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BEFORE THE WASHINGTON UTILITIES  
AND TRANSPORTATION COMMISSION

WASTE CONNECTIONS OF  
WASHINGTON, INC.,

Complainant,

v.

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

Respondents.

Case No. TG-071194

WASTE MANAGEMENT'S AND  
ENVIRO/CON & TRUCKING'S  
ANSWER TO PETITION FOR  
ADMINISTRATIVE REVIEW BY  
WASTE CONNECTIONS OF  
WASHINGTON, INC. OF ORDER 03  
GRANTING MOTION FOR  
SUMMARY DETERMINATION

1 **TABLE OF CONTENTS**

2 Page

3 TABLE OF CONTENTS..... i

4 TABLE OF AUTHORITIES ..... ii

5 I. This Case is Moot. .... 1

6 II. background facts ..... 2

7 III. the moot dispute should be dismissed..... 3

8 A. Before an evidentiary hearing, a moot case must be dismissed..... 3

9 B. There is no administrative purpose for litigating this matter now that no  
10 justiciable controversy exists. .... 6

11 IV. the public interest exception to mootness is not presented. .... 7

12 A. This is a private dispute involving unique facts and not one that is  
13 conducive to future guidance for the industry. .... 8

14 B. There is no evidence that the situation presented in the Evergreen  
15 Aluminum situation is likely to recur. .... 11

16 C. Rulemaking is a more appropriate process for obtaining guidance about  
17 C&D Waste hauling ..... 12

18 V. participation by commission staff is not determinative. .... 13

19 CONCLUSION..... 16

**TABLE OF AUTHORITIES**

Page

**Cases**

*Cole v. Washington Utilities and Transportation Commission*, 79 Wn.2d 302, 485 P.2d 71 (1971)..... 9

*Hart v. Department of Social & Health Servs.*, 111 Wn.2d 445, 759 P.2d 1206 (1988)..... 5, 10

*Holton v. Dept. of Employment & Training, Town of Vernon*, 178 Vt. 147, 878 A.2d 1051 (2005)..... 11

*Incumaa v. Ozmint*, 507 F.3d 281, 289 (4<sup>th</sup> Cir. 2007) ..... 11

*Josef Ventenbergs v. City of Seattle, et al.*, 163 Wn.2d 92, 178 P.3d 960 (2008) ..... 8

*King County v. Central Puget Sound Growth Mngt. Hearings Bd.*, 91 Wn. App. 1, 951 P.2d 1151 (1998), *aff'd in nonrelevant part & rev'd in nonrelevant part*, 138 Wn.2d 161, 979 P.2d 374 (1999)..... 14

*Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004)..... 5

*Morrison v. Basin Asphalt Co.*, 131 Wn. App. 158, 127 P.3d 1 (2005) ..... 3

*Orwick v. City of Seattle*, 103 Wn.2d 249, 692 P.2d 793 (1984)..... 4

*Recall Charges Against Seattle School Dist. No. 1 Directors*, 162 Wn.2d 501, 173 P.3d 265 (2007)..... 4

*Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947)..... 12

*Serena Vista, L.L.C. v. State of Montana Dept. of Natural Resources and Conservation*, 342 Mont. 73, 179 P.3d 510, 514 (2008)..... 10

*Southern Co. Services, Inc. v. F.E.R.C.*, 419 F.3d 39, 43 (D.C. Cir. 2005)..... 11

*Thomas v. Lehman*, 138 Wn. App. 618, 158 P.3d 86 (2007)..... 4, 7

*To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001)..... 6

*Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Comm'n.*, 148 Wn.2d 887, 64 P.3d 606, 614 (2003)..... 12

*Washington Water Power Co. v. Graybar Electric Co.*, 112 Wn.2d 847, 774 P.2d 1199..... 5

**Statutes**

RCW 34.05.010(16)..... 12

RCW 81.04.110 ..... 6

RCW 81.77 ..... 8

RCW 81.80 ..... 8

WAC 480-70-001..... 10

WAC 480-70-041..... 9

WAC 480-70-196..... 9

WAC 480-70-226..... 9

**Other Authorities**

1	<i>Glick v. Verizon Northwest, Inc.</i> , 2005 WL 484651 (W.U.T.C. Jan. 28, 2005) (Docket No. UT-040535, Order No. 3) .....	4
2	<i>In the Matter of Proposed Rule WAC 480-62-218 Relating to Point Protection for Railroad Operations</i> , TR-040151 (January 2005).....	11
3		
4	<i>Pacificorp</i> , 1999 WL 359066 (W.U.T.C. March 16, 1999) (Docket No. UE-981627, Second Supplemental Order).....	9

