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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

WASTE MANAGEMENT DISPOSAL
SERVICES OF OREGON, INC., and
ENVIRO/CON & TRUCKING, INC.,

Petitioners,

v.

WASTE CONNECTIONS OF
WASHINGTON, INC., and
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Respondents.

CASE NO.

PETITION FOR JUDICIAL REVIEW

(1) Petitioners

Waste Management Disposal Services of Oregon, Inc.
18177 Cedar Springs Lane
Arlington, Oregon 97812

Enviro/Con & Trucking, Inc.
PNB 509
26910 92nd Avenue NW, Suite C5
Stanwood, WA 98292

(2) Petitioners' Attorneys

Polly L. McNeill
Jessica L. Goldman
Summit Law Group PLLC

PETITION FOR JUDICIAL REVIEW - 1

SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE SOUTH, SUITE 1000
SEATTLE, WASHINGTON 98104-2682
Telephone: (206) 676-7000
Fax: (206) 676-7001

1 315 5th Ave. South, Ste. 1000
2 Seattle, WA 98104

3 (3) Agency's Address

4 Washington State Utilities and Transportation Commission
5 1300 S. Evergreen Park Drive S.W.
6 Olympia, WA 98504-7250

7 (4) Agency Action at Issue

8 Attached hereto is the final order of the Washington State Utilities and Transportation
9 Commission ("WUTC" or "Commission") in Docket TG-071194 served on October 7, 2008 and
10 denominated *Order Granting Petition for Administrative Review; Reversing Initial Order, and*
11 *Ordering Hearing on the Merits; Granting Motion for Leave to File Reply* (the "Final Order").

12 (5) Parties to Adjudicative Proceeding

13 COMPLAINANT BELOW: Waste Connections of Washington, Inc.

14 RESPONDENT BELOW: Waste Management Disposal Services of Oregon, Inc.

15 RESPONDENT BELOW: Enviro/Con & Trucking, Inc.

16 RESPONDENT BELOW: Envirocon, Inc.¹

17 INTERVENOR BELOW: Clark County

18 INTERVENOR BELOW: Washington Refuse and Recycling Association

19 (6) Facts Demonstrating Right to Judicial Review

20 Respondent, Waste Connections of Washington, Inc. ("Waste Connections") filed before
21 the WUTC a *Complaint and, Alternatively, Petition for Declaratory Order, and Application for*
22 *Brief Adjudicative Proceeding* ("Complaint") alleging that Petitioners, Waste Management
23 Disposal Services of Oregon, Inc. ("Waste Management") and Enviro/Con & Trucking, Inc.
24 ("ECTI") (collectively, "Environmental Contractors" or "Petitioners") had, without proper
25 authority, collected, transported and disposed of construction debris and/or construction waste
26 ("C & D Waste") in the course of an environmental cleanup that involved dismantling the

¹ Envirocon, Inc. was dismissed by the Administrative Law Judge and is not subject to the Final Order.

1 Evergreen Aluminum Smelter facility (the “Remediation Site”) in Clark County. Waste
2 Connections asked the WUTC to either (1) order the Environmental Contractors to cease and
3 desist from engaging in the collection and/or transportation of C & D Waste located at the
4 Remediation Site or (2) issue a declaratory order that the collection of C & D Waste from the
5 Remediation Site required a Certificate of Public Convenience and Necessity authorizing
6 garbage collection from the WUTC.

7 The Environmental Contractors filed a Motion for Summary Determination on the basis
8 that Waste Connections’ Complaint was moot because the removal of C & D Waste from the
9 Remediation Site had been completed. A case is moot if the issues presented are purely
10 academic and the adjudicative body can no longer provide effective relief. *Orwick v. City of*
11 *Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984); *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d
12 658 (1983). Because the services challenged in the Complaint had been completed, the
13 Complaint presented a purely academic issue that was not tied to any effective request for relief.
14 For the same reasons, the Complaint had failed to allege a justiciable controversy. *To-Ro Trade*
15 *Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

16 The WUTC Administrative Law Judge (“ALJ”) agreed the Complaint was moot, granted
17 the Environmental Contractors’ Motion, and dismissed the Complaint. Following a Petition for
18 Administrative Review by Waste Connections, the Commission ruled that “the doctrine of
19 mootness applies to the remedy sought in the complaint (a cease and desist order)....” (Final
20 Order ¶ 16 [emphasis added].)

