

Service Date: November 13, 2019

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Application of

DOCKET TG-181023

SUPERIOR WASTE & RECYCLE
LLC

ORDER 03

For Authority to Operate as a Solid
Waste Collection Company in
Washington

INITIAL ORDER DENYING
APPLICATION

BACKGROUND

- 1 On December 13, 2018, Superior Waste & Recycle LLC (Superior Waste or Applicant) filed with the Washington Utilities and Transportation Commission (Commission) an application for authority to operate as a solid waste collection company in Washington (Application). Specifically, Superior Waste seeks authority to provide service in an area of Kitsap County that overlaps with the service territory of a certificated solid waste carrier, Waste Management of Washington, Inc., d/b/a Brem-Air Disposal (Brem-Air Disposal).
- 2 On January 24, 2019, the Commission issued a Notice of Application, which provided 30 days for interested persons to protest the Application. On February 20, 2019, Brem-Air Disposal filed a protest to the Application.
- 3 The Commission convened an evidentiary hearing in this docket on August 5, 2019, before Administrative Law Judge Rayne Pearson.
- 4 Superior Waste presented testimony and evidence from Daniel Stein, Company owner. Stein testified that he currently provides solid waste collection service to 53 residential customers to whom Brem-Air Disposal is “unreasonably refusing” to provide curbside service, instead requiring those customers to transport their garbage cans up to one mile for collection at a Brem-Air Disposal pickup site.¹

¹ Exh. DS-1T at 5:8.

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- 5 Stein testified that he has attended truck driver training school, has experience driving large vehicles, and has a commercial driver's license. According to the Application, the Company has one vehicle, a 2017 three-quarter ton Chevrolet truck, which it uses to transport solid waste.
- 6 Brem-Air Disposal presented testimony from Michael Weinstein, senior pricing manager, and Robert Rutledge, Brem-Air Disposal district manager.
- 7 Weinstein explained in his pre-filed testimony that Waste Management of Washington, Inc., holds solid waste certificate G-237, which grants Brem-Air Disposal the authority to collect solid waste in unincorporated areas of Kitsap County, including all of Superior Waste's proposed service territory.
- 8 Weinstein testified that Brem-Air Disposal offers both carry-out and drive-in service for an additional charge. For customers with carry-out service, Brem-Air Disposal will move garbage, recycling, and yard waste carts up to 100 feet to where collection vehicles can reach them. For customers with drive-in service, collection vehicles will drive up to one mile off of a public road to collect solid waste carts. Weinstein testified that he has not received any indication from the Commission that Brem-Air Disposal's carry-out and drive-in service options do not satisfactorily serve customers who cannot or prefer not to move their carts to designated collection sites.
- 9 Weinstein acknowledged that Brem-Air Disposal is "still working to determine" whether there is a legitimate need beyond the company's current service offerings, and that there "may be some customers unable to move their own solid waste and recycling to Brem-Air Disposal's existing collection points, even with the benefit of Brem-Air Disposal's existing carry-out and drive-in services."² Weinstein testified he is aware of only one customer in the last two years who requested drive-in service that Brem-Air Disposal was unable to provide due the collection truck's inability to turn around.
- 10 Weinstein further testified that he has never seen any company offer "the particular, highly specialized services Superior proposes, above and beyond the carry-out and drive-in service Brem-Air Disposal already offers."³
- 11 Weinstein testified that Brem-Air Disposal has no objection to Superior limiting its service to hauling customer waste on private property to public roads but not on them,

² Exh. MAW-1T at 8:16-18.

³ *Id.* at 8:21-9:2.