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**I. THIS CASE IS MOOT.**

1. Waste Connections of Washington, Inc. (“Waste Connections” or “Petitioner”) unambiguously concedes that this case is moot – yet, in its *Petition for Administrative Review by Waste Connections of Washington, Inc. Of Order 03 Granting Motion For Summary Determination* (“Petition”), Waste Connections does little if anything to keep this case alive. See Petition ¶ 8. It only obliquely addresses the sole remaining issue of whether the public interest exception to mootness should shield its “narrowly drawn” Complaint from the presumption of dismissal. Petitioner argues what factors *should not* have been considered in granting dismissal, rather than presenting what *should* be considered and affirmatively meeting its burden of proving the exception to the presumption of dismissal in moot cases.

2. Waste Connections expressly restricted its interest to “one single disposal site involving one waste stream.” Second Declaration of Polly L. McNeill in Support of Motion for Summary Determination, Ex. 1 at 36:5-8, 23-24, (attached). From that limited point of view, it extrapolates broadly to find reasons for public interest in the matter, implicating the entire complicated universe of construction and demolition debris. Waste Connections also suggests that dicta in the Initial Order creates a “negative inference” that will wreak dire consequences to every complaint proceeding at the WUTC – not just the ones that 1) are limited in scope to a private complaint involving a dispute about a single job, 2) become moot by completion of the work before any evidentiary hearing takes place, and 3) fail to present a justiciable controversy.

3. The Commission should reject Waste Connections’ unabashed invitation for an advisory opinion. Petitioner cannot meet its burden of proving the exception to mootness. The logic that any complaint alleging a public service law violation must, perforce, present public interest issues cannot insulate the otherwise moot Complaint from dismissal. To rule otherwise would mean that no complaint prosecuted under Title 80 or 81 could ever be dismissed for mootness.

## II. BACKGROUND FACTS

1  
2 4. One year ago, on June 8, 2007, Waste Connections filed a *Complaint and*,  
3 *Alternatively, Petition for Declaratory Order, and Application for Brief Adjudicative Proceeding*  
4 (“Complaint”), initiating a private party complaint action against Respondents Waste  
5 Management Disposal Services of Oregon, Inc. (“Waste Management”) and Enviro/Con  
6 Trucking, Inc. (“ECTI”) disputing activities involving construction debris and/or construction  
7 waste (“C & D Waste”) that was being removed from the Evergreen Aluminum Smelter  
8 environmental remediation site (the “Remediation Site”) in Clark County, along with hazardous  
9 and dangerous waste. Complaint ¶¶ 5 & 6.

10 5. Cleanup at the Remediation Site was conducted under the Washington Model  
11 Toxics Control Act, Ch. 70.105D RCW (“MTCA”), under the direction of the Department of  
12 Ecology, to remediate a defunct aluminum smelter and fabrication plants contaminated with  
13 polynuclear aromatic hydrocarbons, polychlorinated biphenyls, petroleum hydrocarbons,  
14 cyanide, fluoride and metals. Declaration of Polly L. McNeill in Support of Motion for  
15 Summary Determination, Ex. 1, (attached hereto). The work at the Remediation Site also  
16 involved demolition of the aluminum smelter facilities to access contamination and prepare it for  
17 sale to the Port of Vancouver. *Id.*, Ex. 2.

18 6. All the facilities at the site have been demolished with the exception of three  
19 remaining structures: the scalehouse and guardhouse (which are to remain on the property for  
20 the subsequent owner), and a steel-sided equipment storage structure (which is to be recycled).  
21 Declaration of Troy Tyacke in Support of Motion for Summary Determination ¶ 4. Demolition  
22 work involving C & D Waste is completed. *Id.* ¶ 5.