21 Nonetheless, the Commission went on to hold that proceedings should continue before
22 the ALJ to determine whether there existed a remedy that would be meaningful, even though
23 Waste Connections did not request any such other relief in its Complaint. (*Id.* ¶ 18.) Going
24 beyond the issues addressed by the parties in their briefs to the WUTC, the Commission
25 speculated that “a penalty may be an appropriate sanction even though a cease and desist order
26

1 might be moot” and pointed to RCW 81.01.110 as the possible basis for a remedy that Waste
2 Connections never sought. (*Id.*) That statute provides in relevant part:

3 Complaint may be made by the commission of its own motion or
4 by any person or corporation . . . , by petition or complaint in
5 writing, setting forth any act or thing done or omitted to be done by
6 any public service company or any person, persons, or entity acting
7 as a public service company in violation, or claimed to be in
8 violation, of any provision of law or of any order or rule of the
9 commission.

7 RCW 81.01.110. Consequently, the Commission ordered the return of the matter to the ALJ “to
8 determine whether the Complainant wishes to amend the complaint to seek a remedy that is
9 available and, if so, whether such an amendment should be granted and the litigation allowed to
10 continue.” (Final Order ¶ 19.)

11 The Final Order was certified as a final order of the Commission subject to judicial
12 review and served on the parties October 7, 2008.

13 (7) Reasons Why Relief Should Be Granted

14 The relief requested herein should be granted because the Commission has engaged in
15 unlawful procedure or decision-making process and has erroneously interpreted or applied the
16 law, and because the Final Order is arbitrary or capricious and outside the WUTC’s authority.
17 RCW 34.05.570(3)(b, c, d, i). In the Final Order, the Commission agreed that the Complaint, as
18 pleaded, was moot. The outcome of the Final Order is contrary to that express acknowledgement
19 and for this reason alone it is erroneous.

20 The only reason the Commission did not affirm the ALJ’s dismissal of this moot case is
21 because the Commission hypothesized that Respondent might belatedly be inclined to add a
22 request for relief under RCW 81.01.110 – even though such relief was not requested by
23 Respondent in its Complaint. The Commission essentially went outside the record before it, and
24 invented grounds for remanding the case. The Commission went so far as to wonder “whether
25 [Waste Connections] wishes to amend the complaint” to seek a remedy now that the Commission
26 has provided a road-map suggesting how to possibly cure fatally-flawed pleadings. However, in

1 the actual Complaint that establishes the record to be considered on administrative review, Waste
2 Connections did not, in fact, plead the claim suggested by the Commission, did not request the
3 relief speculated by the Commission, and did not raise the issue to the Commission at any time.
4 See RCW 34.05.464(5) (the Administrative Procedures Act limits administrative review to the
5 record); RCW 80.01.060 (limiting the Commission's review of initial orders to the record). The
6 Final Order is unlawful because it was based on an issue that was not pleaded by Waste
7 Connections. *State ex rel. Bohon v. Department of Pub. Serv.*, 6 Wn.2d 676, 108 P.2d 663, 667
8 (1940) (the agency is limited to hearing and determining only issues raised by pleadings).

9 Consequently, the Final Order is error because (1) contrary to the Commission's own
10 statement, the Complaint is moot and the Initial Order should therefore have been upheld; and
11 (2) the Commission reached beyond the record and invented grounds not pled by Waste
12 Connections as a basis for reversing the Initial Order.

