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7 BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

8  
9 WASTE CONNECTIONS OF  
WASHINGTON, INC.,

10 Complainant,

11 v.

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

15 Respondents.

NO. TG-071194

WASTE CONNECTIONS OF  
WASHINGTON, INC.'S OPPOSITION  
TO RESPONDENTS' PETITION AND  
REPLY TO INTERVENORS'  
ANSWERS TO WASTE  
CONNECTIONS OF WASHINGTON,  
INC.'S PETITION FOR  
ADMINISTRATIVE REVIEW

16  
17 1 Waste Connections of Washington, Inc. ("WCW" or "Complainant") hereby files its  
18 opposition to the Petition and Reply filed by Waste Management Disposal Services of  
19 Oregon, Inc. and Enviro/Con & Trucking, Inc. ("Respondents" or "Petitioners") on  
20 June 16, 2008, to Intervenor Clark County and Washington Refuse and Recycling  
21 Association's ("Intervenors" and/or "WRRRA") Answers to the Petitions for  
22 Administrative Review filed by WCW.

23 2 On June 9, 2008, Respondents filed a 15 page Answer to WCW's Petition for  
24 Administrative Review having previously replied on March 24, 2008 to WCW's and  
25 the Intervenors' Answers/Responses to Motion for Summary Determination which,

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1 although permitted by the Administrative Law Judge, appears not to be authorized by  
2 rule (WAC 480-07-380) as noted by Complainant at footnote 9 of its Petition for  
3 Administrative Review. Both Clark County and WRRRA also filed brief Answers to the  
4 Petition on June 9, 2008, Clark County in a three and a half page pleading, and WRRRA  
5 in almost an identical length submission.

6 3 Respondents now claim alternatively both a right to reply under WAC 480-07-825(5)  
7 (a), and seek leave to reply under WAC 480-07-825(5) (b). Both alternatives should be  
8 roundly rejected by the Commission for failing to establish sufficient grounds for a  
9 Reply.<sup>1</sup>

10 4 There is simply no automatic right under rule to file a Reply in this circumstance and  
11 Petitioners/Respondents' Petition should be denied for failing to establish the  
12 requirements of WAC 480-07-825 (5) (a) and (b), specifically, that there are no new  
13 matters raised in either Intervenor's Answers, nor do Petitioners indicate in their  
14 Petition or Reply why those previous issues were not reasonably anticipated and why a  
15 Reply is therefore necessary.

#### 16 I. ANALYSIS

17 5 In their putative Reply, Respondents/Petitioners argue that Clark County's suggestion  
18 that insuring compliance with its solid waste management plan is "sufficient to invoke

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19 <sup>1</sup> While Complainant might have claimed the right or sought leave to file a Reply to Respondents' Answer, it  
20 resisted the temptation after analysis, as Respondents' Answer at best raised alternative arguments on existing  
21 issues that had already been addressed in their previous Reply to the Motion for Summary Determination as well  
22 as their Answer. Respondents might have similarly resisted the urge to reargue their position on the underlying  
23 mootness issue now that they have had three other separate occasions to successively articulate by Motion, Reply  
24 and Answer to Petition for Administrative Review. While the Respondents take yet another turn defending the  
25 mootness doctrine in the Petition and proposed Reply, as they did in their June 9 Answer, they are conspicuous in  
their silence, however, in evaluating the "effective relief" factor in the face of the challenge by the WRRRA on the  
issue of timing delays in the administrative process interval, and the Intervenor's reference to the fact that  
Respondents steadfastly opposed consideration of the hearing issues on an accelerated brief adjudicative  
proceeding basis (*See*, Intervenor WRRRA's Answer to Petition for Administrative Review, fn. 2 at 3), which  
clearly facilitated orchestration of completion of the challenged hauling.

1 the public interest exception to mootness . . .” and “therefore raises an issue beyond the  
2 scope of the Complaint . . .”<sup>2</sup> However, that argument is neither new, unanticipated nor  
3 does it exceed the scope of the complaint.<sup>3</sup> For Respondents to now claim that seeking  
4 compliance with the local solid waste management plan in the public interest broadens  
5 the scope of the intervention and is somehow a first time suggestion, or is inconsistent  
6 either with regulation in the public interest or as an exception to the mootness doctrine,  
7 is incorrect.<sup>4</sup>

8 6 Thus, Petitioner’s primary argument at ¶ 5 of its Reply miscasts both the content of the  
9 underlying Complaint and the argument on intervention which was originally presented  
10 to the Administrative Law Judge by Clark County at the first prehearing conference and  
11 which resulted in her granting intervention status to Clark County.

