

May 30, 2008

89010.0174

VIA EMAIL AND U.S. MAIL

Ms. Carole J. Washburn
WUTC Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504

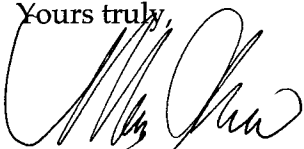
Re: *Waste Connections of Washington, Inc. v. Enviro/Con & Trucking, Inc., et al.*
Docket No. TG-071194

Dear Ms. Washburn:

Enclosed please find the original and three copies of the Petition for Administrative Review by Waste Connections of Washington, Inc. of Order 03 Granting Motion for Summary Determination, with Certificate of Service, for filing with the Commission. Also enclosed is an extra copy of the face sheet that we would ask be stamped and returned to us in the enclosed self-addressed stamped envelope.

Please contact me if you have any questions or concerns.

Yours truly,



Mary Newman, Legal Assistant
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:men

Enclosures

cc: All parties of record

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BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASTE CONNECTIONS OF
WASHINGTON, INC.,

Complainant,

v.

ENVIRO/CON & TRUCKING, INC., a
Washington corporation; and WASTE
MANAGEMENT DISPOSAL SERVICES OF
OREGON, INC.,

Respondents.

NO. TG-071194

PETITION FOR ADMINISTRATIVE
REVIEW BY WASTE CONNECTIONS
OF WASHINGTON, INC. OF ORDER
03 GRANTING MOTION FOR
SUMMARY DETERMINATION

PETITION FOR ADMINISTRATIVE REVIEW BY WASTE
CONNECTIONS OF WASHINGTON, INC. OF ORDER 03
GRANTING MOTION FOR SUMMARY DETERMINATION

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PETITION FOR ADMINISTRATIVE REVIEW BY WASTE
CONNECTIONS OF WASHINGTON, INC. OF ORDER 03
GRANTING MOTION FOR SUMMARY DETERMINATION - ii

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PETITION FOR ADMINISTRATIVE REVIEW BY WASTE
 CONNECTIONS OF WASHINGTON, INC. OF ORDER 03
 GRANTING MOTION FOR SUMMARY DETERMINATION - iii

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1 I. SUMMARY OF PROCEEDING TO DATE

2 This rather unusual case arises out of a private Complaint, and Alternative Request for
3 Declaratory Order and Application for Brief Adjudicative Proceeding filed on or about
4 June 12, 2007, by Waste Connections of Washington, Inc. (hereinafter "WCW," or
5 "Complainant") wherein it sought a number of remedies and/or rulings against the
6 original Respondents including Enviro/Con & Trucking, Inc. and Waste Management
7 Services of Oregon, Inc¹ (hereinafter the "Respondents"). The Complaint involved
8 allegations that the Respondents were violating law and rule by collecting and
9 transporting construction and demolition ("C&D")² wastes off a large industrial
10 demolition site in unincorporated Clark County within the certificated territory of
11 WCW as holder of Public Convenience and Necessity Certificate G-253.³

12 The current Respondents formally answered the complaint on July 3, 2007, generally
13 denying the allegations, offering affirmative defenses and opposing the convening of a
14 brief adjudicative proceeding under RCW 34.05.482 and WAC 480-07-610. The
15 Washington Refuse and Recycling Association and Clark County filed Petitions to
16 Intervene in general support of positions outlined by WCW, and on July 16, 2007, the
17 Commission served its Notice of Prehearing Conference in this action. The Prehearing
18 Conference was held August 2, 2007 in Olympia before Administrative Law Judge
19 Theodora Mace. At that session, the WRRRA was granted intervention status. The
20 intervenor status of Clark County was opposed by the Respondents both in formal
21
22
23

24 ¹ As noted at footnote 1 of the Order Granting Motion on Summary Determination, a third respondent was
previously dismissed by the Commission on Motion of the Complainant.

25 ² See specifically, Complaint ¶¶ 5, 6.

³ Complaint ¶ 4.

1 written opposition filed July 30 and orally through argument at the Prehearing
2 Conference. Intervention was supported by the Complainant.⁴

3 At the Prehearing Conference, the parties also noted that while most transportation
4 proceedings do not automatically invoke discovery under WAC 480-07-400, because
5 this was a complaint proceeding, WAC 480-07-400(2)(b)(iii) would trigger the
6 discovery rule and thus necessarily extend the evidentiary phase of the proceeding.
7 When the issue of the brief adjudicative proceeding request by the Complainant was
8 raised, the administrative law judge noted the objection of “at least one of the
9 respondents” . . . “because it’s not appropriate, and I have to take that into account,
10 according to the rule, the interests of the parties . . .”⁵ By that reference, the
11 administrative law judge was noting the formal opposition to the BAP forum request
12 included in the Respondents’ formal Answers⁶ and also noted her concern about
13 convening a brief adjudicative proceeding due to her own “time schedule”⁷ in the
14 limited time interval allowed by rule. By August then, this Complaint case was not
15 assigned to be resolved in an expedited brief adjudicative proceeding.⁸ The Prehearing
16 Conference Order of August 17, 2007 also prescribed an initial discovery schedule and
17 set a subsequent prehearing conference of November 28, 2007.