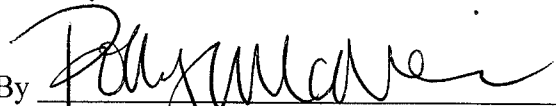
13 (8) Request for Relief:

14 Petitioners request that this Court (a) set aside the Commission's Final Order, and (b)
15 order the WUTC to reinstate the ALJ's Initial Order granting the Motion for Summary
16 Determination, and (c) order the WUTC to dismiss Waste Connections' Complaint with
17 prejudice.

18 DATED this 6th day of November, 2008.

19 Respectfully submitted,

20 SUMMIT LAW GROUP PLLC
21 Attorneys for Petitioners

22 By 
23 Polly L. McNeill, WSBA # 17437
24 pollym@summitlaw.com
25 Jessica L. Goldman, WSBA # 21856
26 jessicag@summitlaw.com

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASTE CONNECTIONS OF)	DOCKET TG-071194
WASHINGTON, INC.,)	
)	
Complainant,)	ORDER 05
)	
v.)	
)	ORDER GRANTING PETITION
ENVIRO/CON & TRUCKING, INC., a)	FOR ADMINISTRATIVE
Washington Corporation, and WASTE)	REVIEW; REVERSING INITIAL
MANAGEMENT DISPOSAL)	ORDER, AND ORDERING
SERVICES OF OREGON, INC.,)	HEARING ON THE MERITS;
)	GRANTING MOTION FOR
Respondents.)	LEAVE TO FILE REPLY
)	
.....)	

1 **Synopsis:** *This Order grants Waste Connections of Washington, Inc.'s petition for administrative review and reverses the Administrative Law Judge's initial order, finding that where alternative remedies are available, the fact that the remedy sought in the complaint may be moot does not warrant dismissal of the complaint without considering amendment of the complaint to reflect other available remedies. The Order requires a hearing to determine whether an amendment of the complaint to seek alternative remedies, such as a penalty, should be allowed. The Order also finds that the Commission does not make an inference, positive or negative, about a Staff decision to participate or not to participate in a private complaint before the Commission. Finally, the Order grants the Respondents' motion for leave to file a reply to the petition for review.*

2 **Proceeding.** This matter involves a private party complaint, or in the alternative, a petition for declaratory order, filed by Waste Connections of Washington, Inc. (Waste

Connections or Complainant) against Enviro/Con & Trucking, Inc. (ECTI) and Waste Management Disposal Services of Oregon, Inc. (Waste Management).

3 **Appearances:** David W. Wiley, Williams, Kastner & Gibbs, PLLC, Seattle, Washington, represents Waste Connections. Polly L. McNeil, Summit Law Group, PLLC, Seattle, Washington, represents ECTI and Waste Management (collectively "Respondents"). James K. Sells, Ryan Sells Uptegraft, Inc. P.S., Silverdale, Washington, represents the Washington Refuse and Recycling Association (WRRRA). E. Bronson Potter, Sr., Deputy Prosecuting Attorney for Clark County, Washington, represents Clark County.

MEMORANDUM

I. Factual Background

4 On June 8, 2007, Waste Connections filed a complaint, alternatively a petition for declaratory order, and an application that the matter be heard as a brief adjudicative proceeding. The complaint alleged that ECTI had collected and transported solid waste in the nature of construction or demolition waste or debris (C & D waste) from the Evergreen Aluminum Smelter environmental remediation site in Clark County without having the proper authority from this Commission. Waste Connections contended that ECTI and Waste Management had assumed overall responsibility for the transportation and disposal of C & D waste from the remediation site. Waste Connections argued that these activities were illegal because they were conducted without a certificate of public convenience and necessity issued by the Commission pursuant to RCW 81.77.040 and WAC 480-70-081.

5 Waste Connections asked the Commission to grant relief either through an order directing the Respondents to cease and desist their operations at the remediation site, or alternatively, a declaratory order that the Respondents' actions at the site violate RCW 81.77.040 and WAC 480-70-081.