23 7. There is no actual, present and existing dispute between these parties. The  
24 activities involving C & D Waste at Evergreen Aluminum challenged by Waste Connections  
25 have been completed. Only potential, theoretical, abstract and academic interests remained to be  
26 adjudicated by the Commission, thus Waste Management and ECTI moved to have the moot  
27 case dismissed.

1           8.       Administrative Law Judge Dennis Moss issued *Order 03 Granting Motion for*  
2 *Summary Determination* (the “Initial Order”). With no material facts in dispute, the  
3 Administrative Law Judge correctly concluded that the case was moot. He recognized that a  
4 cease and desist order would be meaningless since the complained-of activities had ceased  
5 already. Initial Order ¶ 14. And, declaratory relief would not be proper because, “Other than as  
6 possible disputants of an academic question, there are no genuine and opposing interests between  
7 the parties.” Initial Order ¶ 15. The Administrative Law Judge summed it up by saying:

8                   Although it might be satisfying to Waste Connections in some  
9 sense to be declared “right,” a statement in a Commission order  
10 that Respondents required a certificate of public convenience and  
11 necessity under the specific facts of this case would be of no value  
12 either in the context of the defined controversy or in any broader  
13 sense.

14 Initial Order ¶ 16.

### 15                   **III. THE MOOT DISPUTE SHOULD BE DISMISSED.**

16           9.       The Evergreen Aluminum job is done and in all the pleadings and oral assertions  
17 prior to the Motion for Summary Determination, Waste Connections strictly limited its interests  
18 to that one project. The dispute is now undisputedly moot. Yet Waste Connections – and  
19 doubtless the intervenors – wants an advisory opinion. The Commission should uphold the  
20 Initial Order dismissing the Complaint because there is no justiciable controversy remaining, and  
21 the only purpose served in having a ruling about the Evergreen Aluminum work is to potentially  
22 provide Waste Connections fuel for litigation.

#### 23           **A.       Before an evidentiary hearing, a moot case must be dismissed..**

24           10.       In the doctrine of mootness, timing is indeed relevant. By its very nature,  
25 mootness is commonly the result of activities that occur after a complaint is filed. *See Morrison*  
26 *v. Basin Asphalt Co.*, 131 Wn. App. 158, 162, 127 P.3d 1 (2005) (claim for entitlement to unpaid  
27 wages was moot where the employer had paid the requested wages after the lawsuit was  
initiated); *see also In re Recall Charges Against Seattle School Dist. No. 1 Directors*, 162 Wn.2d

1 501, 506, 173 P.3d 265 (2007) (appeal moot in case seeking recall of school district directors  
2 where the directors did not run, or were defeated, in intervening election).

3 11. In *Glick v. Verizon Northwest, Inc.*, 2005 WL 484651 (W.U.T.C. Jan. 28, 2005)  
4 (Docket No. UT-040535, Order No. 3), the Commission dismissed as moot the complainant's  
5 request for an order requiring a telephone company to provide prospective call detail as required  
6 by the tariff because the complainant had discontinued service for the phone line for which he  
7 requested the itemization. The order does not specifically state when Mr. Glick terminated  
8 service, but presumably it was after the request for relief in his complaint was submitted.

9 12. Waste Connections suggests that post-filing behavior should not be considered in  
10 determining the fate of a private complaint proceeding, and yet that is exactly how a case may  
11 become moot. It is typically just this sort of timing that causes mootness in the first place.

12 13. Timing in the context of the litigation itself is also relevant to the fate of a moot  
13 case. For its complaint to survive mootness, Waste Connections must persuade the Commission  
14 to apply a limited exception to the general rule disfavoring advisory opinions unless the case  
15 "involves matters of continuing and substantial public interest." *Thomas v. Lehman*, 138 Wn.  
16 App. 618, 622, 158 P.3d 86 (2007). However, the public interest exception to the mootness  
17 doctrine has been applied just in "cases which became moot only after a hearing on the merits of  
18 the claim." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (emphasis  
19 added) ("Dismissal of their claim will not involve a waste of judicial resources and will avoid the  
20 danger of allowing petitioners to litigate a claim in which they no longer have an existing  
21 interest."). Before a hearing on the merits, if a case becomes moot even the interest of the  
22 general public will not save it.