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and that Brem-Air Disposal does not believe that performing only that service would require a solid waste certificate. Brem-Air Disposal is also considering using smaller, specialized vehicles that could traverse smaller roads and turn around in tighter locations than its standard collection trucks. Alternatively, Brem-Air Disposal may offer to haul solid waste from customers' homes to regular Brem-Air Disposal collection points using standard light-duty vehicles to move material to locations where standard collection trucks can pick it up. Weinstein testified that Brem-Air Disposal would "appreciate any guidance about what type of service would be most satisfactory to the Commission" in this Order.⁴ In response testimony, Weinstein stated that Brem-Air Disposal is able and willing to continue serving Superior Waste's proposed territory to the Commission's satisfaction:

Based on ... site surveys ... and work I've done toward developing costs and rates, it looks increasingly likely that Waste Management will be able to offer a special extension of our standard residential service at a reasonable cost to virtually all of Superior's customers.⁵

- 12 Weinstein explained that he believes Brem-Air Disposal can serve "virtually all" of Superior Waste's customers because he is uncertain about one customer, but ultimately expects to be able to provide service to all customers.
- 13 Finally, Weinstein raises concerns about Superior Waste's fitness to provide service, including the lack of a backup plan and business records.
- 14 Rutledge testified that Brem-Air Disposal currently collects solid waste using full-size trucks and provides drive-in and carry-out service with a smaller vehicle. In addition, Brem-Air Disposal is permitted by Commission rules to decline service at collection points where operating company vehicles would threaten the safety of persons or property; where a private driveway or road is improperly constructed or maintained; where vehicle turn-around space is inadequate; or where other unsafe conditions exist.
- 15 Rutledge acknowledged in testimony that there may be a small number of customers whose needs could be better served, and that Brem-Air Disposal is willing to meet any need identified by the Commission to provide more satisfactory service. In response testimony, Rutledge provided more detail about Superior's customers: of the 34 customers currently ineligible for carry-out or drive-in service, 33 would become

⁴ *Id.* at 11:8-11.

⁵ Exh. MAW-5T at 3:20-4:2.

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accessible with a smaller collection vehicle. For the one remaining customer who has a particularly rough and steep driveway, Rutledge believes further evaluation is necessary, and the customer may be required to perform some maintenance in order to be eligible for drive-in service.

- 16 At hearing, Rutledge testified that he does not recall why service limitations were placed in Brem-Air Disposal's tariff, and explained that Brem-Air Disposal does not track instances when it is unable to provide service requested by a customer.
- 17 Staff presented testimony from Scott Sevall, regulatory analyst. Sevall explained that Staff believes Superior has the financial resources to operate its proposed services for at least 12 months. Sevall also testified that Brem-Air Disposal's drive-in service is limited to only those customers who live less than one mile off of a public road, and that its carry-out service is not available to customers who live more than 100 feet from their designated collection point. Staff believes these limitations create a gap in service.
- 18 Sevall further testified Superior Waste failed to demonstrate that Brem-Air Disposal will not provide service to the Commission's satisfaction, or that the public convenience and necessity require the proposed service. Nevertheless, Staff expects Brem-Air Disposal to work with Superior Waste's customers to achieve universal service in its territory. Sevall also explained that the Commission has received 23 informal complaints against Brem-Air Disposal since January 2017. Three of those complaints were customer upheld; two were related to missed pickups, and one was related to a disputed bill.
- 19 At hearing, Sevall testified that Staff believes the record fails to support a finding that Brem-Air Disposal does not provide timely or sufficiently regular service, or that Brem-Air Disposal is providing unsatisfactory service based on the nature, seriousness, or pervasiveness of customer complaints filed with the Commission. Moreover, Staff does not believe that invoking a safety exemption establishes, on its own, that Brem-Air Disposal is not providing satisfactory service.
- 20 On October 4, 2019, the parties filed post-hearing briefs. In its brief, Superior Waste argues that the community in its proposed service territory has shown that its proposed service is necessary, and that Brem-Air Disposal has refused to provide comparable service. Superior Waste asserts that Brem-Air Disposal hides behind safety concerns to refuse service to customers it deems unprofitable to serve.
- 21 Superior Waste also argues that carry-out and drive-in service should be considered a separate category of service that requires a separate certificate, like biomedical waste collection. To address Brem-Air Disposal's concerns about its operational fitness,

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Superior Waste explains that it owns its collection vehicle, it can rent a back-up vehicle when needed, and that it has a backup plan.