18 4 Following the initial prehearing conference and initiation of discovery on September 7,
19 2007, Complainant moved for dismissal of Envirocon, Inc. from the Complaint and
20 Petition proceeding which, after opportunity for comment, was granted, by

21 _____
22 ⁴ Leave for Clark County to intervene was formally granted August 17, 2007 in the Order No. 1 on Prehearing
Conference.

23 ⁵ Prehearing Conference Transcript Volume I, TG-071194, August 2, 2007 at 26.

24 ⁶ See, ¶ 3.12 of the Answer of Waste Management Disposal Services of Oregon, Inc. and ¶ 3.12 of the Answer of
Enviro/Con Trucking, Inc.

25 ⁷ Prehearing Conference Transcript, Volume I, TG-071194, p. 26, lines 16-20.

⁸ Respondents are thus flatly wrong when they contend at page 7, lines 3, 4 of their Reply in Support of Motion
for Summary Determination that WCW “has never made any effort to seek speedy relief from the Commission in
this case.”

1 interlocutory order of the administrative law judge on October 2, 2007. Following
2 scheduling extensions at the request of the Respondents and the substitution of
3 administrative law judge on December 21, 2007, on January 7, 2008, a second
4 prehearing conference notice was issued resetting the Second Prehearing Conference
5 for February 4, 2008. On that date, the parties convened to describe the status of
6 discovery and to argue an oral motion brought by Respondents to compel additional
7 discovery to authorize third-party subpoenas opposed by Complainant, and which was
8 denied by the hearing officer. At the February prehearing conference, Respondents'
9 counsel also sought and was granted leave to file a Motion for Summary Determination
10 and a schedule for Response and Reply was set by the judge at the Respondents'
11 request.⁹

12 5 Following service of the Motion, March 3, 2008, Complainant's Answer of March 14,
13 2008 and responses by Clark County and the WRRRA on March 14 and 17, 2008
14 respectively, and the Respondents' Reply in Support of Motion of March 24, 2008, on
15 April 22, 2008, Judge Dennis Moss served his Initial Order Granting Motion for
16 Summary Determination. Upon approval of a continuance request granted May 7, 2008
17 extending the time for filing, Complainant now serves this Petition for Administrative
18 Review of Order No. 3 Granting Motion on Summary Determination, pursuant to WAC
19 480-07-825.

20 **II. BASIS OF PETITION AND SPECIFICATION OF CHALLENGES TO INITIAL ORDER**
21 **ON REVIEW**

22 **A. Incontrovertible Facts, Mootness of Remedy, and Tyacke Declaration**

23 6 The Order on Motion for Summary Determination, if upheld by the Commission,
24 terminates administrative litigation of the underlying complaint and the alternative

25 ⁹ Albeit, a Reply to a Response is apparently not authorized by WAC 480-07-380(2).

1 Petition for Declaratory Order. For the respondents of course, timing rather
2 fortuitously, is everything. As Complainant originally noted in its initial pleading, “in
3 the weeks preceeding the filing of this Complaint to the present”¹⁰ the Respondents
4 were alleged to have been engaged in the collection and transportation of C&D wastes
5 from the Evergreen Aluminum remediation site in unincorporated Clark County over
6 the public highways for compensation in violation of RCW 81.77.040 and WAC 480-
7 07-081. While that allegation was expressly initially denied,¹¹ by March, 2008, after
8 months of process and discovery, the Respondents now contended the underlying issues
9 were “moot,” alleging the project had been essentially completed, and that Respondent
10 “has finished all work that involves arranging for the collection and/or transportation of
11 C&D Waste from the Evergreen Aluminum Smelter site.”¹² Without on-going access
12 to or service upon the subject site, Complainant of course could not contravene the
13 claim that C&D hauling sometime over the eight-month period from June 2007 to
14 February 2008, (at the time of Tyacke’s Declaration), had concluded,¹³ and indeed now
15 believes that sometime after the filing of its complaint, accelerated collection and
16 transportation of C&D wastes off the site occurred and that issue had been effectively
17 “resolved” by one or more of the Respondents.

18
19
20 ¹⁰ Complaint at ¶ 8.

21 ¹¹ See, i.e. Enviro/Con Trucking, Inc. Answer at ¶ 3.5 and 3.6; Waste Management Disposal Services of Oregon,
22 Inc. Answer at ¶ 3.5 and 3.6.

23 ¹² Tyacke Declaration in Support of Motion for Summary Determination ¶ 5 at 2.

