of doing discovery through the data requests
15 has actually resulted in some questions on our end, and
16 so we feel that there needs to be some further
17 discovery. In particular, we have identified some
18 third parties for whom we would like to request
19 payments, and that is all for the purpose of developing
20 facts that have to do with the affirmative defenses of
21 my clients.

22 Mr. Wiley and I have a dispute about this,
23 which actually I would suggest today would be a good
24 opportunity to present it to you for your resolution on
25 it because I think your determination in the disputed

0034

1 issue would relate to whether or not subpoenas would be
2 issued for the third-party witnesses potentially, and I
3 don't know if you want me to stop there or tee up the
4 issue for you.

5 JUDGE MOSS: Go ahead.

6 MS. MCNEILL: Mr. Wiley has filed a complaint
7 in this matter that has to do with allegations
8 regarding unauthorized solid waste collection from a
9 job site that arose in the context of an environmental
10 remediation project. As we have discussed amongst
11 ourselves, we are confronted with a determination of a
12 bright line in what is currently a gray area of
13 practice, primarily in how environmental remediations
14 are done throughout the state commonly without
15 involving the certificated haulers, but having said
16 that, there is an issue that has been presented with
17 regard to certain constituents and waste treatment that
18 are generated out of an environmental remediation
19 project, and Mr. Wiley's particular focus of attention
20 has been on a portion of the waste, the construction
21 and demolition portion of the remediation.

22 The Complaint then alleges that my client,
23 Waste Management of Oregon, arranged for the
24 supervision and disposal of solid waste, and the
25 Enviro/Con and Trucking, or as we call them ECTI, is

0035

1 actually an illegal transporter. I pleaded affirmative
2 defenses, two of which go to the operations of
3 Mr. Wiley's clients.

4 One of my understandings is that his client
5 actually engages in a business that is quite similar if
6 not the same as the operations of Waste Management of
7 Oregon, and in order to explore that, I have both in
8 terms of data requests, I have asked for information
9 that geographically exceeds the boundaries of Clark
10 County, which is the jurisdiction in which the subject
11 activities are alleged to have occurred, and Mr. Wiley
12 has responded to that, and I'll let him give you his
13 argument, that he does not believe there is any
14 authority to go beyond the geographic boundaries of
15 Clark County.

16 I feel I have an obligation to develop facts
17 that relate to the affirmative defenses that my clients
18 may have, and I think that clean hands, the defense of
19 saying that you really are not able to bring this
20 complaint because you yourself are doing is it one that
21 I need to explore. So I think that's the issue; Dave?

22 MR. WILEY: Your Honor, I think she's alluded
23 to a couple of the points at which we are in agreement
24 and a couple of the points in which we are in some
25 disagreement, and I share Polly's view that this is a

0036

1 timely prehearing conference today because in this
2 latest round of data requests, we've sort of drilled
3 down now to objections and scope issues.

4 Polly is correct that I believe the issues
5 are framed in Paragraph 5 and 6 of our complaint, which
6 is a complaint that is limited to an unincorporated
7 portion of Clark County on one single disposal site
8 involving one waste stream that the Commission has very
9 clearly defined as solid waste for the purposes of WUTC
10 regulation and Commission laws.

11 Where we are diverging right now is that I
12 believe under the statutes of the Complainant -- this
13 is not a show-cause proceeding brought by the
14 Commission, but it is the Complainant that has the
15 burden of proof. That would be me.

16 Ms. McNeill has alluded to her defenses,
17 which are found in Paragraph 4 in her answer. They are
18 affirmative defenses. There is no counterclaim
19 pending, and while I've been patient and cooperative, I
20 think she would say, to this stage in discovery, we are
21 now reaching the point where I think the issues she is
22 raising go far beyond the scope of the Complaint, the
23 defense and the narrowly-drawn scope of this
24 proceeding, which I will say, Your Honor, I spent a lot
25 of time refining so that we could, in fact, focus on

0037

1 the particular allegations in this complaint.

2 I'm not asking about Waste Management's
3 certificated operations in the 23 or odd counties in
4 which they operate. I'm not talking about any other
5 job type or site. I'm talking about an actual large,
6 industrial demolition site that we believe the facts
7 will clearly show Waste Management and its contractor
8 violated Commission law and rule by collecting,
9 transporting, and moving over the public highways of
10 the state construction and demolition debris material
11 that rightfully should have gone to the G certificate
12 holder.