- 22 Brem-Air Disposal argues in its brief that the legislature has a strong preference for exclusive service territories for solid waste collection. Brem-Air Disposal believes the record shows that it meets statutory standards for providing solid waste service to the Commission's satisfaction, and that Superior Waste has failed to demonstrate there is a public need for its proposed service. In addition, Brem-Air Disposal argues that Superior Waste is neither financially nor operationally fit to provide service. Finally, Brem-Air Disposal argues that the record lacks evidence of systematic failures, such as widespread service failures, repeated failures to respond to customer complaints, an unwillingness to resolve complaints, or a repeated failure to correct known violations. As such, Brem-Air Disposal contends that the Commission should work with Brem-Air Disposal as the existing carrier to address any concerns it may have.
- 23 Staff argues in its brief that the Commission should find that Superior Waste has demonstrated financial and regulatory fitness, and that it has, in part, proposed a new service. Nonetheless, Staff believes that Superior Waste has not demonstrated that Brem-Air Disposal's service will be unsatisfactory to the Commission with respect to those portions of service that overlap with existing service, and that it has also failed to demonstrate that the public convenience and necessity require the proposed service.
- 24 Staff requests the Commission require Brem-Air Disposal to meet with Staff to discuss how to best resolve the issues raised by the Application, including possible tariff revisions, and provide a status report of those discussions within 6 months of the date of this Order.
- 25 The Commission received comments from seven of Superior Waste's current customers, all of whom expressed frustration at Brem-Air Disposal's refusal to provide drive-in or carry-out service to their homes. Several customers are elderly or injured and are unable to haul their cans to designated collection points.
- 26 Jimmy Garg, Seattle Litigation Group PLLC, Seattle Washington, represents Superior Waste. Walker Stanovsky, Davis Wright Tremaine LLP, Seattle, Washington, represents Brem-Air Disposal. Harry Fukano, Assistant Attorney General, Lacey, Washington represents the Commission's regulatory staff (Staff).

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DISCUSSION AND DECISION

- 27 We deny Superior Waste’s Application for the reasons discussed below, and require Brem-Air Disposal to file tariff revisions within 90 days of the effective date of this Order to address gaps in service.⁶
- 28 Solid waste carrier applicants must demonstrate that they are financially and operationally fit to provide service, and that the public convenience and necessity require the service proposed in an application. Solid waste applications filed with the Commission are subject to a 30-day protest period.
- 29 RCW 81.77.040, which addresses protested applications, provides as follows:

When an applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, the commission may, after notice and an opportunity for a hearing, issue the certificate only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission or if the existing solid waste collection company does not object.

Because Brem-Air Disposal objected to the Application, the threshold issue we must address is whether Brem-Air Disposal will provide service to the Commission’s satisfaction.

- 30 When determining whether a carrier will provide service to the Commission’s satisfaction, the Commission reviews evidence concerning: (1) the nature, seriousness, and pervasiveness of complaints against the existing carrier; (2) the existing carrier’s demonstrated ability to resolve complaints to the Commission’s satisfaction; and (3) the existing carrier’s history of compliance with regulation, with attention on the carrier’s cooperativeness on matters central to regulation in the public interest.⁷ We address each factor in turn.
- 31 The record evidence shows that the Commission has received 23 complaints against Brem-Air Disposal since January 2017, three of which were upheld in the complainant’s

⁶ Although Staff recommends a six-month timeline, we are confident, based on Brem-Air Disposal’s representations and the progress it has made thus far, that full resolution can be achieved on a shorter schedule.

⁷ *In re R.S.T. Disposal Co., Inc. d/b/a Tri-Star Disposal*, 1989 Wash. UTC LEXIS 51, 30 (Order M.V.G. No. 1402, Cause No. GA-845 (July 1989)).

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favor. Of those three complaints, two related to missed pickups and one related to a disputed bill. None of the three complaints were serious or pervasive in nature, and none involved circumstances relevant to the service limitations at issue here.⁸ Only one complaint, which was upheld in the company's favor, involved providing drive-in service to a disabled customer. Brem-Air Disposal was able to provide the requested service and the Commission found no violations of the company's tariff or Commission rules.

