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7 BEFORE THE WASHINGTON UTILITIES
8 AND TRANSPORTATION COMMISSION

9 WASTE CONNECTIONS OF
10 WASHINGTON, INC.,

11 Complainant,

12 v.

13 ENVIRO/CON & TRUCKING, INC. a
14 Washington corporation; ENVIROCON, INC., a
15 corporation; and WASTE MANAGEMENT
16 DISPOSAL SERVICES OF OREGON, INC.,

17 Respondents.

Case No. TG-071194

WASTE MANAGEMENT'S AND
ENVIRO/CON TRUCKING'S
REPLY IN SUPPORT OF MOTION
FOR SUMMARY
DETERMINATION

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WASTE MANAGEMENT'S AND ENVIRO/CON
TRUCKING'S REPLY IN SUPPORT OF MOTION FOR
SUMMARY DETERMINATION

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1 I. THIS CASE IS MOOT.

2 1. Confronted with incontrovertible evidence that the challenged remediation work
3 is finished, and accepting “arguendo” that Respondents’ collection and/or transportation of
4 construction debris and/or construction waste (“C & D Waste”) from the Evergreen Aluminum
5 remediation site is completed, Waste Connections of Washington, Inc. (“Waste Connections”)
6 cannot dispute that the case is moot.¹

7 2. To avoid dismissal, Waste Connections urges the Commission to find an
8 exception to the mootness doctrine and render an advisory opinion on a “narrowly-drawn”
9 Complaint that is limited to “one single disposal site involving one waste stream.” (2nd McNeill
10 Decl., Ex. 1 at 36:5-8, 23-24.) The Commission should reject this invitation. This case is moot
11 and no exception applies.²

12 II. THE EXCEPTION TO MOOTNESS DOES NOT APPLY HERE.

13 3. Rather than directly attacking the conclusion that this dispute is moot, Waste
14 Connections asks the Commission to apply a limited exception to the general rule that courts will
15 not issue an advisory opinion unless “it involves matters of continuing and substantial public
16 interest.” *Thomas v. Lehman*, 138 Wn. App. 618, 622, 158 P.3d 86 (2007). To determine
17 whether a case presents the requisite public interest, courts consider:

18 (1) the public or private nature of the question presented, (2) the
19 desirability of an authoritative determination to provide future
20 guidance to public officers, and (3) the likelihood that the question
21 will recur.

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23 ¹ Citing to *Morrison v. Basin Asphalt Co.*, 131 Wn. App. 158, 127 P.3d 1 (2005), Waste Connections mentions
24 that “a case or issue is not ‘moot’ if a court can still provide effective relief.” (Answer to Mot. at 3:9-10.) However,
25 in *Morrison*, the Court held that a claim for entitlement to unpaid wages was moot where the employer had paid the
26 requested wages after the lawsuit was initiated. *Morrison*, 131 Wn. App. at 162; *see also In re Recall Charges*
27 *Against Seattle School Dist. No. 1 Directors*, 162 Wn.2d 501, 506, 173 P.3d 265 (2007) (appeal moot in case
seeking recall of school district directors where the directors did not run, or were defeated, in intervening election).

² In their Motion for Summary Determination, Respondents cited to *Glick v. Verizon Northwest, Inc.*, 2005 WL
484651 (W.U.T.C. Jan. 28, 2005) (Docket No. UT-040535, Order No. 3) solely to show that the Commission has
recognized and applied the mootness doctrine, not to suggest that any other feature of the case was analogous.

1 *Id.* The court also “may consider the likelihood that the issue will escape review because the
2 facts of the controversy are short-lived.” *Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d
3 1067 (1994) (quotation marks & citation omitted).

4 4. However, the public interest exception to the mootness doctrine has been applied
5 in “cases which became moot only after a hearing on the merits of the claim” so as “to avoid the
6 danger of an erroneous decision caused by the failure of parties, who no longer have an existing
7 interest in the outcome of a case, to zealously advocate their position.” *Orwick v. City of Seattle*,
8 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (emphasis added). *Westerman*, relied upon by Waste
9 Connections, reiterates this key point that the exception is limited “to cases in which a hearing on
10 the merits has occurred.” 125 Wn.2d at 286. “In those cases, the facts and legal issues had been
11 fully litigated by parties with a stake in the outcome of a live controversy.” *Orwick*, 103 Wn.2d
12 at 253. After a hearing on the merits, it is a waste of judicial resources to dismiss matters of
13 continuing and substantial public interest. *Id.*

14 5. In *Orwick*, the Supreme Court affirmed dismissal of a claim for declaratory and
15 injunctive relief that became moot before trial, explaining: “Dismissal of their claim will not
16 involve a waste of judicial resources and will avoid the danger of allowing petitioners to litigate
17 a claim in which they no longer have an existing interest.” *Id.* at 253-54; *accord Hart v.*
18 *Department of Social & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988) (court must
19 consider the “level of genuine adverseness and the quality of advocacy of the issues.”). In
20 contrast, in *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004), the Supreme Court
21 applied the mootness exception where

22 [t]he quality of the advocacy is good because the parties’ briefing
23 addresses the vital issue of the case ... and the genuinely adverse
24 parties fully litigated the merits of this case on numerous
occasions.