24 ¹³ Significantly, the Commission, in solid waste certificate *application* cases, has not historically considered post-
25 filing conduct by the parties. “The proper test period for determining the level of service is the period prior to the
filing of the application for new authority.” Order M.V.G. No. 1526, *In re: Superior Refuse Removal
Corporation*, App. GA-849 (Nov. 1991) at 6. While this is admittedly a *complaint* case, consideration of post-
filing conduct that now supports a finding of mootness and lack of justiciable controversy begs the policy question
of whether post-filing conduct of a respondent can retroactively ameliorate actions alleged at filing to have
violated the law. At a minimum, the Commission must now acknowledge, in the wake of this ruling if upheld,
that administrative process intervals can, in and of themselves, deflect private party complaints, particularly if
post-filing activity may be found to have precluded agency review of the complained-of conduct.

1 7 Whether or not the Commission views the Tyacke Declaration as a whole in the light
2 most favorable to Complainant as the non-moving party under WAC 480-07-380 and
3 CR 56, it is incontrovertible that C&D waste (whatever its disputed percentage of the
4 total waste stream on the subject site and which Complainant believes was very
5 substantial) **was** collected and transported over the public highways for compensation
6 and that it was not performed by WCW as the certificated carrier. At this prehearing
7 stage of the proceeding, no one has put forward any evidence that any party other than
8 the Complainant/Petitioner has the lawful authority to collect and transport such wastes
9 in the subject unincorporated territory, and again, no one has contravened the fact that
10 the complained-of activity, at least by February, 2008, had been completed.¹⁴

11 B. Acknowledging the Original Remedy is Mooted Should not end the Dispute

12 8 From that standpoint then, WCW, on review, now necessarily admits its initial prayer
13 for relief seeking a cease and desist order is academic, and that with the disputed
14 collection and transportation activity apparently completed, that form of relief is
15 mooted.

16 9 It, however, vigorously contests that the proceeding should simply be terminated on
17 that acknowledgement. Whether the remedy sought by the original complaint is
18 presently mooted, the basis of the Complaint remains today, i.e., the action complained
19 of at the filing of the Complaint that ongoing operations of Respondents violated
20 Washington law.¹⁵ Moreover, its pleadings also alternatively sought declaratory relief

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22 ¹⁴ On the basis of this finding then and the Tyacke Declaration, the Commission could well act, on its own to grant
Summary Adjudication, for the Complainant and the Intervenor, under WAC 480-07-380.

23 ¹⁵ Respondents also cite *Hart v. Social and Health Services*, 111 Wn.2d 445 (1998), in support of their depiction
24 of this case as isolated and lacking precedential value for the industry. *Hart* is inapposite on this point. There, the
25 court found there was "little likelihood of these same facts recurring," 111 Wn.2d at 451, and that the challenged
action was the only time DSHS had ever issued a modified paramedic certificate. Thus, the case would provide
little guidance to other public officials under these facts in the future. This starkly contrasts with the issue here
contesting the lawfulness of the collection and transportation activity involving C&D wastes. Indeed,
characterization of construction and demolition debris wastes and disputes and pending concerns about, i.e. their

1 on an expedited basis, asking that the evidentiary record to be adduced be applied and
2 construed under the applicable statute and rules,¹⁶ and was joined by the WRRRA and
3 Clark County in this request. The Commission, as the primary regulatory agency
4 legislatively-delegated the authority to promulgate rules and enforce laws under RCW
5 81.77, has the inherent authority to consider issues of general interest, even when they
6 be raised by a deficient pleading,¹⁷ or when an issue is technically moot. (*See, i.e.,*
7 Order M.V. No. 135089, *In EC Brown d/b/a A-N Auction Transport*, App. P-69188,
8 (Dec. 1986), where the Commission, after entry of a final order without appeal or
9 objection by any party, decided a matter of general procedural interest that had been
10 actively argued and contested by the parties earlier).

11 III. EXCEPTIONS TO ORDER OF SUMMARY DETERMINATION: PARAGRAPHS 14
12 AND 15 AND MOOTNESS/LACK OF JUSTICIABLE CONTROVERSY AND CONCRETE
RELIEF¹⁸

13 10 The Initial Order's "Determination Section" noticeably begins to err at Sections 14 and
14 15, which provide in relevant part:

- 15 14. . . . Waste Connections, as a practical matter, already has obtained
16 this form of relief that it requests via it [sic] Complaint.
17 15. We similarly cannot give Waste Connections any meaningful relief
on the facts of this case, as pled, by declaring Respondents should

18 constitutional inclusion in local city ordinances (*See, i.e., Josef Ventenbergs v. City of Seattle, et al.*, 163 Wn.2d
19 92, 178 P.3d 960 (2008), whether their transportation constitutes property transportation under RCW 81.80 or
20 solid waste transportation under RCW 81.77, (*See, i.e. Order M.V.G. No. 1849, In the Matter of Determining the*
21 *Proper Classification of Drop Boxes R Us, Inc. and Puget Willamette Express, Inc.*, Hearing Nos. H-5039 and H-
22 5040, (Oct. 1998)), or a just-initiated Commission rulemaking under Docket TG-080591 served May 9, 2008, in
23 which apparently the Commission will consider revision to its solid waste definitions under WAC 480-70-041,
WAC 480-70-196 and WAC 480-70-226, abound. Thus, whether or not this particular proceeding involves a
24 single large industrial job site or not, it is not credible to suggest that a ruling by the Commission on the
25 lawfulness of the challenged activity would provide "little guidance" to others on these specific facts. Indeed,
incremental assessments of such issues are contributory and highly relevant to the body of this agency's
lawmaking through such individual case adjudications.