- 32 The evidence also shows that Brem-Air Disposal has satisfactorily demonstrated its ability to resolve complaints to the Commission's satisfaction. With respect to the three complaints that were customer-upheld, Brem-Air Disposal promptly corrected the violations by issuing credits or providing additional pickups. Although two unrelated complaints resulted in violations for failure to initially investigate a complaint and three resulted in violations for failure to timely respond to Staff's request for additional information, these violations do not, on their own, constitute an unsatisfactory ability to resolve complaints. Violations of these types are common, and are frequently cited against companies across all industries the Commission regulates.
- 33 In addition, the Commission only first became aware that Brem-Air Disposal's distance limitations were creating a hardship for Superior Waste's customers during the pendency of this proceeding.⁹ Until Superior Waste customers filed comments in this Docket between October 9 and 11, 2019, no consumer had complained to the Commission about these limitations. Accordingly, no opportunity previously presented itself for Brem-Air Disposal to evaluate, in cooperation with Commission Staff, the practical application of its distance limitations and the hardship they create for some customers. Although we require Brem-Air Disposal to remedy this situation, there is insufficient evidence to support a finding that Brem-Air Disposal has failed to satisfactorily resolve Superior Waste's customers' complaints. Rather, this proceeding presents an opportunity for

⁸ The majority of informal complaints filed with the Commission against Brem-Air Disposal were related to missed pickups due to inclement weather, and Commission Staff found in most instances that Brem-Air Disposal did not violate its tariff or Commission rules. *See* Exh. SS-11CX.

⁹ On September 21, 2018, the Commission issued Order 01, Order Instituting Special Proceeding; Complaint Seeking to Impose Penalties; and Notice of Brief Adjudicative Proceeding in Docket TG-180181 based on Staff's investigation that found Stein was providing solid waste service in Seabeck, Washington, without the requisite authority from the Commission. At the November 29, 2018, hearing noticed in that docket, Stein presented one witness, Tena Hopper, who testified that Stein assisted her by collecting and transporting her solid waste containers because she and her husband were no longer physically able to transport them to the dump. Hopper stated she had never obtained solid waste service from any service provider in the area. Accordingly, Hopper neither addressed nor complained of the distance limitations in Brem-Air Disposal's tariff.

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Brem-Air Disposal to remedy its gaps in service, and the company has demonstrated both a willingness and ability to do exactly that.

34 We also agree with Staff that it is both reasonable and consistent with Commission rules and Brem-Air Disposal's tariff for the company to refuse service based on safety concerns. Both Item 30 in the company's tariff and WAC 480-70-366(2)(c) provide that Brem-Air Disposal may refuse service when, in the company's judgment, driveways or roads are improperly constructed or maintained, do not have adequate turn arounds, or have other unsafe conditions. The record evidence established that Brem-Air Disposal is unable to provide drive-in service to a portion of Superior Waste's customers due to unsafe conditions posed by navigating the collection vehicles Brem-Air Disposal currently uses in its service territory. Accordingly, there is no evidence in the record that Brem-Air Disposal has violated its tariff or Commission rules by refusing service to these customers.

35 Finally, we find that both Brem-Air Disposal and its parent company, Waste Management, have a positive history of compliance with Commission regulations. Waste Management was penalized in 2013 for missed pickups related to a labor dispute, and received two penalties in 2019 for motor vehicle safety violations.¹⁰ Following the 2013 case, which resulted in a settlement with Commission Staff wherein Waste Management agreed to provide refunds to customers for missed pickups, the company worked with Staff and other certificated carriers to modify tariff Item 30 on an industry-wide basis to provide remedies for customers when pickups are missed due to labor disputes.¹¹ Overall, and also as compared to other large companies the Commission regulates, Waste