23 14. If the case becomes moot after an evidentiary hearing, then the public interest  
24 exception might allow the matter to survive dismissal, assuming other elements are also satisfied.  
25 Otherwise, a moot case must be dismissed so as "to avoid the danger of an erroneous decision  
26 caused by the failure of parties, who no longer have an existing interest in the outcome of a case,  
27 to zealously advocate their position." *Orwick*, 103 Wn.2d at 253; accord *Hart v. Department of*



1 *Social & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988) (court must consider the  
2 “level of genuine adverseness and the quality of advocacy of the issues.”).

3 15. In contrast, in *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004), the  
4 Supreme Court applied the mootness exception where

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

9 *Id.* at 893; accord *Washington Water Power Co. v. Graybar Electric Co.*, 112 Wn.2d 847, 850  
10 n.2, 774 P.2d 1199 (mootness exception applied because of “the genuine adverseness of the  
11 parties and the exceptional quality of the briefing”), *amended in nonrelevant part*, 779 P.2d 697  
12 (1989).

13 16. Post-filing activities that took place prior to a hearing on the merits have made  
14 this case moot, and there should be no need to consider whether an exception to the general rule  
15 should insulate it from dismissal. At this point, with the work complete, parties do not have  
16 sufficient stake in the outcome to zealously advocate their positions. Continuing this case would  
17 force Waste Management and ECTI to litigate a claim in which they no longer have an existing  
18 interest. The Respondents cannot be expected to vigorously expend resources to quibble about  
19 the regulatory implications of a job completed.

20 17. With the work at the Remediation Site complete, Respondents have no reason to  
21 advocate against Waste Connections. After all, Waste Management of Washington, Inc. holds a  
22 G Certificate, too; and its affiliated Respondent likely has little motivation to argue about the  
23 broader academic questions involving C&D Waste. Given that there has been no hearing or  
24 briefing on the merits in this case and in light of the lack of actual adversity going forward, it  
25 should not be necessary to even consider the exception to the mootness doctrine. The case  
26 should be dismissed, and the Initial Order should be upheld.

1 **B. There is no administrative purpose for litigating this matter now that no**  
2 **justiciable controversy exists.**

3 18. Waste Connections wants to fight a one-sided battle, but a justiciable controversy  
4 requires more:

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

14 *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). With the work at the  
15 Evergreen Aluminum site complete, only potential, theoretical, abstract and academic debates  
16 remain.

17 19. In concluding that a justiciable controversy was no longer present in the  
18 Evergreen Aluminum dispute, the Administrative Law Judge noted that Waste Connections did  
19 not assert any “actual, concrete harm” in its Complaint, as it is legally required to do. Initial  
20 Order ¶ 15, n.15 (citing *To-Ro Trade*, 144 Wn.2d at 412.) In response, Waste Connections cites  
21 to language in RCW 81.04.110 that prohibits dismissal solely “because of the absence of direct  
22 damage to the complainant.” Petition ¶ 12. The statute, however, guards against dismissal for  
23 failure to state a claim. It cannot resurrect a moot dispute lacking any justiciable controversy.  
24 The absence of an allegation about how Waste Connections was harmed is not the only reason  
25 for dismissing this case, but it is a legitimate indication of the academic nature of the dispute.  
26 The dicta in the Initial Order noting the failure to allege harm merely buttresses the primary  
27 conclusion that, “There are no direct and substantial interests at stake insofar as the issues were  
joined in this proceeding.” Initial Order ¶ 15. <sup>1</sup>

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<sup>1</sup> The fact is that Waste Connections did not allege any harm in its pleadings, as required to demonstrate a justiciable controversy. Petitioner hints at the prospect of using an advisory opinion from the Commission in a subsequent forum, likely judicial. Petition ¶ 15. If so, that would make Waste Connections’ interests clearly and obviously private.

1           20.     There is certainly no administrative reason for continuing this moot case. As the  
2 Administrative Law Judge noted, “This specific case is not an enforcement or penalty proceeding  
3 in which the Commission could take effective action for past wrongdoing, if proven. If a similar  
4 fact pattern is alleged in the future, it will still require proof and will still have to be tested  
5 against governing statutes and rules, not against any determination we might make here.” Initial  
6 Order ¶ 16.