¹⁶ Complaint at ¶ 11.

¹⁷ "The Commission will also liberally construe pleadings and motions with a view to effect justice among the parties." WAC 480-07-395(4).

¹⁸ In Appendix B, attached at the end of the Petition and incorporated by this reference, Complainant sets forth the entirety of its recommended revisions to the Initial Order's various findings pursuant to WAC 480-07-825.

1 have had a certificate to perform some or all of the activities they
2 undertook at the Evergreen Aluminum facility. Declaratory
3 judgment relief is improper if it does not relate to a justiciable
4 controversy. Under the standards that define such a controversy,
5 there in none present here. Other than as possible disputants of an
6 academic question, there are no genuine and opposing interests
7 between these parties. There are no direct and substantial interests
8 at stake insofar as the issues were joined in this proceeding.

11 Thus, the judge's rationale is that the Complaint should now be dismissed because the
12 activities complained of are terminated and a cease and desist order would be
13 meaningless. Similarly, relief such as a declaratory order would be inappropriate
14 because there is no longer any justiciable controversy presented and there are not
15 articulated substantial interests joined in the proceeding, citing *To Ro Trade Shows*, 144
16 Wn.2d. 403, 412, (2001), for the proposition.¹⁹

17 The "merged metaphor" rationale above posits WCW with a Catch 22-like burden that
18 is ultimately legally inappropriate. In noting that "Waste Connections did not assert in
19 its Complaint any 'actual, concrete legal harm,' caused by Respondents' activities"²⁰
20 the examiner seems to overlook RCW 81.04.110's key proviso that "[n]o complaint
21 shall be dismissed because of the absence of direct damage to the complainant."

22 At an initial submission stage of a complaint, much of the allegations in the Complaint
23 are necessarily predicated on "information and belief"²¹ and, pending discovery and an
24 evidentiary hearing, it is difficult to specify/quantify damages particularly when the
25 Commission has no authority to award monetary damages in the first place.

¹⁹ *To Ro* was a case under the Uniform Declaratory Judgments Act RCW 7.24.010, *et seq.* finding a lack of justiciable controversy for failure of a trade show promoter to demonstrate how a licensing statute had a "direct and substantial rather than contingent and inconsequential" harm on it. 144 Wn.2d 403, 412. While noting that in justiciability requirements inhere the traditional doctrines of standing, mootness and ripeness, *To Ro* is not relevant to consideration of whether a **complaint** is valid for failing to establish "direct and substantial" harm/damage to a **complainant**, particularly in view of a separate statute which expressly avoids dismissal of a complaint action on that basis, discussed, *infra*.

²⁰ Order on Summary Determination, Footnote 13 at 5.

²¹ *See*, i.e. Complaint at ¶¶ 6-9.

1 14 The Initial Order in Section 15, above, additionally appears to equate the failure to
2 quantify direct damage/lack of a justiciable controversy as also precluding declaratory
3 relief and, in a circuitous swath of reasoning, finds the completion of the activity
4 prompting the complaint and the lack of present-day rendition of an available direct
5 remedy as the basis for finding both the Complaint and the alternative Declaratory
6 Relief action today “an academic question” with “no genuine and opposing interests
7 between these parties . . . insofar as the issues were joined in this proceeding.”²²

8 15 In so doing, the Order appears to prejudge the evidence and elevates the form of
9 remedy sought by the Complaint over the initial underlying allegations of violation of
10 law. If the Complaint action establishes a violation of Commission law or rule, the
11 availability of remedy would presumably be less important than the threshold
12 lawfulness finding, particularly in an initial forum where monetary damages are
13 unavailable.²³ Again, WCW is the only certificate holder of the subject solid waste
14 stream in the territory on this record. If solid waste streams to which it is the authorized
15 hauler are being diverted by unlicensed hauling (the Complaint allegations), the impact
16 upon the Complainant and potentially, its ratepayer customers, is inherent in the
17 Washington statutory system,²⁴ and the Complainant would be anticipated to generally
18 address this at a hearing. To dismiss the Complaint at this juncture on the basis of lack
19 of remedy, failure to articulate specific direct harm, or viewing post-filing conduct as
20 mooting the initial gravamen of the original Complaint, is a misreading of the
21
22

23 ²² Order on Summary Determination ¶ 15, at 5.

24 ²³ Nevertheless, WCW would implicitly suffer economic harm by the diversion of regulated waste streams and
revenues therefrom to unlicensed haulers.

