

Appendix B

APPENDIX B

PETITIONER'S RECOMMENDED REVISIONS TO STATEMENTS IN INITIAL ORDER

Because the Initial Order No. 3 on review does not recite conventional findings of fact and conclusions of law, since this was a Motion on Summary Determination without a hearing, Complainant, in conforming to WAC 480-07-825's requirements to propose recommended findings and conclusions in substitution, sets forth the following recommended revisions in reference to the Initial Order's numbered section/paragraphs:

- 4 Eliminate Paragraph/Section 4 in toto.
- 14 [Second Sentence Substitute] . . . Waste Connections has not obtained a ruling from this Commission on the lawfulness of the activities alleged in the underlying Complaint.
- 15 Despite the apparent mootness today of the requested remedy of a cease and desist order by virtue of the uncontroverted completion of the alleged unlawful collection and transportation of C&D wastes from the Evergreen Aluminum site as addressed in the declaration submitted by respondent representative, Tyacke, in this proceeding, WCW has filed a valid private party complaint under RCW 81.04.110 and RCW 81.77.030(6) asking the Commission to construe RCW 81.77.040 and WAC 480-70-016 to the facts alleged and addressed in the record of the proceeding. Moreover, upon filing the Complaint, WCW contended the activity was on-going. Post-filing conduct is not an appropriate guide to test the lawfulness or relevancy of the actions complained of. The issue of the lawfulness of Respondents' activities and the impact thereof upon Complainant and its customers was appropriately joined at the outset of the proceeding and those interests remain direct, substantial and pertinent to the gravamen of the complaint whether or not post-filing conduct by one or both of the respondents has mooted the original remedy. Under RCW 81.04.110, no direct damage to the complainant need be established to withstand dismissal of the Complaint and the lack of an original remedy such as a cease and desist order after the Complaint is filed should not nullify Complainant's right to be heard on the original factual allegations.

- 16 Whether or not a solid waste certificate was required to collect and transport C&D wastes in unincorporated Clark County at the referenced job site is a fact-specific case adjudication that will be useful to regulated companies, public officials and presently unlicensed providers in a way that previous Commission rulings are and will be such as Order M.V.G. No. 1849, *In the Matter of Determining the Proper Classification of Drop Boxes R Us, Inc. and Puget Willamette Express, Inc.*, Hearing Nos. H-5039 and H-5040, (Oct. 1998), and other articulations of regulatory law and policy that the Commission has issued and accumulated in the past which lend guidance to evaluation of present and future actions on both an incremental and industry-wide basis. This impact is only strengthened and reinforced by the participation in this record of the WRRRA and Clark County who bring important policy perspectives to this adjudicative proceeding.
- 18 The mootness doctrine exception and evaluation of whether a matter involves a matter of continuing and substantial public interest, while relevant for consideration by the Commission, should not be read as constraining the authority and ability of this administrative agency to consider matters such as certificate or rate complaints brought by private parties that may afford guidance to various persons or parties in the present or future. The Commission has historically considered such issues even in the wake of deficient pleadings, cases which have become uncontested or matters where guidance on increasingly contentious definitions like solid waste stream composition are raised and can do so whether or not its regulatory staff is an active or passive participant in the proceeding. The litigant role of the Commission Staff in a proceeding or the absence thereof yields no negative inference on whether an adjudication implicates the public interest, nor more significantly, whether a private party complaint should be considered moot.
- 19 The Commission has not previously ruled on presumptions or inferences to be drawn when the Commission staff participates or does not participate in a private party complaint action. While the Commission regulatory staff might ideally wish to participate in all adjudications brought at the Commission, it does not have the staffing or budgetary resources to do so, and rarely if ever participates in private party complaints under Title 81 RCW where private counsel are representing the parties. The absence of Commission Staff participation should also not adversely impact whether the Commission can address public interest factors in a private complaint nor should it lead to a ruling, much less a presumption, that a private complaint is moot or lacks justiciable controversy. In some cases the public interest factor can be specifically

addressed by other parties, including cities or counties, i.e. in solid waste cases where local governments have statutorily-mandated roles involving public health and safety in concert with the Commission's specified functions. The Commission, in regulating in the public interest, has the ability and expertise to decide matters within its expertise and acts within its statutory mandate in deciding questions of fact and law consistent therewith.

- 21 The Commission, aside from reviewing its staff's actions as a prosecutor under RCW 81.04.510, is after all, the primary arbiter of disputes under the private complaint statute RCW 81.04.110, and RCW 81.77.030(6). Whether or not its staff has acted to investigate, file and/or otherwise sought to classify the actions of a party under the former provision, the Commission retains the jurisdiction and authority to resolve individual complaints of unlawful conduct in violation of Commission law and rule whether that action is joined by its staff or by a private party litigant and whether or not direct harm is articulated by that complaint. Whether the complaint action is initiated by the Staff or a private party, the Commission will not draw inferences from the presence or absence of its staff or public counsel in a private party complaint, particularly as to the probable cause basis therefor. In considering issues such as standing, justiciable controversy and dispositive motions before hearing, it will again also not consider post-filing conduct of respondents as determinative of those threshold issues in order that such conduct not control the outcome of an adjudication.
- 22 Considering all of the evidence, including the Declaration of Chris Rose submitted by the Complainant, in Appendix A, and all of the foregoing citations of authority and arguments of the parties in the light most favorable to Complainant as required by WAC 480-70-380(2)(a) and CR 56 as the non-moving party herein, the Initial Order 03 Granting Motion for Summary Determination should be, and is hereby reversed.