7           21.     A dismissal of this moot case does not render the Commission into a “passive  
8 overseer of events.” Petition ¶ 19. The Commission, unlike the judiciary, has authority to  
9 determine lawfulness of specified activity in the context of a private-party proceeding, but the  
10 fact is that a ruling in this case would not contribute to the Commission’s body of law regarding  
11 C&D Waste. Although the Commission has authority to retain jurisdiction, neither is it required  
12 to exercise its broad powers where a dispute has become academic. For the Commission to issue  
13 an advisory opinion in the absence of a justiciable controversy serves no purpose other than  
14 vindicating the private complainant in this case.

15     **IV. THE PUBLIC INTEREST EXCEPTION TO MOOTNESS IS NOT PRESENTED.**

16           22.     To determine whether a case presents the public interest, courts consider:

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

21     *Thomas v. Lehman*, 138 Wn. App. 618, 622, 158 P.3d 86 (2007). These judicially-created public  
22 interest factors were briefed in the motion papers and taken into account in the Initial Order.  
23 Initial Order ¶¶ 17 & 18 (the Commission “considers not only these factors but also the broader  
24 regulatory framework in which it performs its statutory duties.”). Yet Waste Connections fails to  
25 affirmatively demonstrate how they are present. It simply asserts that “acknowledging the  
26 original remedy is mooted should not end the dispute.” Petition ¶ 8. Waste Connections spends  
27 a great deal of effort criticizing dicta in the Initial Order, but very little definitely saying why the  
outcome should differ on administrative review.

1 **A. This is a private dispute involving unique facts and not one that is conducive**  
2 **to future guidance for the industry.**

3 23. This is a private dispute between two large garbage companies over one big job.  
4 It does not raise issues of broad public concern warranting an advisory opinion. Waste  
5 Connections made it plain from the outset of this case that it was only raising a very discreet  
6 issue about one particular job. Waste Connections stated that it was “not talking about any other  
7 job type or site” and that this case “is limited to an unincorporated portion of Clark County on  
8 one single disposal site.” Second Declaration of Polly L. McNeill in Support of Motion for  
9 Summary Determination, Ex. 1 at 37:4-5 and 36:6-7 (attached).

10 24. The description of its “actual, concrete legal harm” makes it obvious that Waste  
11 Connections is dressing up its private interests in a public interest guise. *See* Petition p. 8, n.23  
12 (“Nevertheless, WCW would implicitly suffer economic harm by the diversion of regulated  
13 waste streams and revenues therefrom to unlicensed haulers.”). Waste Connections basically  
14 admits that its interests are private, and that it is concerned about its loss of revenue – including  
15 even its potential loss of revenues in future disputes with other haulers who are not even  
16 participating in this case.

17 25. Petitioner now suggests that the matter is capable of resolving a myriad of issues  
18 related to C&D Waste. *See* Petition ¶ 9, n. 15 (“Indeed, characterization of construction and  
19 demolition debris wastes and disputes and pending concerns about, i.e., their constitutional  
20 inclusion in local city ordinances (*See, i.e., Josef Ventenbergs v. City of Seattle, et al.*, 163  
21 Wn.2d 92, 178 P.3d 960 (2008), whether their transportation constitutes property transportation  
22 under RCW 81.80 or solid waste transportation under RCW 81.77, (*See, i.e. Order M.V.G. No.*  
23 *1849, In the Matter of Determining the Property Classification of Drop Boxes R Us., Inc. and*  
24 *Puget Willamette Express, Inc.*, Hearing Nos. H-5039 and H-5040, (Oct. 1998)), or a just-  
25 initiated Commission rulemaking under Docket TG-080591 served May 9, 2008, in which  
26 apparently the Commission will consider revision to its solid waste definitions under WAC 480-  
27

1 70-041, WAC 480-70-196 and WAC 480-70-226, abound.”). It is ludicrous to suggest that the  
2 Evergreen Aluminum dispute is capable of guiding resolution on all of these issues.

3 26. The underlying facts implicated in this dispute are not conducive to future  
4 guidance. The Evergreen Aluminum remediation site was not a typical demo job. It involved  
5 the environmental remediation and dismantling of one of the State’s last aluminum plants over  
6 several years. Waste Connections claims it is “not credible to suggest that a ruling by the  
7 Commission on the lawfulness of the challenged activity would provide ‘little guidance’ to  
8 others on these specific facts.” *Id.* Yet it fails to explain exactly how this “narrowly-drawn”  
9 dispute – *i.e.*, who should have collected and/or transported C & D Waste from the Evergreen  
10 Aluminum remediation site – would provide the global guidance it seeks.