25 ²⁴ A regulated rate-based system calculated on an indicated and individualized carrier revenue requirement whose
customers are potentially adversely affected when their provider’s revenues are siphoned off by unlicensed
hauling.

1 Complaint statute, the related solid waste statute complaint provision,²⁵ the
2 Commission's procedural rules on complaints and petitions, and applicable case law,
3 and should be reversed by the Commission.

4 A. The Initial Order Appears to take a Constricted View of Standing and the Viability of
5 the Original Complaint and Petition

6 16 The companion statute to RCW 81.04.110 (the utility complaint statute under RCW
7 80.04.110), was recently afforded an expansive reading contrary to the more restricted
8 view of the present administrative law judge, in UT-061256, Order No. 6, *In re: Cost*
9 *Management Services v. Cascade Natural Gas Corporation*, (Oct. 2007).

10 17 There, the Commission reversed an Initial Order's denial of standing in a Complaint
11 case brought by an unregulated supplier of natural gas to non-core customers under
12 *Cole v. Washington Utilities and Transportation Commission*,²⁶ and noted:

13 *Cole* is clearly distinguishable. Beyond our authority to regulate in
14 the public interest under RCW 80.01.040(3), the first clause of the
15 Complaint statute, RCW 80.04.110(1), is a specific grant of subject
16 matter jurisdiction over, claims by 'any person or corporation . . .'
17 of any act or omission that violates any law, order or Commission
18 rule.

19 Docket UG-061256, et al. Order 06, ¶ 41 at 13.

20 B. The Private Complaint Statute Gives the Commission Broad Interpretive Powers

21 18 The Title 81 RCW Complaint statute has a "mirror image," broad proviso which
22 subjects the matter of alleged public service law violation by any person to the
23 Commission's jurisdiction. The statute goes on to say:

24 "[T]he Commission shall have power . . . to, by its Order, . . .
25 correct the abuse complained of by establishing such uniform . . .
26 regulations or practices in lieu of those complained of, to be
27 observed by all such competing public service companies in the
28 locality or localities specified . . ."

29 ²⁵ See, RCW 81.77.030(6), which allows, *inter-alia*, Commission or private party complaints alleging law
30 violations to be filed against certificate holders at any time . . .

31 ²⁶ 79 Wn.2d 302, 485 P.2d 71 (1971).

1 RCW 81.04.110.

2 19 Nowhere does the statute limit the Commission's jurisdiction to matters on-going at the
3 time of hearing of the complaint nor does it subject the complaint to dismissal if a cease
4 and desist order remedy is rendered academic or otherwise unavailable by post-filing
5 conduct, i.e. at the time of hearing. In short, the Order on Motion for Summary
6 Determination dismisses the breadth of adjudicatory power granted the Commission in
7 the private party complaint statute rendering it not an active arbiter of lawful activity,
8 but rather a passive overseer of events occurring during the pendency of a proceeding
9 potentially invalidating the original remedy sought by the complaint.

10 20 While the *To-Ro Trade Show* decision as well as the Commission's Order No. 6 in
11 *Cascade Natural Gas* above make clear that the doctrine of standing is intertwined with
12 the concept of a direct, cognizable interest in a dispute, the Initial Order on Summary
13 Determination is also incorrect in finding that WCW, as the current G-Certificate
14 holder alleging unauthorized solid waste collection in a specified territory at the time of
15 filing the complaint, lacked a direct adverse interest in the dispute such that the
16 apparent irrelevance of the original remedy today extinguishes its "genuine and
17 opposing interest."²⁷

18 21 As noted above, this circuitous, Catch-22 rationale for dismissing WCW's Complaint
19 does not conform to recent Commission case-law, *To Ro Trade Shows'* reference to
20 declaratory judgments, or WAC 480-70-305(3)(a)'s generalized requirements for
21 appropriately joining issues for an actionable complaint. For these reasons alone, Initial
22 Order No. 3's Order Granting Motion for Summary Determination should be reversed.

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²⁷ Initial Order on Summary Determination at ¶ 15, p. 5.

1 IV. ADDITIONAL CHALLENGES TO THE INITIAL ORDER'S DETERMINATION
2 RELATING TO THE STAFF ROLE OR ABSENCE THEREOF IN THIS PROCEEDING

3 22 Likely even more egregious in Petitioner's eyes than what it contends to be the
4 erroneous rulings on the Complaint's present invalidity and lack of justiciability, are the
5 explicit and implicit findings upon which the Order is also based outlined in Sections 4,
6 16, 18, 19, 21 and 22 of the Order which, for reference, are set forth below:

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

10 16. Although it might be satisfying to Waste Connections in some
11 sense to be declared "right," a statement in a Commission order
12 that Respondents required a certificate of public convenience and
13 necessity under the specific facts of this case would be of no value
14 either in the context of the defined controversy or in any broader
15 sense. This specific case is not an enforcement or penalty
16 proceeding in which the Commission could take effective action
17 for past wrongdoing, if proven. If a similar fact pattern is alleged
18 in the future, it will still require proof and will still have to be
19 tested against governing statutes and rules, not against any
20 determination we might make here.