12 7 After the initial inaccurate broad-brushing of the procedural basis of the intervention by  
13 Clark County and of the “exceeding the scope of complaint and intervenor role issue,”

14 <sup>2</sup> Respondent’s Reply to Intervenors’ Answers ¶ 5 at 3.

15 <sup>3</sup> See ¶ 10 of the original Complaint where Complainant also alleges that the ongoing collection and transportation  
16 of C&D waste violates local law, specifically Chapter 24.12 of the Clark County Code, and that those activities  
17 appear to circumvent the **Solid Waste Management Plan** for Clark County by avoiding delivery of the collected  
C&D waste to county transfer stations.

18 <sup>4</sup> As Clark County argued for intervention at the initial prehearing conference on August 2, 2007 in this matter:

19 “. . . [B]ut I think basically, Clark County’s requesting intervention because counties are  
20 specifically charged with insuring there is a harmony between these state and local regulation [sic]  
21 of the solid waste carriers and that Clark County holds an interest, whether through specifically  
22 imposed mandates or their general police powers, to supervise those activities within its own  
23 unincorporated area.

24 So I think under general principle, that certainly speaks to the standard for intervenors in terms of  
25 the substantial interest in the subject matter, but also, I think the line is blurred where a County is  
involved the difference between *public interest standard* and a *substantial interest*. Those two  
issues sort of merge when you are talking about a county. [Emphasis added.]

But in any event, it’s not a secret that this activity is having and will continue to have an economic  
impact on the current solid waste system in general, and the economics of the existing plan are  
based on this waste stream actually getting into the system. So it’s the County’s position that the  
stated purpose of the County’s Solid Waste Ordinance is to provide a coordinated management  
plan.”

Docket TG-071194, Prehearing Conference, August 2, 2007, pages 8 & 9.

1 the Respondents next familiarly fall back on their arguments about what an evidentiary  
2 hearing (they have thus far successfully blocked) would focus on. Under the guise of a  
3 Reply to an Administrative Review Petition Answer, the Respondents proceed to  
4 reargue their previous opposition to Clark County's intervention status which was  
5 overruled by Order No. 1 on Prehearing Conference served August 17, 2007.

6 8 The Respondents' points<sup>5</sup> are clearly not those in response to new **issues** raised in  
7 Intervenors' Answers, rather they are at best new **arguments** on Respondents' same old  
8 saw they have been on record about since at least March 3, 2008 in their Motion for  
9 Summary Determination, to wit: "this matter is moot (albeit, thanks to the concerted  
10 efforts of Respondents responding to the original complaint by completing the alleged  
11 unauthorized hauling); WCW thus seeks an advisory opinion on a now non-justiciable  
12 controversy; AND last but not least, there is no public interest exception to the  
13 mootness doctrine meriting Commission review.<sup>6</sup>

14 9 Sections 9-13 of the proposed Reply are similarly neither responsive to Intervenors'  
15 Answers to Petition for Administrative Review nor the rule allowing replies by right or  
16 by leave of the Commission. In short, they constitute a rehash of Respondents'  
17 previous three pleadings in support of their summary dismissal motion and reargue  
18 themes i.e., demolition site as a complete environmental clean-up locale, lack of  
19 adversity, lack of reoccurrence as not constituting a public interest exception to  
20 mootness, and the *To Ro Trade Shows*,<sup>7</sup> premise that declaratory judgment actions can  
21 be dismissed for mootness.<sup>8</sup> Where in any of these renewed arguments is there

22 <sup>5</sup> See ¶¶ 7 and 8 of their Reply appended to the Petition for Leave to Reply.

23 <sup>6</sup> Complainant resists the temptation here to again argue in opposition to these argumentative points.

24 <sup>7</sup> *To Ro Trade Shows*, 144 Wn2d. 403, 412 (2001).

25 <sup>8</sup> While Respondents again strive in this portion of their Reply (¶ 10 at 4) to demonstrate a lack of present adversity in their previously-presented (Respondents' Answer ¶ 18 at 6) verbatim recitation of the *To Ro Trade Shows* "justiciable controversy" elements, they also ironically here resurrect an original contested fact or mixed

1 demonstration of any new challenges to the Initial Order by Intervenor (WAC 480-07-  
2 825(5)(a)), and where is there any suggestion why these constitute matters “not  
3 reasonably anticipated” by Respondents to which a Reply is necessary (WAC 480-07-  
4 825(5)(b))?