11 27. Intervenor Clark County may similarly desire for an advisory opinion. The fact  
12 that Clark County has intervened in the matter does not create public interest. It is an intervenor,  
13 not a direct party and its request for participation expressly stated that it would not broaden the  
14 issues in the proceeding. Like Waste Connections, Clark County was interested in only the  
15 Evergreen Aluminum site. It is incumbent on Waste Connections to demonstrate the public  
16 interest exception, and merely because a local government intervened cannot create a justiciable  
17 controversy where one is not otherwise present. Clark County’s participation does not change  
18 the fact that the Evergreen Aluminum dispute is moot.

19 28. The concept of “public interest” has several applications in this proceeding, not  
20 all of which mean the same thing. The fact that the Commission has broad powers over the  
21 “public interest” does not prove the exception to mootness. If that were the case, then no  
22 proceeding legitimately invoking Commission jurisdiction could ever be dismissed for mootness.  
23 In the context of Commission laws, “the interest of the public which is to be protected is that  
24 only of customers of the utilities which are regulated.” *Cole v. Washington Utilities and*  
25 *Transportation Commission*, 79 Wn.2d 302, 306, 485 P.2d 71 (1971); *see also In re Pacificorp*,  
26 1999 WL 359066 (W.U.T.C. March 16, 1999) (Docket No. UE-981627, Second Supplemental  
27 Order) (considering the fundamental requirement that the Commission regulates in the public

1 interest – that is, to protect the public from harm). Similarly, not every dispute involving solid  
2 waste can be insulated from dismissal for mootness merely because it is a “business affected  
3 with a public interest.” Petition ¶ 31 (citing WAC 480-70-001). Involvement by Clark County,  
4 a public entity, is not the same as public interest in solid waste collection which is not the same  
5 as the Commission’s broad authority to regulate in the public interest. None of these factors  
6 prove the public interest exception to mootness.

7 29. The Administrative Law Judge noted that a decision on the Evergreen Aluminum  
8 matter would have little value “either in the context of the defined controversy or in any broader  
9 sense.” Initial Order p. 16.

10 If a similar fact pattern is alleged in the future, it will still require  
11 proof and will still have to be tested against governing statutes and  
rules, not against any determination we might make here.

12 *Id.* Waste Connections is correct that individual case adjudications are “contributory and highly  
13 relevant” to the Commission’s body of law; but that generalized concept cannot elevate this case  
14 over the hurdle of proving a public interest exception to mootness.

15 **B. There is no evidence that the situation presented in the Evergreen Aluminum  
16 situation is likely to recur.**

17 30. Waste Connections does not show or present any evidence suggesting that  
18 Respondents are engaging in the challenged conduct anywhere else. *Hart v. Department of*  
19 *Social & Health Servs.*, 111 Wn.2d 445, 452, 759 P.2d 1206 (1988) (mere speculation that a  
20 moot dispute with a government agency might recur was “certainly not a reasonable expectation”  
21 and upheld dismissal of the case as moot). It has brought forward no credible evidence to  
22 suggest that the Evergreen Aluminum project is capable of repetition.

23 31. A party relying on an exception to mootness has the burden to establish the  
24 exception. Jurisdictions other than Washington have held the party seeking to invoke the  
25 “capable of repetition, yet evading review” exception to the mootness doctrine bears the burden  
26 of demonstrating that the exception applies. *See, e.g., Serena Vista, L.L.C. v. State of Montana*  
27 *Dept. of Natural Resources and Conservation*, 342 Mont. 73, 179 P.3d 510, 514 (2008) (a party

1 seeking to invoke the capable of repetition, yet evading review exception to the mootness  
2 doctrine bears the burden of establishing that it applies); *Southern Co. Services, Inc. v. F.E.R.C.*,  
3 419 F.3d 39, 43 (D.C. Cir. 2005) (the burden is on the party invoking the exception to show that  
4 the requirements of exception to mootness doctrine are met); *Holton v. Dept. of Employment &*  
5 *Training, Town of Vernon*, 178 Vt. 147, 155, 878 A.2d 1051 (2005) (the town of Vernon failed  
6 to meet its burden of showing that its claim fell within the mootness exception of being capable  
7 of repetition yet evading review); *Incumaa v. Ozmint*, 507 F.3d 281, 289 (4<sup>th</sup> Cir. 2007) (plaintiff  
8 bore the burden of establishing the exception to the mootness doctrine that its claim was not  
9 moot because it was capable of repetition yet evaded review).