21 18. These principles no doubt provide thorough guidance to the courts,
22 but we are not a court. When the Commission considers whether
23 an otherwise moot case ought to be resolved under the public
24 interest exception, it considers not only these factors but also the
25 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 and
[sic] 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 19. The Commission relies in significant part on its expert Staff to
20 identify those fact patterns raised in private party complaints that
21 present matters of continuing and substantial public interest, the
22 determination of which potentially will have ramifications beyond
23 resolution of an immediate controversy. In such cases,
24 Commission Staff will participate as a party. Commission Staff
25 has elected not to participate in this proceeding. Without

1 participation by Staff, we run the risk of a decision with
2 unintended consequences or even an erroneous decision because
3 there is no assurance that any party will zealously advocate the
4 public interest.

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

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

26 23 For ease of reference, the above holdings are collectively referred to as the “negative
27 inference” conclusions which are pivotal to Initial Order No. 3’s outcome.²⁸ In essence,
28 the examiner supports his ruling on this alternate footing, reasoning that because this
29 was: a) a private party complaint and did not involve a complaint, investigation/show
30 cause and/or prosecution role by the Commission; and b) lacked any participation by
31 the Staff as a party representing the public interest,²⁹ this now enables a negative
32 inference to be drawn from the Staff’s non-participation, and worse yet, “. . . [w]e run
33 the risk of a decision with unintended consequences or even an erroneous decision

34 ²⁸ And, in fairness, it was the Respondents who first suggested this insupportable inference by noting at pp. 3-4 of
35 their Reply that “surely” Staff would have appeared in the proceeding if “there were public interest issues
presented.”

²⁹ Initial Order on Summary Determination ¶ 18 at 6.

1 because there is no assurance that any party will zealously advocate the public interest.
2 [footnote omitted].”³⁰

3 A. The Initial Order’s Ruling on Staff Participation or Lack thereof May Be the Real
4 “Unintended Consequence”

5 24 The Commission here needs to recognize the material leap this “unintended
6 consequence holding” portends for private party complaint actions. Hereafter, if a
7 private complainant does not obtain either the staff’s active proxy by successfully
8 importuning it to file a classification proceeding or otherwise gain its participation by
9 intervention in a private proceeding, there can be no imprimatur of either regulation or
10 decision-making “in the public interest.” Clearly, there is no “private attorney general”
11 concept analogy here.³¹

12 ³⁰ Initial Order on Motion for Summary Determination, ¶ 19 at 7.

13 ³¹ While the actual private attorney general doctrine is directed to the Consumer Protection Act and expressly
14 exempts actions under the jurisdiction of this Commission in RCW 19.86.170, private enforcement of the CPA
15 was not authorized until 1971 when the legislature created the private right of action to encourage it (*See*, RCW
16 19.86.090). Thus, by 1971, both private parties and the attorney general’s office could bring separate actions for
17 violations of consumer protection impacting the public interest.

18 Again, WCW, in bringing its complaint against the Respondents, asked the Commission to find the
19 collection of C&D wastes off a large industrial job site as a violation of RCW 81.77.040 and WAC 480-70-081
20 since the Commission is the agency established by the legislature to oversee and regulate Title 81 RCW issues.
21 However much Respondents would now like to minimize that by reiterating the narrowness of the Complaint’s
22 express facts, it is indisputable that the complaint alleged violations of the public service laws with implications
23 for all certificate holders depending on the established facts of this case and the Commission’s role in
24 interpretation and construction of the law to those facts. In this sense, this tailored dispute is far more than the
25 equivalent of a private breach of contract action, and in that way, is analogous to a private attorney general action
to the extent that both the Attorney General under RCW 81.04.510, and private parties under RCW 81.04.110 and
RCW 81.77.030(6) through separate statutory mechanisms, have the right to prosecute complaints for violation of
the Commission’s laws and rules (and, indeed, without such prior private complaint actions, those original claims
might well be subject to a subsequent primary jurisdiction defense in court).

21 As the Washington Supreme Court noted in *Lightfoot v. MacDonald*, 86 Wn.2d 331, 544 P.2d 388
(1976), concerning the Consumer Protection Act . . .

22 [S]ince the purpose of the act is to protect the public interest, it is natural to assume that the
23 legislature, in granting a private remedy in RCW 19.86.090, intended to further implement the
24 protection of that interest. It follows that an act or practice of which a private individual may
25 complain must be one which also would be vulnerable to a complaint by the Attorney General
under the act . . .

86 Wn.2d 331, 334.

Here, however, RCW 81.04.110 has always recognized the separate rights of private parties to prosecute
complaints before the Commission, as does RCW 81.77.030(6). The Initial Order’s ruling seems to wholly

1 25 According to the Initial Order, a dispute between two private party litigants without
2 Staff involvement raises that “negative inference” such that there is both an absence of
3 public interest issues, and/or more detrimentally, the vacuum of Commission Staff
4 participation implies a lack of original probable cause for the Complaint.

