

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASTE CONNECTIONS OF)	DOCKET TG-071194
WASHINGTON, INC.,)	
)	
Complainant,)	ORDER 03
)	
v.)	
)	
ENVIRO/CON & TRUCKING, INC., a)	GRANTING MOTION FOR
Washington Corporation, and WASTE)	SUMMARY DETERMINATION
MANAGEMENT DISPOSAL)	
SERVICES OF OREGON, INC.,)	
)	
Respondents.)	
)	
.....)	

1 *Synopsis: This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. This Order would dismiss Waste Connections of Washington, Inc’s, Complaint because the relief requested—that Respondents cease collecting and transporting certain waste—has already been realized in fact, there would be no practical value in determining in the context of a private party dispute that Respondents required a certificate to conduct the activities that now are concluded, and the matter is not one that falls within the public interest exception for cases that otherwise are moot.*

MEMORANDUM

2 **PROCEEDINGS:** This matter involves a private party complaint, or in the alternative, a petition for a declaratory order, filed by Waste Connections of Washington, Inc. (Waste Connections) against Enviro/Con & Trucking, Inc. (ECTI) and Waste Management Disposal Services of Oregon, Inc. (Waste Management).¹

¹ The original complaint included Envirocon, Inc., as a Respondent. However, on further investigation, Complainant filed a motion for voluntary dismissal and the Commission entered Order 02 dismissing Envirocon, Inc.

Waste Connections alleges that ECTI and Waste Management (Respondents) are engaging in the collection and transportation of solid waste from an environmental remediation site in unincorporated Clark County without required certificate authority. Waste Connections asks for an order requiring Respondents to cease and desist from the alleged activities or declaring they are subject to the Commission's jurisdiction and must have certificates of public convenience and necessity to conduct the alleged activities.

3 **APPEARANCES:** David W. Wiley, Williams, Kastner & Gibbs, PLLC, Seattle, Washington, represents Waste Connections. Polly L. McNeil, Summit Law Group, PLLC, Seattle, Washington, represents ECTI and Waste Management. James K. Sells, Ryan Sells Uptegraft, Inc. P.S., Silverdale, Washington, represents Washington Refuse and Recycling Association (WRRRA). E. Bronson Potter, Sr., Deputy Prosecuting Attorney for Clark County, Washington, represents Clark County.

4 Neither the Commission's regulatory staff nor the Public Counsel Section of the Attorney General's office entered an appearance at any stage of this proceeding.

DISCUSSION

I. Statement of Facts

5 On June 8, 2007, Waste Connections filed a Complaint and, alternatively, Petition for Declaratory Order, and Application for Brief Adjudicative Proceeding ("Complaint"). Waste Connections alleged that ECTI had collected and transported construction debris and/or construction waste ("C & D Waste") from the Evergreen Aluminum Smelter environmental remediation site in Clark County.² Further, Waste Connections contended that ECTI and Waste Management had assumed overall responsibility for the transportation and disposal of C & D waste from the remediation site.³ Waste Connections contends these activities were illegal because they were conducted without required authority in the form of a certificate of public convenience and necessity issued by the Commission pursuant to RCW 81.77.040 and WAC 480-70-081.

² Complaint ¶ 5.

³ *Id.* ¶6.

- 6 The remediation site consisted of a defunct aluminum smelter and fabrication plants.⁴ The Washington Department of Ecology issued an Enforcement Order during 2007 requiring Evergreen Aluminum LLC to clean up hazardous waste and materials at the site that contain hazardous substances. The project involved demolition of the aluminum smelter facilities to allow access to, and removal of, contamination. A portion of the waste generated at the remediation site was C & D Waste.⁵
- 7 All the facilities at the site have been demolished with the exception of three remaining structures: the scalehouse and guardhouse (which are to remain on the property for the subsequent owner), and a steel-sided equipment storage structure (which is to be recycled).⁶ Work involving collection and/or transportation of C & D Waste by Respondents is completed.⁷

II. Motion for Summary Determination

- 8 On March 3, 2008, Respondents filed their Motion for Summary Determination. They argue that Waste Connections has presented a narrow request for relief that is now moot. Respondents state correctly that Complainant specifically requests a cease and desist order with respect to collection and transportation of C&D waste from the remediation site. Respondents state that the project is complete, C&D Waste collection has ceased⁸ and, accordingly, even if Waste Connections were to prevail on its claim, the cease and desist order they request would serve no purpose.
- 9 Waste Connections, in the alternative, asks the Commission to enter an order declaring that collection of C & D Waste from the Evergreen Aluminum Smelter Remediation Site in Clark County is subject to RCW 81.77.040 and WAC 480-70-081 and requires a certificate of public convenience and necessity. Respondents argue that because the challenged services have been completed, the requested order presents a purely academic question that is not tied to any effective request for relief

⁴ McNeill Declaration, Exhibit 1 (Department of Ecology Fact Sheet for the Evergreen Aluminum Smelter Facility Cleanup Enforcement Order).