13 I'm not expanding the scope in my burden of
14 proof. I intend to prove and establish that. I do not
15 intend to address operations of either company in any
16 other territory, and I think now that the discovery
17 rules would, in fact, be violated, particularly with
18 respect to my burden of proof, if we go on these
19 protracted what appear now to be fishing expeditions on
20 other issues that I haven't raised.

21 So we welcome a schedule, Your Honor, just to
22 finish. We welcome setting of a schedule that I think
23 will address the conventional completion of a
24 proceeding like this with some discussion of prefiled
25 versus live testimony and all the other sort of stages

0038

1 that.

2 MS. MCNEILL: We also welcome a schedule with
3 that, and just again to be more specific with regard to
4 the exact area of inquiry that I have is related to the
5 data requests that I have submitted to Mr. Wiley's
6 client, certainly, but also the subpoena would have to
7 do with drivers of the trucking company from whom I
8 have nothing, no verified or under-oath testimony, but
9 information that they have transported waste for
10 Mr. Wiley's client in the same manner ECTI has
11 transported for Waste Management Disposal of Oregon.
12 So there is other trucking companies and drivers that I
13 would like to subpoena.

14 JUDGE MOSS: Mr. Sells, do you want to be
15 heard on this?

16 MR. SELLS: We are generally in agreement
17 with the Complainant here. Although to the intervenor,
18 this is a broad-based question that's going to have
19 application statewide, this case here involves Clark
20 County and we, of course, pledge not to expand the
21 issues when we petitioned to intervene, and I think
22 there is plenty of issues resolving this one single
23 job, and we don't need to go beyond there, but we do
24 look forward to getting an order that has applicability
25 elsewhere.

0039

1 JUDGE MOSS: Mr. Potter, do you want to be
2 heard on this?

3 MR. POTTER: I will say that I agree that it
4 would be useful to set a filing of dispositive motions.
5 Otherwise, the discovery that's being sought isn't
6 really directed at the County, so I don't have a
7 position on that. Although, I would agree with
8 Mr. Wiley that the issues should be more narrowly
9 focused.

10 JUDGE MOSS: Thank you. Any final word?

11 MS. MCNEILL: No. Other than the fact that
12 having three people saying the same thing should not be
13 a surprise to Your Honor, and I'm sure it isn't, and
14 again, I think it's a fairly concise area of inquiry
15 that I have. It can be done in an expedited manner,
16 and I think that although Mr. Wiley has the burden of
17 proof, we do have the burden of proving our affirmative
18 defenses, and I don't know how I can prove that
19 affirmative defense without having the authority to
20 seek the evidence that I've requested.

21 JUDGE MOSS: Why would the Commission be
22 particularly swayed if it found out that Mr. Wiley's
23 client is violating the law and your client was also
24 violating the law. How would that exonerate your
25 client?

0040

1 MS. MCNEILL: I guess I would say that in the
2 order that would be issued, it would have to say that
3 both of our clients were violating the law, and the
4 reason that's relevant is because it is part of our
5 defense that it has been the pattern and practice of
6 solid waste collection companies to have environmental
7 remediation jobs and remediation sites out of the scope
8 of the regulatory ambit of the WUTC, and that pattern
9 and practice and history relates then to interpreting
10 the phrase, not the -- let me go sideways a little
11 bit -- not the definition of solid waste. This
12 material is within the definition of solid waste. Our
13 position is the activity is not within the scope of the
14 definition of the business of collecting solid waste.

15 MR. WILEY: Your Honor, procedurally, I think
16 there is a flaw in her position because there is no
17 counterclaim pending in this lawsuit. She has the
18 right to file a complaint against -- involving
19 allegations against our company. Obviously in
20 considering filing this complaint, we looked, as all
21 good draftsmen do, I hope, we did a little due
22 diligence on the fact, but whatever we are doing is not
23 relevant, and we, of course, deny it, but whatever we
24 are doing is not relevant to our burden of proof in
25 framing a complaint that we filed and served that

0041

1 called out the facts and the issues.

2 I don't believe the Commission's procedural
3 rules on discovery allow an independent cause of action
4 to be established through discovery on the part of the
5 Respondent that could be the source of a separate
6 complaint or counterclaim, Your Honor, and merely
7 alluding to a boilerplate affirmative defense in your
8 answer doesn't give you the right to establish an
9 independent cause of action through your defense. We
10 are in the second round of discovery. I think
11 Ms. McNeill will say we've cooperated, but today is a
12 good point to draw that line about how much further we
13 are going and focus on the facts and issues that I
14 plead back in August.