5 26 While the party bringing a Complaint under RCW 81.04.110 bears the burden of proof
6 (as opposed to the respondent’s burden when the Staff bring a complaint and
7 classification proceeding under RCW 81.04.510), the impact of the Initial Order’s
8 “negative inference” finding here is more than a mere commentary on relative burdens
9 of proof. Rather, its effect is to engraft a regulatory presumption against the merit of a
10 private party complaint in the absence of active staff involvement in a proceeding. (*See*
11 *also*, the Declaration of Chris Rose ¶¶ 9, 11, attached as Appendix A, and incorporated
12 herein by this reference.) This will have an unquestionably chilling effect on private
13 party complaints under Title 81 RCW.^{32, 33}

17 discount that private party right, and in dismissing WCW’s complaint, elevates RCW 81.04.510’s provisions in a
18 manner which not only swallows up the private party complaint statute exceptions, but does so by interpreting the
19 public interest so preemptively, it appears to eliminate the entire efficacy of a private party litigant without
20 Commission Staff involvement in the action.

21 ³² The ruling is also contrary to the statutory premise of RCW 81.04.110 in providing a private party complaint
22 right of action which has been featured in the provision at least since its enactment in 1911 to the present. That
23 private party action has vested the Commission and its predecessors with the jurisdiction to consider disputes,
24 such as those here, where a certificate holder alleges operations by another in violation of its certificate and
25 Washington law. Indeed, in *State ex rel North Bend Stage Line v. Department of Transportation*, 26 Wn.2d 485,
174 P.2d 516 (1946), the Court reversed an Order of the Commission’s predecessor granting a motion to dismiss
in finding that the Complaint had stated a cause of action implicating whether or not the respondent’s certificate
authorized service in the territory complained of, and remanded the case for hearing by the Commission.

³³ Such an effect is particularly troubling in an era of declining enforcement staffing and agency resources which
impact the robustness of the Commission’s prosecutorial resources. This is not in any way to diminish the
efficacy of those resources once deployed, but clearly the Commission Staff cannot police every alleged violation
of law by regulated or unlicensed companies across all the industries it regulates. (Declaration of Chris Rose ¶ 7).
Indeed, the activities of unlicensed transporters alone under Titles 81.77, 81.80, 81.68 RCW could undoubtedly
maximize all transportation regulatory staff and assigned assistant attorney general time.

1 B. The Public Interest has Multiple Dimensions

2 27 In basing its finding in the absence of Commission Staff involvement as noted above,
3 the Initial Order also appears to tie this back to the finding that the public interest
4 mootness exception is not implicated in the summary dismissal of the original
5 Complaint. In so doing, the Order dramatically limits the generalized concept of
6 regulation in the public interest and confines the Commission's delegated solid waste
7 transportation enforcement role solely to adjudicatory matters in which the Commission
8 Staff actively participates.

9 28 Now, in a private party complaint, a complainant prosecutes a filing at the peril of not
10 only the conduct complained of being mooted during the pendency of administrative
11 litigation as addressed in critique of Sections 14 and 15 of the Initial Order, above, but
12 should the Staff not be involved in participation in the complaint, there is a presumption
13 that there is no public interest represented to sustain the original action. Regulatory
14 "double jeopardy" surely attaches to a private party complainant in this circumstance.

15 C. The Public Interest Factor, Regulatory Agencies' Powers in Interpretation of
16 Proprietary Rules and the Staff's Role in Proceedings

17 29 While, in contrast, the Initial Order's findings in Section 18 start out promisingly for
18 Complainant by correctly suggesting the public interest exception is merely one factor
19 as against "the broader regulatory framework in which it performs its statutory
20 duties,"³⁴ it actually diminishes, rather than expands, the scope of the Commission's
21 jurisdiction by its subsequent findings in that Section. The broad and overriding
22 regulatory role of the Utilities and Transportation Commission to "regulate *in the public*
23 *interest*" as mandated by RCW 80.01.040 is seemingly discounted.³⁵

24 ³⁴ Initial Order on Summary Determination ¶ 18 at 6.

25 ³⁵ RCW 80.01.040 (emphasis added). The rights and responsibilities set forth in Title 80.01, including those in RCW 80.01.040, are adopted and applied to Title 81 as stated in RCW 81.01.010. See also, i.e. RCW 81.80.020.

1 30 In contrast to the Commission's statutory responsibility to regulate in the broader public
2 interest, the Initial Order's rendition of that role seems entirely too restrictive. While
3 the Initial Order identified appropriate factors for reviewing an issue otherwise
4 potentially moot under the public interest exception,³⁶ (as did the Complainant in its
5 Answer to Motion for Summary Determination), the Initial Order appears to have
6 restricted the jurisdiction of the Commission in this process. It does so by alluding to
7 judicial doctrines of mootness and intertwining those with the examiner's view of the
8 WUTC staff and attorney general roles as the sole representatives of the public interest
9 in Commission proceedings.