⁵ Tyacke Declaration, ¶ 3.

⁶ *Id.* ¶ 4.

⁷ *Id.* ¶ 5.

⁸ *Id.*

by Waste Connections. Respondents contend the parties do not have a disputed issue and, therefore, “an administrative hearing would be pointless within the APA context.”⁹

10 For similar reasons, Respondents argue, this action is moot because there is no longer a justiciable controversy. Such a controversy requires:

(1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement.¹⁰

11 Respondents argue that because the collection and transportation of C & D Waste challenged by Waste Connections has been completed, there is no existing dispute between these parties to be adjudicated by the Commission and therefore the case should be dismissed.

III. Determination

12 Waste Connections, in its Answer, does not meaningfully dispute the facts recited in section I of this Order. Indeed, Waste Connections presents no evidence that would establish that there are material issues of fact in dispute. Instead, the Complainant takes the facts recited in Respondents’ Motion as true, “arguendo,” and contends that “the Respondents utterly fail to provide the Commission with facts sufficient to allow a summary determination.”¹¹ We disagree with this contention and find there are no material facts in dispute insofar as the question of mootness is concerned.

⁹ Motion for Summary Determination ¶ 10 (quoting *Lawrence v. Department of Health*, 133 Wn. App. 665, 678, 138 P.3d 124 (2006)).

¹⁰ Id. ¶ 11 (quoting *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (internal quotation marks, citations, and ellipsis omitted)).

¹¹ Complainant’s Answer at 2:11-15. WRRRA’s Reply states that it accepts “what appears to be at least tentative agreement regarding the facts ... pertinent to the motion.” Reply at 1:19-21.

- 13 A case is moot if the issues presented are purely academic and the adjudicative body can no longer provide effective relief.¹² In its request for relief, Waste Connections asks that the Commission either order Waste Management and ECTI to cease and desist “from engaging in the collection and/or transportation of [C & D Waste] located at the Evergreen Aluminum remediation site in unincorporated Clark County,” or declare that the collection of C & D Waste “from the Evergreen Aluminum site in Clark County” is subject to RCW 81.77.040 and WAC 480-70-081 and requires a certificate of public convenience and necessity.¹³
- 14 Since Respondents have ceased the activities of which Waste Connections complains, a cease and desist order from the Commission would be meaningless. Waste Connections, as a practical matter, already has obtained this form of relief that it requests via its Complaint.
- 15 We similarly cannot give Waste Connections any meaningful relief on the facts of this case, as pled, by declaring Respondents should have had a certificate to perform some or all of the activities they undertook at the Evergreen Aluminum facility. Declaratory judgment relief is improper if it does not relate to a justiciable controversy. Under the standards that define such a controversy,¹⁴ there is none present here. Other than as possible disputants of an academic question, there are no genuine and opposing interests between these parties. There are no direct and substantial interests at stake insofar as the issues were joined in this proceeding.¹⁵
- 16 Although it might be satisfying to Waste Connections in some sense to be declared “right,” a statement in a Commission order that Respondents required a certificate of public convenience and necessity under the specific facts of this case would be of no value either in the context of the defined controversy or in any broader sense. This specific case is not an enforcement or penalty proceeding in which the Commission could take effective action for past wrongdoing, if proven. If a similar fact pattern is

¹² *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984); *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).

¹³ Complaint ¶¶ 11, 13.

¹⁴ *See supra*, ¶ 10.