15 JUDGE MOSS: I'm inclined to agree with
16 Mr. Wiley on this, Ms. McNeill. I think what you are
17 talking about does go beyond the scope of this
18 proceeding, and as he observed, you do have the
19 opportunity to bring an independent complaint against
20 his client if you think his client is violating the
21 law. The industry pattern and practice might be
22 interesting to learn about, but I'm not sure it would
23 necessarily be all that helpful to us.

24 The question for us is a fairly narrow one,
25 whether this falls within the language of the statute

0042

1 or not, so we may have widespread violations of the
2 law, but that's not going to change the law, and that's
3 going to be our job is to interpret, if necessary, and
4 apply that, so I'm not going to allow the discovery
5 into those areas.

6 MS. MCNEILL: Thank you.

7 JUDGE MOSS: Are there any other disputes we
8 need to deal with before we talk about a schedule?

9 MS. MCNEILL: I don't think so, but in light
10 of that decision, I do intend to bring a dispositive
11 motion, so when we talk about the schedule, because if
12 Mr. Wiley is, in fact, as narrowly interested as he is,
13 this case is actually completed, so it's moot.

14 JUDGE MOSS: I'll do whatever you all want to
15 do in terms of setting a schedule, but I will say that
16 it's my usual practice when parties intend to file
17 dispositive motions, whether one party or both parties,
18 to set a schedule for that and just leave open how long
19 it's going to take me to get the order done, and once I
20 get the order finished, it either disposes of the case
21 or it does not. If it does not, we can have a further
22 prehearing, and we can do that all by telephone, or you
23 can give me an agreed-to schedule to any evidentiary
24 phase. Does that work for you guys?

25 MS. MCNEILL: That does work for me. Having

0043

1 spent that week with Glacier Recycling where they
2 practically had like two different what-if schedules,
3 what if there is a ruling, what if there is not, I
4 welcome that approach.

5 JUDGE MOSS: Let's go ahead and do it that
6 way. How long do you all want before you file your
7 dispositive motions? I assume there will be
8 cross-motions?

9 MR. WILEY: No.

10 MS. MCNEILL: No. Just my own motion and
11 then Mr. Wiley's reply and response, and let me say I
12 intend to file it at least by the first of March.

13 JUDGE MOSS: Do you want to set that as the
14 date?

15 MS. MCNEILL: I would like to set that as the
16 date except it's on a Saturday, so I guess I would like
17 to file the third of March. The one caveat I have
18 about it is I have a declaration from an individual
19 that works at the Department of Ecology, and the
20 attorney general with whom I spoke about that process
21 wanted to get back to me to tell me how long he thought
22 it would be to work that through, and I didn't hear
23 back from him before coming down here.

24 When I spoke with him about the concept, he
25 didn't think what I was asking was particularly

0044

1 controversial and time-consuming from his end, but
2 sometimes the Department of Ecology moves slowly. So I
3 would like to have the March 3rd filing deadline, and
4 if I'm wrong, and I should know within the next 24
5 hours, then Mr. Wiley and I can confer and suggest an
6 alternate schedule to you.

7 JUDGE MOSS: That's fine. How long do you
8 want to respond?

9 MR. WILEY: I was thinking two weeks after
10 the filing.

11 JUDGE MOSS: What day would that be?

12 MR. WILEY: March 17th, I believe.

13 JUDGE MOSS: So we'll have the Saint
14 Patrick's Day response. The rules don't really provide
15 for a reply round, but if you feel the need for one...

16 MS. MCNEILL: I would like to schedule one.

17 MR. WILEY: My concern is not so much with
18 the reply, but are we also going to be tracking the
19 prefiled testimony? It sounded like your intention
20 would be to kind of double-track that, or would that be
21 after all of this?

22 JUDGE MOSS: I think after all of this. This
23 project is completed, you said?

24 MS. MCNEILL: It's going to be completed
25 before the end of this week.

0045

1 JUDGE MOSS: This doesn't seem like the type
2 of case with any particular urgency.

3 MR. WILEY: No. As I understand the motion
4 based on Ms. McNeill's comments both on the record,
5 it's a motion to dismiss for mootness; is that correct?