25 *Id.* at 893; *accord Washington Water Power Co. v. Graybar Electric Co.*, 112 Wn.2d 847, 850
26 n.2, 774 P.2d 1199 (1989) (mootness exception applied because of “the genuine adverseness of
27 the parties and the exceptional quality of the briefing”); *Westerman*, 125 Wn.2d at 287 (“With

1 one amicus for each side and all of the parties, there is genuine adverseness on the issues.
2 Moreover, a hearing has been held on the merits and the briefs before this court are of good
3 quality.”)

4 6. Continuing this case would force the Respondents to litigate a claim in which they
5 no longer have an existing interest. At this point, with the work complete, do the parties really
6 have sufficient stake in the outcome of this case to zealously advocate their positions? Indeed,
7 might not the parties have different attitudes about remediation work in areas of Washington
8 where Waste Connections does not hold a G Certificate, yet Waste Management of Washington,
9 Inc. (an affiliate of Respondent) does? Because work at the Evergreen Aluminum remediation
10 site is complete, Respondents have little reason to advocate against the position Waste
11 Connections advances in this case. Given that there has been no hearing or briefing on the merits
12 in this case and in light of the possible lack of actual adversity going forward, it is not
13 appropriate to employ the exception to the mootness doctrine.

14 **III. THIS CASE DOES NOT INVOLVE SUBSTANTIAL PUBLIC INTEREST.**

15 7. Because there has been no hearing on the merits, this moot case should be
16 dismissed without consideration of the limited exception to the mootness doctrine. However, if
17 the Commission is inclined to consider the exception to mootness, a careful analysis
18 demonstrates that it does not apply here.

19 **A. This Is a Dispute Between Private Companies.**

20 8. This is a private dispute between two large garbage companies over one big job.
21 It does not raise issues of broad public concern warranting an advisory opinion. This conclusion
22 is highlighted by the decision of the Commission’s Staff to refrain from participating in this
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1 action. If Staff believed there were public interest issues presented, surely they would have
2 appeared in the proceeding.³

3 9. Waste Connections argues that this “narrowly-drawn” dispute – *i.e.*, who should
4 have collected and/or transported C & D Waste from the Evergreen Aluminum remediation site –
5 is “public” in nature. (Answer to Mot. at 4:1-15.) Waste Connections has made it plain from the
6 outset of this case that it is only raising a very discreet issue about one particular job. According
7 to Waste Connections, its “narrowly-drawn” Complaint “is limited to an unincorporated portion
8 of Clark County on one single disposal site involving one waste stream.” (2nd McNeill Decl., Ex.
9 1 at 36:5-8, 23-24.) Waste Connections has itself refused to allow discovery about its own
10 potential activities involving the collection and/or transportation of C & D Waste, evidencing its
11 lack of interest in broadening the issues potentially resolved by this proceeding. Rather, Waste
12 Connections has stated that it is “not talking about any other job type or site.” (2nd McNeill
13 Decl., Ex. 1 at 37:4-5.) Given its own admissions as to the narrow nature of this dispute, Waste
14 Connections cannot now elevate this matter to one of significant statewide public interest. “The
15 public interest exception has not been used in statutory or regulatory cases that are limited on
16 their facts.” *Hart*, 111 Wn.2d at 449-51 (due process challenge to DSHS paramedic certification
17 did not concern issues of a public nature).

18 **B. Public Officers Do Not Need an Advisory Decision.**

19 10. Waste Connections suggests that the Commission should review this moot case
20 because “it would potentially provide useful guidance to . . . other public officials.” (Answer to
21 Mot. at 4:18-19.) Essentially, Waste Connections concedes that it is asking for nothing more
22 than an advisory opinion. However, the Supreme Court has emphasized that “[d]ecisions of
23 moot cases with limited fact situations provide little guidance to other public officials.” *Hart*,

24 ³ Waste Connections suggests that because public interest is relevant to issuance of a certificate of public
25 convenience and necessity, the exception to the mootness doctrine should be found *a priori*. (Answer to Mot. at 4:8-
26 13.) These are two different, unrelated “public interest” concepts. Washington Refuse and Recycling Association
27 similarly argues that any case involving solid waste should meet the public interest exception because of the public
health issues related to handling garbage. (Intervenor’s Reply to Mot. at 2:20-3:2). This, too, is inapposite. No
Commission proceeding involving disputes about solid waste could ever be dismissed as moot if either of these
positions were upheld.

1 111 Wn.2d at 451. As previously discussed, Waste Connections has steadfastly taken the
2 position that this case raises a very discreet claim, limited to the facts at the Evergreen
3 Aluminum remediation site. Waste Connections has not submitted any evidence to the
4 Commission to support its claim now that this moot case should be litigated for an advisory
5 opinion that might provide guidance outside the context of the environmental remediation at the
6 Evergreen Aluminum smelter.