5 10 While in their Petition in support of Reply, Respondents suggest that the intervenor role  
6 of Clark County as an exception to the public interest doctrine was somehow a novel  
7 argument<sup>9</sup> which apparently surprised them, Respondents had actually already argued  
8 in their own Answer to the Petition for Administrative Review that the intervention of  
9 Clark County did not constitute or demonstrate the public interest exception to  
10 mootness “and merely because a local government intervened cannot create a  
11 justiciable controversy where one is not otherwise present.”<sup>10</sup> This then was hardly  
12 either a new issue or one that was not reasonably anticipated by Respondents. Indeed,  
13 the whole concept of the role of the Intervenor in representing “the public interest” has  
14 been a part of this proceeding since the initial prehearing conference of August 2, 2007,  
15 as the lengthy arguments on record in support of intervention and opposition attest (*See*  
16 footnote 4, above). Clark County’s isolated aside on the Initial Order’s failure to  
17 recognize its “interest and involvement in the proceeding in consideration of whether  
18 the public interest exception to the mootness doctrine applied,”<sup>11</sup> constitutes neither a  
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20  
21 law and fact issue that the declaration of Troy Tyacke (¶ 5 at 2) in Support of Motion for Summary Determination  
22 had implicitly seemed to resolve. If, as they now suggest in their latest Reply, “. . . certainly the Respondents  
23 dispute the activities were illegal . . . “ how does there not then remain an actual dispute “or the mature seeds of  
24 one” between parties of opposing interests involving interests that are direct and substantial and for which an  
25 **administrative** determination would be final? Once again, Respondents want it both ways in arguing the matter  
is moot, but hedging on the crux of the Complaint to avoid any contrary inferences, admissions and/or conclusions  
about their conduct.

<sup>9</sup> Respondents’ Petition for Leave to Reply ¶ 7.

<sup>10</sup> Respondents’ Answer to Petition for Administrative Review ¶ 27 at 9.

<sup>11</sup> Intervenor Clark County’s Answer to Petition for Administrative Review ¶ 9 at 4.

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1 new challenge to the Order, nor is it again a new matter not reasonably anticipated by  
2 Respondents as their numerous variations on this theme already suggest.<sup>12</sup>

3 11 Finally, Respondents' closing salvo at ¶¶ 14-16 of their proposed Reply demonstrate  
4 their miscarriage of the Reply rule here succinctly. There, they now piggyback the  
5 County intervention on top of their previously and extensively addressed argument in  
6 characterization of the role and absence of the Staff in this proceeding in their Answer.  
7 This bootstrapped argument by Respondents is particularly ironic in that it was the  
8 **Respondents** themselves who initially launched the proceeding in this circuitous  
9 misdirection by argument at ¶¶ 3 and 4 of their March 24, 2008 "Reply" on the  
10 Summary Determination Motion. In that pleading, they railed against what they now  
11 claim is an "advisory opinion," then opined "[t]his conclusion is highlighted by the  
12 decision of the Commission's Staff to refrain from participating in this action. If Staff  
13 believed there were public interest issues presented, surely they would have appeared in  
14 this proceeding."<sup>13</sup>

15 12 As with Clark County's Answer, the WRRRA's Answer to WCW's Petition for  
16 Administrative Review similarly makes no such "new challenges" to the Initial Order  
17 or raises any new matters not reasonably anticipated. It actually makes only two  
18 references to Clark County in support of the public interest role of the County in solid  
19 waste management jurisdiction, and offers no explicit or implicit correlation to the  
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21 <sup>12</sup> Respondents themselves minimize the County's reference here ((or any purported right/permission to respond  
22 thereto), by characterizing the County's observation as lacking explanation in saying it "notably had not presented  
23 any information to establish the public interest exception to the mootness doctrine"), Respondents' Reply to  
24 Intervenor's Answers ¶ 15 at 6, 7. Again, merely pointing out the Initial Order did not consider the County's  
25 public interest role in the proceeding hardly amounts to a new challenge to the Order and Respondents were well  
aware of the issue previously raised, i.e., in ¶ 10 of the Declaration of Chris Rose appended to WCW's Petition for  
Administrative Review, and to which the Respondents responded at some length in ¶¶ 27 and 28 of their previous  
June 9, 2008 Answer.

<sup>13</sup> Footnote omitted, Respondents' Reply in Support of Motion for Summary Determination ¶ 8 at 3, 4.

1 public interest exception to the mootness doctrine whatsoever. (*See*, WRRR Answer to  
2 Petition for Administrative Review at 2, lines 18-23.)