¹⁰ See *Washington Utilities and Transportation Commission v. Waste Management of Washington, Inc., d/b/a Waste Management – Northwest, Waste Management – South Sound, Waste Management of Seattle, and Waste Management – Sno-King*, Docket TG-121265, Order 03 (September 4, 2013); *In the Matter of the Penalty Assessment Against Waste Management of Washington, Inc.*, Docket TG-190495 (Waste Management was penalized \$47,700 for safety violations related to vehicle defects, failure to properly maintain driver qualification files, using a driver not medically examined and certified, and using a driver with a downgraded commercial driver license. Waste Management filed an application for mitigation, which was denied. Subsequently, the company filed a petition for administrative review, disputing 253 of the 274 violations related to medical examination and certification. The petition is currently under review); *In the Matter of the Penalty Assessment Against Waste Management of Washington, Inc.*, Docket TG-190895 (Waste Management was penalized \$100 for one safety violation related to defective brakes).

¹¹ *Washington Utilities and Transportation Commission v. Waste Management of Washington, Inc., d/b/a Waste Management – Northwest et. al*, Dockets TG-120840, TG-120842, and TG-120843, Order 03 (March 20, 2014).

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Management has an exemplary history of complying with Commission rules, Commission orders, and its tariffs.

- 36 RCW 81.77.040 permits the Commission to issue a certificate to operate in a territory already served by a certificate holder who objects to such issuance only if the certificate holder *will not* provide service to the Commission's satisfaction. The statutory language is forward-looking, allowing the existing carrier the opportunity to correct any service deficiencies, as Brem-Air Disposal represents it will do here. We find that Brem-Air Disposal is willing and able to operate lawfully and satisfactorily, based on both its representations made in the course of this proceeding and its lengthy track record of compliance.
- 37 Overall, we find that Superior Waste failed to demonstrate that Brem-Air Disposal will not provide service to the Commission's satisfaction.¹² Because we conclude that Brem-Air Disposal will provide service to the Commission's satisfaction, we need not, and do not, determine whether Superior Waste is financially and operationally fit to provide service. For the same reason, we need not, and do not, determine whether public convenience and necessity require the proposed service.¹³
- 38 The Commission has learned over the course of this proceeding, however, that a small portion of consumers in Brem-Air Disposal's service territory are, at the very least, inconvenienced by the company's service limitations, and we agree with Staff that Brem-Air Disposal should be required to remedy the gaps in service created by these limitations.¹⁴ To that end, Brem-Air Disposal must file tariff revisions eliminating its

¹² We are similarly unpersuaded that Superior Waste's proposed service constitutes a separate category of service for which a separate certificate should be issued, or that Superior's proposed service constitutes different service than the service that Brem-Air Disposal currently provides. The "pack out" service Superior Waste proposes to provide is the same as Brem-Air Disposal's existing drive-in service, distinguished only by its lack of distance limitations. As such, we find that these services are substantially the same.

¹³ The Commission should only consider an applicant's proposal after a finding that the existing carrier will not provide service to the Commission's satisfaction. *See In re Application GA-896 of Superior Refuse Removal Corporation for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles in Furnishing Solid Waste Collection Service*, 1993 Wash. UTC LEXIS 52, 37 (Order M.V.G. No 1369, Hearing No. GA-896, June 28, 1993).

¹⁴ The Commission initially approved Brem-Air Disposal's carry-out and drive-in service distance limitations in Docket TG-071785 at the Commission's regularly scheduled open meeting on October 24, 2007. The memo prepared by Staff in that docket addressed only the company's proposed rate increase, and did not mention the distance limitations for carry-out and drive-in

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service limitations within 90 days of the effective date of this Order. Based on Brem-Air Disposal's representations, we anticipate the company will: (1) purchase smaller vehicles to ensure it is able to provide drive-in service to customers not currently eligible for such service; (2) remove distance limitations and evaluate its ability to provide drive-in and carry-out service on a case-by-case basis; (3) work with customers who have particularly challenging driveways to accomplish drive-in and carry-out service to the best of its ability, recognizing that this may require customers to properly maintain their driveways as a condition of continued service.

