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REGARDING: **ORDER NO. 12- DENYING MOTION TO OFFER ADDITIONAL EVIDENCE DURING DIRECT CASE AND GRANTING MOTION TO MAKE OPENING STATEMENTS**

DOCKET NUMBER: **582-08-2178**

JUDGE WILLIAM G NEWCHURCH

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**SOAH DOCKET NO. 582-08-2178
TCEQ DOCKET NO. 2007-1774-MSW**

**APPLICATION OF BFI WASTE §
SYSTEMS OF NORTH AMERICA, INC., §
FOR A MAJOR AMENDMENT TO §
TYPE I MSW PERMIT NO. 1447A §**

**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**

**ORDER NO. 12
DENYING MOTION TO OFFER ADDITIONAL EVIDENCE DURING
DIRECT CASE AND GRANTING MOTION TO
MAKE OPENING STATEMENTS**

On January 8, 2009, BFI Waste Systems of North America, Inc., (BFI) filed a motion to offer additional evidence during its direct case when each witness is called. BFI asks that it be allowed to:

- ask the witnesses to summarize their prefiled testimony to allow the Administrative Law Judge (ALJ) to better see the big picture;
- offer demonstrative exhibits, and
- ask its witnesses to respond to and rebut the opinions of the witnesses of other parties, as revealed during depositions and in the other parties' prefiled evidence.

TJFA, L.P., (TJFA) objects to the motion. TJFA claims that it would undermine the ALJ's order that all direct-case evidence be prefiled and provide BFI with two opportunities to rebut other parties' evidence. The ALJ agrees with TJFA. BFI's motion to offer additional direct-case evidence is denied. However, the ALJ would note two additional points.

First, in its motion, BFI claims that it is trying, in part, to limit costs by allowing a witness to provide both direct and rebuttal testimony at the same time, thus avoiding a second trip to testify. It is very common in complex case such as these for parties to accommodate one another by such an arrangement in order to minimize a witness's travel expense. If all parties agree that a particular witness should be allowed to offer his rebuttal testimony at the same time as his direct, the ALJ will honor the parties' agreement.

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Second, it is common for witnesses to discover typos and other errors in the prefiled evidence when they make their final preparations to testify. By this order, the ALJ is not ruling on any motion to make such corrections that BFI or any other party may make at the hearing.

In its motion, BFI also asked that its attorney be allowed to make an opening statement at the beginning of its direct case. TJFA does not object to BFI being allowed to make an opening statement, but asks that it be strictly limited in time and to what BFI's pre-filed evidence shows, and that exhibits not prefiled not be admitted during any opening statement.

BFI's motion to make an opening statement is granted. It is common practice for an attorney for a party to make an opening statement setting out what the attorney expects the evidence will show at the beginning of the client's direct case. Such a statement is not evidence but argument, and the ALJ can distinguish between the two. Moreover, the ALJ sees no reason to prohibit an attorney from arguing concerning issues and evidence that another party is likely to put forth later in the hearing. BFI and every other party will be given an opportunity to make opening statements at the beginning of their direct cases. As to time limits, the ALJ agrees that opening statements should be relatively short—five or ten minutes is common—but declines to set a more specific time limit.

SIGNED January 13, 2009.



WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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STYLE/CASE: BFI WASTE SYSTEMS OF NORTH AMERICA INC
SOAH DOCKET NUMBER: 582-08-2178
REFERRING AGENCY CASE: 2007-1774-MSW

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH**

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