7 11. Indeed, it would be perilous for the Commission to be issuing a broad advisory
8 decision in a moot case involving very specific facts and a narrowly-drawn Complaint. Such an
9 opinion may have unintended consequences if applied in other cases where the facts, parties, and
10 circumstances would have warranted a different outcome absent a Commission-issued advisory
11 opinion in this case. *See King County v. Central Puget Sound Growth Mngt. Hearings Bd.*, 91
12 Wn. App. 1, 23-24, 951 P.2d 1151 (1998) (“Use of the public interest exception is not justified
13 when the underlying claim is limited to the facts of the present case, and when future challenges
14 of a similar nature will require examination and full litigation on the facts of that particular
15 case.”), *aff’d in nonrelevant part & rev’d in nonrelevant part*, 138 Wn.2d 161, 979 P.2d 374
16 (1999).

17 **C. The Issue Is Not Likely To Recur.**

18 12. Although Waste Connections has repeatedly claimed that this case “is limited to
19 an unincorporated portion of Clark County on one single disposal site,” (2nd McNeill Decl., Ex. 1
20 at 36:6-7), it now professes a desire to use this unique situation for prospective guidance as to the
21 handling of C & D Waste at run-of-the-mill demolition jobs. However, the Evergreen
22 Aluminum remediation site was not a typical demo job.⁴ It involved the environmental
23 remediation and dismantling of one of the State’s last aluminum plants over several years.
24 (McNeill Decl., Ex. 2.) It does not present the commonly recurring situation for which Waste
25 Connections seeks “guidance.”

26 ⁴ Nor does this involve sham recycling, as suggested by the Washington Refuse and Recycling Association
27 (Intervenor’s Reply to Mot. at 3), which emphasizes why the limited factual situation is not conducive to the kind of
“guidance” sought.

1 13. Waste Connections does not dispute that the work at the Evergreen Aluminum
2 remediation site challenged here is completed. Moreover, Waste Connections presents only
3 mere speculation that Respondents – or others – “could . . . perhaps” do something like this in
4 the future. (Answer to Mot. at 6:7-8.) Waste Connections does not present any evidence
5 suggesting that Respondents are engaging in the challenged conduct anywhere else.
6 Consequently, Waste Connections’ discussion of there being, in the abstract, “a likelihood of the
7 illegal conduct recurring,” (Answer to Mot. at 5), is immaterial. In *Hart*, the Supreme Court held
8 that mere speculation that a moot dispute with a government agency would recur was “certainly
9 not a reasonable expectation,” and warranted dismissal of the case as moot. *Hart*, 111 Wn.2d at
10 452.

11 14. Similarly, Waste Connections’ conjecture that others may be performing activities
12 similar to those contested here does not satisfy the standard for employing the exception to the
13 mootness doctrine. Courts have found there is a likelihood that a question will recur when there
14 is actually evidence thereof. *State v. Ross*, 152 Wn.2d 220, 236, 95 P.3d 1225 (2004) (“This
15 issue has generated a substantial number of lower court opinions”); *In re Personal Restraint*
16 *Pet’n of Myers*, 105 Wn.2d 257, 260, 714 P.2d 303 (1986) (“The petition before the court is the
17 first of many petitions raising similar issues. Most of these petitions have been stayed pending
18 resolution of this petition. Accordingly, the decision will have a broad impact within the
19 corrections system, providing needed guidance to public officers who await this decision.”); *In*
20 *re Personal Restraint Pet’n of Goulsby*, 120 Wn. App. 223, 226, 84 P.3d 922 (2004) (multiple
21 petitions pending raising same issue); *In re Welfare of J.H.*, 75 Wn. App. 887, 880 P.2d 1030
22 (1994) (issue “has been raised in dependency proceedings at least 15 times in the past year”).

23 **D. The Facts of the Controversy Are Not Short-Lived.**

24 15. Again, Waste Connections’ argument as to this element is based wholly on
25 conjecture. The only facts in the record relate to the Evergreen Aluminum smelter site, a huge
26 project at which remediation has been taking place since at least May 2006, over 22 months.

1 (Tyacke Decl. ¶ 3, previously filed with the Motion for Summary Determination.) This is not a
2 typical demolition job or a project "of relatively short duration." (Answer to Mot. at 6 n.4.)

3 While Waste Connections has never made any effort to seek speedy relief from the Commission
4 in this case, it imagines that solid waste collection companies "could" complete other
5 unauthorized activities prior to adjudication of a hypothetical case against them. (*Id.* at 6:16-17.)

6 It is noteworthy that Waste Connections has not identified a single other case raising this issue.
7 In fact, there is no evidence whatsoever of similar issues existing "in smaller or short-term
8 projects" such as construction sites. (*Id.* at 6:17-18.)

9 16. In sum, Waste Connections has failed to establish any of the elements required to
10 warrant application of the exception to the mootness doctrine. The Commission should decline
11 the invitation to issue an advisory opinion in this moot case.

12 **IV. THIS CASE SHOULD BE DISMISSED.**

13 17. Respondents respectfully request that this action be dismissed as moot and
14 nonjusticiable, with each party bearing its own costs and fees.

15 DATED this 24th day of March, 2008.

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17 

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