10 31 In the context of judicial constructions of the public interest, the Washington Court of
11 Appeals has previously noted that "the judiciary should generally defer to the
12 Commission's judgment when it interprets its own rules because *the Commission, not*
13 *the courts, is best qualified to promote public policy.*"³⁷ In that case, the court reasoned
14 that the "Commission's comprehensive authority to regulate common carriers in the
15 public interest includes the authority to interpret its rule."³⁸ In this regard, the
16 Commission has previously codified a rule for regulating solid waste carriers. Before
17 specifically noting the criteria for the standards it will establish for enforcement of
18 RCW 81.77, the Commission observes in its rule preamble . . .

19 [the] legislature has declared that operating as a solid waste
20 collection company in the state of Washington is a business
21 affected with a public interest and that such companies should be
22 regulated.³⁹

23 _____
24 ³⁶ Initial Order on Summary Determination ¶ 17 at 6.

25 ³⁷ *Washington Utilities and Transportation Commission v. United Cartage, Inc.*, 28 Wn. App. 90, 95, 621 P.2d
217 (1981) (emphasis added).

³⁸ *Id.* at 97.

³⁹ WAC 480-70-001.

1 32 Moreover, rather than suggesting that the public interest exception for a regulatory
2 agency charged with promulgating and enforcing industry rules and conducting
3 specified adjudications thereunder is broader than the courts' "public interest" review
4 of moot cases, the Initial Order instead appears to tie its perspective solely to the
5 "proactivity" of the administrative agency enforcement staff. According to the Order
6 that proactivity inheres in policing the conduct and companies subject to its
7 jurisdiction.⁴⁰ The thread of that finding continues in Section 19, that because the Staff
8 did not participate here to represent the public interest, the referenced unintended
9 consequences, or worse, "an erroneous decision,"⁴¹ are posed because in a private
10 complaint no one is advocating the public interest.⁴² In the Initial Order's view then,
11 we have come full circle: the original complaint no longer has an actionable injury,
12 there was no specific damage pled, the remedy is now moot, there is no generalized or
13 public interest reason for consideration of the matter under any "public interest
14 exception," and no one in fact is representing the public interest because the
15 Commission Staff has not prosecuted or participated in this circumscribed private
16 complaint action.

17 33 That preclusive circuitous effect of the ruling on the Complaint becomes even more
18 pronounced in the immediately precedent finding in Section 19 . . .

19 " [T]he Commission relies in significant part on its expert Staff to
20 identify those fact patterns raised in private party complaints that
21 present matters of continuing and substantial public interest, the
22 determination of which potentially will have ramifications beyond
23 resolution of an immediate controversy."⁴³

24 ⁴⁰ Initial Order on Summary Determination ¶ 18 at 7.

25 ⁴¹ Initial Order on Summary Determination ¶ 19 at 7.

⁴² See also, Declaration of Chris Rose ¶ 9.

⁴³ Initial Order on Summary Determination ¶ 19 at 6.

1 34

This broad conclusory observation is unsupported by citation to any rule or previous adjudication. And, while it may be a laudatory aspirational policy, Complainant is unaware of its existence in law or in fact. These leaps of logical corollaries, coupled with Respondents' portrayal of this dispute as an isolated fight between two large, private companies with no broader applications to now-completed conduct, marginalize the facts supporting the Complaint and minimize the Commission's role under the private complaint statute. Relying implicitly on such faulty reasoning, along with the narrowly drawn nature of the Complaint and post-filing developments over which Complainant has no control,⁴⁴ the Initial Order dismissed the Complaint. Surely the Commission perceives the ultimate inequity and true "negative inference" of such a ruling as well as the flaws in the administrative due process system this outcome presents.

13 V. CONCLUSION/PRAAYER FOR RELIEF

14 35

For all the reasons argued above, the Complainant urges the Commission to reverse Initial Order No. 3 Granting Motion for Summary Determination, and remand this matter for further determination or hearing.

18 DATED this 30 day of May, 2008.

20 WILLIAMS, KASTNER & GIBBS PLLC

21 By David W. Wiley
22 David W. Wiley, WSBA #08614
23 Attorneys for Complainant WASTE
24 CONNECTIONS OF WASHINGTON, INC.

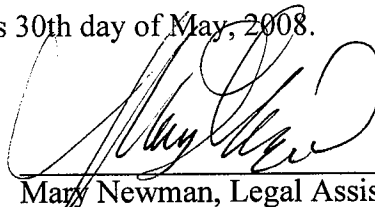
25 ⁴⁴ Not to mention its lack of control of the due process interval for scheduling an adjudication.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by the method as indicated below, pursuant to WAC 480-07-150.

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DATED at Seattle, Washington, this 30th day of May, 2008.



Mary Newman, Legal Assistant