6 MS. MCNEILL: That's correct.

7 MR. WILEY: I would think you would want a
8 very short reply because I think you will make all your
9 arguments on the opening. I don't think there is much
10 in my response.

11 MS. MCNEILL: I guess I would want the
12 opportunity to make that determination.

13 MR. WILEY: March 24th?

14 MS. MCNEILL: You are probably right. March
15 24th will be fine.

16 JUDGE MOSS: Anybody else have heartburn over
17 the proposed schedule of dispositive motion on March
18 3rd, response on March 17, and reply on March 24?

19 MR. POTTER: No.

20 MR. SELLS: Fine with me.

21 JUDGE MOSS: We will set those dates.

22 MR. WILEY: The intervenors, Your Honor,
23 could reply as we will or join the motion if they
24 wanted to?

25 JUDGE MOSS: I don't know where they would

0046

1 be. Although they agreed with you on discovery
2 matters, they may not agree with you on the merits.
3 The intervenors should take to file at the appropriate
4 moment depending on their positions in the case. Do we
5 have any other business we need to conduct today?

6 MS. MCNEILL: The other thing I would ask is
7 if there is going to be any limitation on the
8 intervenors in terms of not duplicating any of the
9 arguments or adding any maybe some sort of limitation
10 so it isn't just the gang piling more paper on Polly's
11 desk?

12 JUDGE MOSS: The only one burdened by the
13 repetitive arguments is me.

14 MS. MCNEILL: That's a strong cautionary
15 ascertainment.

16 JUDGE MOSS: While I discourage them, I won't
17 set any guidelines at this juncture. This strikes me
18 as a pleading, and the responses should be fairly brief
19 given the scope of it, so I'm not anticipating being
20 overwhelmed with mountains of paper. If I am, it will
21 simply take me longer to get through, but I'm not too
22 concerned in this incidence about that.

23 MS. MCNEILL: May we agree to filing and
24 service by electronic needs for these?

25 JUDGE MOSS: What we call it is actually

0047

1 submission by electronic means with the filing actually
2 occurring after whatever date you have set with the
3 additional copies. I think it's six in this case.
4 It's in the prehearing order.

5 MR. WILEY: Your Honor, not to prejudge your
6 ruling on that motion, if we were to have an
7 evidentiary phase in this hearing, would you then call
8 another prehearing conference, or how do you want to
9 address that?

10 JUDGE MOSS: If we need to address that, then
11 what I would like to do at that time is get in touch
12 with you all informally and see if you can consult
13 among yourselves and come up with an agreed schedule
14 that you send me in writing and then I just set it. We
15 don't need to have a conference to do that. You guys
16 have always been cooperative in working these things
17 out. If we need to have a prehearing conference, we
18 will.

19 MR. WILEY: At least as of today, I believe
20 that would be a prefiling by the proponent of the
21 Complaint, then a response and a reply and then
22 cross-examination.

23 JUDGE MOSS: If you all wish to have prefiled
24 testimony, we can do it that way. If you prefer to do
25 live testimony, we can do it that way. I'll leave it

0048

1 to you all to decide in the first instance. If you
2 can't decide and have a dispute, I'll resolve it for
3 you.

4 MR. WILEY: Your Honor, do I take it that
5 your ruling on the discovery, we are done with
6 discovery now, Ms. McNeill --

7 MS. MCNEILL: I haven't seen your response.

8 MR. WILEY: And I haven't yours, but other
9 than that, yes. We are now shifting into the
10 dispositive motion phase, because we typically have a
11 cooling-off period during these.

12 MS. MCNEILL: I think depending on, of
13 course, the responses that I've received and you've
14 received, and depending, of course, on the ruling on
15 the dispositive motion, I may make a request for a
16 third data request round, but I just don't know that
17 yet.

18 MR. WILEY: That seems fair enough to me,
19 Your Honor. We like cooling-off periods when the
20 different phases of the case are going on, and that's
21 what I think we are into now, other than the objections
22 that we both had to today's served requests where we
23 hopefully won't have to call you in, but it could be.

24 JUDGE MOSS: I will cling to that hope as
25 well. Is there anything else?

0049

1 MR. WILEY: I don't think so.

2 MR. POTTER: Not from Clark County.

3 JUDGE MOSS: Then thank you for all being
4 here today, and I look forward to helping you work
5 through this in due course.

6 (Prehearing adjourned at 1:58 p.m.)

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