FINDINGS AND CONCLUSIONS

- 39 (1) The Commission is an agency of the state of Washington vested by statute with the authority to regulate the rates, rules, regulations, and practices of solid waste collection companies.
- 40 (2) On December 13, 2018, Superior Waste filed an Application with the Commission to operate as a solid waste collection company subject to the Commission's jurisdiction.
- 41 (3) On February 20, 2019, Brem-Air Disposal filed an objection to the Application on the basis that it provides solid waste collection service in the territory that Superior Waste proposes to serve.
- 42 (4) The Commission will only grant an application for overlapping solid waste collection authority if the Commission finds that the existing carrier will not provide service to the Commission's satisfaction.
- 43 (5) Superior Waste bears the burden of proving that Brem-Air Disposal will not provide service to the Commission's satisfaction.
- 44 (6) Since January 2017, the Commission has received 23 informal consumer complaints against Brem-Air Disposal. Three of the 23 complaints were upheld in the customer's favor; two were related to missed pickups and one was related to a disputed bill. None related to Brem-Air Disposal's drive-in or carry-out services.
- 45 (7) The 23 complaints filed with the Commission were neither serious nor pervasive in nature, and Brem-Air Disposal promptly corrected the violations.

service. We infer from the memo's contents that Staff considered the distance limitations to be both reasonable and noncontroversial based on the information available to it at the time.

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- 46 (8) None of Superior Waste's customers complained to the Commission about
Brem-Air Disposal's drive-in or carry-out distance limitations prior to filing
comments in this proceeding in October 2019.
- 47 (9) Brem-Air Disposal and its parent company, Waste Management, have an
exemplary history of compliance with Commission rules.
- 48 (10) Brem-Air Disposal's refusal to provide drive-in service to a portion of Superior
Waste's customers is permitted by both Brem-Air Disposal's current tariff and
Commission rules.
- 49 (11) Superior Waste failed to establish that Brem-Air Disposal will not provide service
to the Commission's satisfaction.
- 50 (12) Because the Commission finds that Brem-Air Disposal will provide service to the
Commission's satisfaction, the Commission need not reach the question of
whether Superior Waste is fit to provide service, or whether the public
convenience and necessity require the proposed service.
- 51 (13) Brem-Air Disposal's drive-in and carry-out service limitations create a gap in
service for a small portion of its customers.
- 52 (14) Brem-Air Disposal represented that it will remedy the gap in service, which
includes purchasing smaller vehicles to ensure it can serve customers who are
currently ineligible for drive-in service.
- 53 (15) Brem-Air Disposal should be required to file with the Commission revisions to its
tariff to remedy the gap in service within 90 days of the effective date of this
Order consistent with the guidance provided in paragraph 38, above.
- 54 (16) Superior Waste's Application for a certificate to operate as a solid waste
collection company should be denied.

ORDER

THE COMMISSION ORDERS THAT:

- 55 (1) Superior Waste & Recycle LLC's Application is DENIED.
- 56 (2) Waste Management, Inc., d/b/a Brem-Air Disposal, must file with the
Commission revisions to its tariff to eliminate carry-out and drive-in service

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limitations within 90 days of the effective date of this Order, consistent with the guidance provided in paragraph 38, above.

- 57 (3) The Commission retains jurisdiction over the subject matter and the parties to this proceeding to effectuate the provisions of this Order.

DATED at Lacey, Washington, and effective November 13, 2019.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ Rayne Pearson
RAYNE PEARSON
Administrative Law Judge

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NOTICE TO 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 (Petition). Section (2)(b) of the rule identifies what you must include in any Petition as well as other requirements for a Petition. WAC 480-07-825(2)(c) states that any party may file a response to a Petition within 10 days after service of the Petition.

WAC 480-07-830 provides that before the Commission enters 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 with due diligence at the time of hearing, or for other good and sufficient cause. The Commission will give other parties in the proceeding an opportunity to respond to a motion to reopen the record, unless the Commission determines that it can rule on the motion without hearing from the other parties.

WAC 480-07-825(1) 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.

Any Petition or Response must be electronically filed through the Commission's web portal as required by WAC 480-07-140(5).