¹⁵ Waste Connections did not assert in its complaint any “actual, concrete harm” caused by Respondent’s activities. *To-Ro Trade Shows*, 144 Wn.2d at 412 (citing *Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994) (petitioners’ failure to identify any ‘actual, concrete harm precluded from declaratory action)).

alleged in the future, it will still require proof and will still have to be tested against governing statutes and rules, not against any determination we might make here.¹⁶

17 Waste Connections and the intervenors argue that a case or issue is not moot if the activity involves a matter of continuing and substantial public interest.¹⁷ These parties state that to determine whether a continuing and substantial matter of public interest exists, a court should consider: (1) the public or private nature of the issue, (2) the need for a judicial decision to provide future guidance to public officers, and (3) the likelihood that the issue will recur.¹⁸ Complainant also contends that a court may also consider the “the likelihood that the issue will escape review because the facts of the controversy are short-lived.”¹⁹

18 These principles no doubt provide thorough guidance to the courts, but we are not a court. When the Commission considers whether an otherwise moot case ought to be resolved under the public interest exception, it considers not only these factors but also the broader regulatory framework in which it performs its statutory duties. The Commission, unlike a court, is proactive in policing the activities and companies that are subject to its jurisdiction. When a fact pattern involving arguably illegal activities subject to our jurisdiction comes to the attention of the Commission’s regulatory staff (Commission Staff or Staff) it may institute an investigation and may, in its prosecutorial role, bring the matter to the Commission for decision. Alternatively, Commission Staff can participate as the party representing the public interest when such a matter is brought before us, as here, on a private party complaint.

19 The Commission relies in significant part on its expert Staff to identify those fact patterns raised in private party complaints that present matters of continuing and substantial public interest, the determination of which potentially will have ramifications beyond resolution of an immediate controversy. In such cases,

¹⁶ See *King County v. Central Puget Sound Growth Mngt. Hearings Bd.*, 91 Wn. App. 1, 23-24, 951 P.2d 1151 (1998) (public interest exception not justified when underlying claim is limited to the facts of the present case, and future challenges of a similar nature will require examination and full litigation on the facts of that particular case), *aff’d and rev’d in parts not relevant*, 138 Wn.2d161, 979 P.2d 374 (1999).

¹⁷ Complainant and the intervenors present identical or closely similar arguments on this point.

¹⁸ Complainant’s Answer at 3:13-17; WRRR Reply at 2:11-18 (both citing *In re Personal Restraint Petition of Silas*, 135 Wn. App. 564, 568, 145 P.3d 1219 (2006)).

Commission Staff will participate as a party. Commission Staff has elected not to participate in this proceeding. Without participation by Staff, we run the risk of a decision with unintended consequences or even an erroneous decision because there is no assurance that any party will zealously advocate the public interest.²⁰

20 Waste Connections argues that if the Commission finds moot its request for a declaratory order, a procedural loophole that allows solid waste collections companies to evade state laws and regulations could well be created. WRRRA argues in a similar vein that if this matter is dismissed for mootness, “illegal haulers and sham recyclers” will take the “dangerous message” that they need only “finish the job quickly and quietly and you are home free.”²¹

21 These assertions are simply incorrect. The Commission, among other powers, has the power to bring its own complaint against companies that haul solid waste without required authority and to penalize them for such illegal activity. The Commission has not intervened in this instance, as discussed above. It may, or may not later find it has probable cause to complain, or to penalize Respondents in connection with the activities alleged here, or in connection with other activities Respondents or other haulers may undertake in the future. In light of these considerations, it simply is not true that “[t]he Respondents and other solid waste collection companies allegedly operating without a certificate in the present or future would simply have to complete or terminate their contested activities before being formally pronounced in violation of the law” to avoid prosecution.²² The Commission will exercise its discretion to prosecute in appropriate cases, and will penalize companies found to have violated the law. Thus, the Commission can bring its authority to bear in a more meaningful way than what would be accomplished by a simple declaration here.

¹⁹ *Id.* at 3:17-20 (citing *Westerman v. Cary*, 125 Wn.2d 277, 286-287, 892 P.2d 1067 (1994) (internal citation omitted)).

²⁰ *Cf. Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (discussing the applicability of the public interest exception to cases that become moot only after hearing on the merits thus ensuring the quality of record and briefing that occurs when there is genuine adversity).

²¹ WRRRA Reply at 3:12-15.

²² Complainant’s Answer at 6:3-6.

- 22 There being no material facts in dispute, the Commission concludes in light of the foregoing discussion that Waste Connection's Complaint should be dismissed as moot.

ORDER

THE COMMISSION ORDERS That Waste Management and Environ/Con Trucking's Motion for Summary Determination is granted and, accordingly, Waste Connection, Inc's Complaint and, Alternatively, Petition for Declaratory Order, and Application for Brief Adjudicative Proceeding is dismissed

DATED at Olympia, Washington and effective April 22, 2008.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order, any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such an answer.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion. You will be notified if this order becomes final.

On copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and (8) copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
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