10 32. Yet Waste Connections has not suggested why a hazardous waste remediation  
11 dismantling one of the few remaining aluminum smelters in Washington is representative of the  
12 more typical “collection off C&D wastes off a large industrial job site” about which it seeks  
13 “interpretation and construction of the law to those facts.” Petition ¶ 24, n.31. It leaves only  
14 speculation and conjecture to justify a hearing on the merits in this matter.

15 **C. Rulemaking is a more appropriate process for obtaining guidance about**  
16 **C&D Waste hauling.**

17 33. There is legitimate cause to question whether this particular fact situation presents  
18 the kind of scenario that is appropriate for providing guidance through adjudication. Especially  
19 where the facts of the project are so unique, where the work has been completed and the  
20 controversy mooted, and where the parties’ interest in zealous advocacy is dubious, a better  
21 source of relief is through rule-making. *See, e.g., In the Matter of Proposed Rule WAC 480-62-*  
22 *218 Relating to Point Protection for Railroad Operations*, TR-040151 (January 2005)  
23 (comparing an adjudicative hearing when the Commission “makes specific factual findings that a  
24 particular carrier’s existing rules or practices are unsafe” to rulemaking that applies to the  
25 industry as a whole). Unlike courts, agencies may make policy either by the adoption of rules or  
26 by case-by-case decision making. As a result, the Commission has less reason to rely upon ad  
27

1 hoc adjudication to formulate new standards. *Securities & Exchange Comm'n v. Chenery Corp.*,  
2 332 U.S. 194, 202-203, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

3 34. The guidance Waste Connections seeks is more likely to come from a rule. See  
4 RCW 34.05.010(16) (a rule is “any agency order, directive, or regulation of general applicability  
5 (a) the violation of which subjects a person to a penalty or administrative sanction....”). The  
6 Washington Supreme court has, in a number of cases, held that “where an agency's order,  
7 directive or regulation of general applicability meets the definition of a rule,” the agency must go  
8 through rule-making. *Washington Independent Telephone Ass'n v. Washington Utilities and*  
9 *Transp. Comm'n.*, 148 Wn.2d 887, 902, 64 P.3d 606, 614 (2003). (upholding a rule because it  
10 established rate-making standards but did not set the rates themselves).

11 35. Waste Connections argues that the alleged violations involving the Evergreen  
12 Aluminum Remediate Site have “implications for all certificate holders.” Doubtless Intervenor  
13 Washington Refuse and Recycling Association will also support an advisory opinion to “guide”  
14 the industry on the increasingly-complicated questions about hauling C&D Waste. In light of the  
15 fact that the parties seek prospective guidance, rulemaking is a better procedural mechanism for  
16 the relief it seeks.<sup>2</sup>

17 **V. PARTICIPATION BY COMMISSION STAFF IS NOT DETERMINATIVE.**

18 36. Instead of proactively presenting reasons for invoking the public interest  
19 exception to this otherwise-moot case, Waste Connections reactively criticizes the factors  
20 considered in the Initial Order. More than anything, the Petitioner unduly emphasizes whether  
21 participation by Commission Staff should have been mentioned. It even went so far as to have  
22 the Director of Regulatory Services weigh in on the “important policy implications” of the order  
23 regarding what Waste Connections calls a “negative inference.” (Rose Decl. pars. 3 & 4.)

24 37. This concern is hyperbole. For the absence of Commission Staff to be relevant at  
25 all, a precise sequence of events must occur. The proceeding must involve a private complaint  
26  
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1 on a narrowly drawn set of facts; the matter must become moot before the hearing on the merits;  
2 remaining outcome must be an advisory opinion not tied to any effective request for relief; the  
3 parties must no longer have genuine and opposing interests; and Commission Staff must have  
4 chosen at the outset to refrain from participation. Then, and only then, could the “negative  
5 inference” be pertinent – and arguably it should be.