3 <sup>13</sup> In response to the arguments of Complainant attacking the Initial Order’s acceptance  
4 and expansion of the Staff role premise as buttressed by the Declaration of Chris Rose,  
5 the Respondents, in their previous June 9 Answer, defensively sought to downplay this  
6 issue they themselves had fomented by alternately calling the concerns “hyperbole,”<sup>14</sup>  
7 “a red herring,”<sup>15</sup> and self-consciously dismissing those concerns as directed to  
8 “dicta.”<sup>16</sup> Astoundingly, they then seem to contradict that original, misguided premise  
9 instigated by their earlier “Reply,” by now acknowledging in that Answer (yet another  
10 response opportunity), “[t]here is certainly no unrebuttable presumption that  
11 participation by Staff in a moot case establishes the exception, nor should the absence  
12 of Staff participation mean there is no substantial public interest.”<sup>17</sup> [emphasis added.]

13 <sup>14</sup> Again, none of these arguments in the Conclusion to their pending Reply are new,  
14 despite Respondents’ transparent hope that adding the County’s long-standing  
15 intervention role would render a previously-familiar refrain novel. While the  
16 Respondents here strain to modify their rationale, the refrain that there is no public  
17 interest exception to the mootness doctrine presented is long since received and actively  
18 disputed.

19 <sup>15</sup> Additionally, the fact that Respondents may not have repeatedly intertwined their  
20 rendition of the public interest and the mootness/public interest exception with the role  
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22 <sup>14</sup> Respondents Answer to Petition for Administrative Review, ¶ 37 at 12.

23 <sup>15</sup> Waste Management’s and Enviro/Con Trucking’s Answer to Petition for Administrative Review by Waste  
Connections of Washington, Inc. ¶ 38 at 13.

24 <sup>16</sup> Waste Management’s and Enviro/Con Trucking’s Answer to Petition for Administrative Review by Waste  
Connections of Washington, Inc. ¶ 39 at 13.

25 <sup>17</sup> Waste Management’s and Enviro/Con Trucking’s Answer to Petition for Administrative Review by Waste  
Connections of Washington, Inc. ¶ 40 at 13, 14.

1 of the County in representing the public interest (which again has been in this  
2 proceeding since its inception), does not render that recognized role in representing the  
3 public interest or in solid waste management under state law a consideration for  
4 exception to the mootness doctrine “new,” or provide the Respondents an automatic  
5 right to reply when the issue is nuanced differently. They have had, as noted, repeat  
6 opportunities to anticipate and respond to these claims and have previously done so.

7 **II. CONCLUSION**

8 <sup>16</sup> While Respondents unmistakably, and possibly even understandably want not only the  
9 last word, but also the last word *in reply* in this proceeding, there has to be a finite point  
10 at which pleadings are concluded. In short, the Respondents are not entitled to yet  
11 another proverbial bite at the apple no matter how much they wish to dress up their  
12 Petition and Reply in what is ultimately presented as cumulative and recalibrated  
13 attacks on the positions’ of the Complainant and the Intervenors. As demonstrated,  
14 what they lack in successfully replying is identification of a legitimate new challenge to  
15 the Order or any new issue raised in the Intervenor Answers which could not have been  
16 reasonably foreseen.

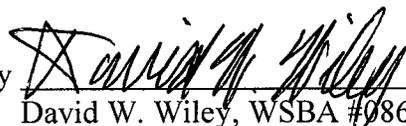
17 <sup>17</sup> In the end, there is a sense of some desperation in Respondents’ proposed Petition and  
18 Reply. Having ostensibly orchestrated completion and/or obfuscation of the particular  
19 problem raised in the initial complaint by heretofore successfully invoking the  
20 mootness doctrine and aggressively seeking to block any further consideration of what  
21 they contrived to present as an academic, non-justiciable matter, they attempt to leave  
22 no procedural stone unturned to ensure their actions are beyond scrutiny of the  
23 administrative agency charged by the legislature with construing the law and rules  
24 against the actions complained of. Their problem at this particular juncture is simply  
25

1 the procedural rule they rely on to yield one last forum leaves them without a safe  
2 harbor.

3 <sup>18</sup> The Complainant thus asks that Respondents Waste Management Disposal Service of  
4 Oregon, Inc.'s and Enviro/Con & Trucking, Inc.'s joint Petition for Leave and Reply to  
5 Intervenors' Answers be denied.

6 DATED this 23 day of June, 2008.

7 WILLIAMS, KASTNER & GIBBS PLLC

8 By  \_\_\_\_\_

9 David W. Wiley, WSBA #08614  
10 Attorneys for Complainant WASTE  
11 CONNECTIONS OF WASHINGTON, INC.

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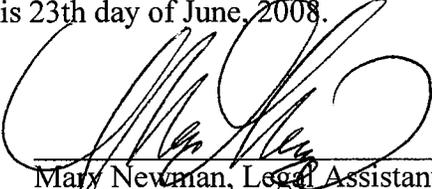
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**CERTIFICATE OF SERVICE**

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 23th day of June, 2008.

  
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 Mary Newman, Legal Assistant