6 38. With due respect for the concerns expressed by Mr. Rose, this issue is a red  
7 herring. The Administrative Law Judge dismissed the complaint because it was moot and Waste  
8 Connections had not established any exception to mootness. Whether or not participation of  
9 Commission Staff creates a “negative inference” does not change the outcome of the initial order  
10 on its merits. Indeed, most certainly the absence of the WUTC staff involvement in this matter  
11 does not support finding an exception to the mootness. The underlying case is moot, and should  
12 be dismissed regardless of whether Commission Staff was a party to the proceeding.

13 39. Significantly, in his declaration, Mr. Rose does not criticize the outcome of the  
14 case. He does not suggest that dismissing the Evergreen Aluminum dispute for mootness is  
15 error. Indeed, having familiarized himself with this case, the Director of Regulatory Services  
16 nowhere even suggests that the underlying claims in the Evergreen Aluminum dispute raise  
17 issues of continuing and substantial public interest. Mr. Rose’s comments are strictly limited to  
18 the so-called “negative inference” of Commission Staff participation. His concerns are  
19 specifically limited to “some specific findings” in paragraphs 4, 18, 19 and 21 of the Initial  
20 Order, which he interprets to infer a direct correlation between participation of Commission Staff  
21 and public interest. Mr. Rose’s declaration expresses concern only about the “dicta” contained in  
22 the Initial Order.

23 40. Whether a case meets the public interest exception to mootness can depend on a  
24 number of pieces of evidence. Commission Staff participation in a case may be one factor of  
25 several that are considered. There is certainly no un rebuttable presumption that participation by

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26 <sup>2</sup> The availability of that recourse is not speculative. The Commission has just recently issued a notice of its  
27 intention to undertake rulemaking in Docket TG-080591 served May 9, 2008, to consider revision to regulatory

1 Staff in a moot case establishes the exception, nor should the absence of Staff participation mean  
2 there is no substantial public interest. Whether or not Commission Staff is a party does not  
3 decide the question. Most certainly, however, the absence of Commission Staff involvement  
4 cannot be twisted – as Waste Connections tries to do – into stronger evidence of a substantial  
5 public interest than if the Commission Staff had been participating. Even if Commission Staff  
6 had participated in this proceeding, the Evergreen Aluminum dispute would still be moot, and  
7 should still be dismissed.

8 41. In the Initial Order, the Administrative Law Judge recognized that issuing a broad  
9 advisory decision in a moot case involving very specific facts and a narrowly-drawn Complaint  
10 might have unintended consequences if applied in other cases where the facts, parties, and  
11 circumstances would have warranted a different outcome absent a Commission-issued advisory  
12 opinion in this case. Initial Order ¶ 19. The Administrative Law Judge tied this risk to the  
13 presence of Commission Staff, and it is on this aspect of his ruling that Waste Connections and  
14 the Director of Regulatory Services take umbrage. However, the risk is present even without  
15 regard to Commission Staff involvement and is a legitimate and judicially-recognized rationale  
16 for dismissing a moot case prior to a hearing on the merits. *See King County v. Central Puget*  
17 *Sound Growth Mngt. Hearings Bd.*, 91 Wn. App. 1, 23-24, 951 P.2d 1151 (1998) (“Use of the  
18 public interest exception is not justified when the underlying claim is limited to the facts of the  
19 present case, and when future challenges of a similar nature will require examination and full  
20 litigation on the facts of that particular case.”), *aff’d in nonrelevant part & rev’d in nonrelevant*  
21 *part*, 138 Wn.2d 161, 979 P.2d 374 (1999).

## 22 CONCLUSION

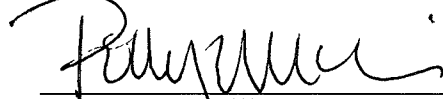
23 42. Respondents respectfully request that the Commission uphold the ruling of the  
24 Initial Order, dismiss the Complaint as moot and nonjusticiable, and reject Petitioner's demand to  
25 use the narrow and unique facts of this case for an advisory opinion.

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27 solid waste definitions.

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DATED this 9th day of June, 2008.

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