6 The remediation site held a former aluminum smelter and fabrication plants. The Washington Department of Ecology entered an Enforcement Order during 2007 requiring the site owner, Evergreen Aluminum LLC, to clean up hazardous waste and

materials at the site. The project involved demolition of the smelter facilities to allow access to, and removal of, contamination. A portion of the waste generated at the remediation site was C & D waste that was transported for disposal.

7 All the facilities at the site have now been demolished except the scalehouse and guardhouse (which are to remain on the property for the subsequent owner), and a steel-sided equipment storage structure (which is to be recycled). Work involving collection and/or transportation of C & D waste by the Respondents was completed prior to the time the Respondents filed their motion to dismiss the complaint.

II. Procedural History

8 **Motion for Summary Determination.** On March 3, 2008, Respondents moved for summary determination, arguing mootness. Complainant Waste Connections answered, arguing that a public policy exception to the doctrine of mootness should be applied to allow the complaint to go forward. Intervenor WRRRA and Clark County also filed answers supporting the Complainant. The Respondents filed a reply to the answers.

9 On April 22, 2008, Administrative Law Judge Dennis Moss entered an initial order granting the motion.

10 Waste Connections petitioned for review of the initial order on May 30, 2008. Clark County, WRRRA and Respondents answered the petition.

11 Respondents filed a petition for leave to file a reply to the intervenors' answers, attaching a reply. Waste Connections filed its Opposition to Respondents' Petition and Reply to Intervenor's Answers. WRRRA joined in Waste Connections' opposition.

12 **Initial Order.** The initial order explored the nature of mootness, found that the complaint became moot with the completion of the contract to haul material from the site, and determined that there was no adequate showing that a "public interest" exception to mootness should be applied. The initial order also noted the absence of Commission Staff from the proceeding, acknowledged the value of Staff

contributions to the record in private complaint proceedings, and observed that it could be possible to infer from the lack of Staff participation that the complaint fails to raise issues of policy significance to the Commission. The initial order also observed that because the specific project has been completed, Waste Connections' requested relief of an order to cease and desist would serve no purpose.

13 **Petition for Review.** Waste Connections seeks review, arguing that the Commission should reverse the initial order and hear the evidence because doing so would serve a significant public purpose.

14 Waste Connections also contests the suggestion that Staff's lack of participation indicates that the policy issues in the proceeding are not significant. Waste Connections offers the declaration of Chris Rose, the Commission's Director of Regulatory Services, in support of its petition. In his declaration, Mr. Rose states that the absence of Staff participation in any complaint proceeding should support no inference, positive or negative, because Staff has no obligation to participate in private complaints and many reasons contribute to a Staff decision regarding participation.

III. Discussion

A. Mootness

15 All parties agree that the subject of the complaint – the Respondents' transportation and disposal of C & D waste at the Evergreen Aluminum Smelter has concluded, and that there is no legal need for an order to cease and desist from performance of a specific activity that has concluded and is not shown to recur. However, the parties dispute whether the proceeding should be dismissed as moot. Waste Connections, WRRRA and Clark County all urge the Commission to acknowledge and apply a public interest exception to the doctrine of mootness.¹ They allege great significance to the industry and public policy in resolving the question of whether a carrier without solid waste authority may transport C & D waste to a transfer station or landfill for

¹ See, *In re Personal Restraint of Silas*, 135 Wn.App 564, 145 P.3d 1219 (2006); see also *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994).

disposal. The Respondents argue that the public interest exception does not apply in this matter.

16 We have reviewed the facts and arguments presented in the parties' pleadings and conclude that while the doctrine of mootness applies to the remedy sought in the complaint (a cease and desist order) the complaint itself is an "enforcement or penalty proceeding in which the Commission could take effective action for past wrongdoing."² Thus, we must consider whether there are other remedies that would not be moot if the complaint were to be amended.

17 As the name implies, an enforcement action seeks to enforce a state law or Commission rule or order and thus by its nature involves the public interest. Under the complaint statute, RCW 81.04.110, the Commission, a municipal corporation or other "body politic" or a private entity may file a complaint alleging that a public service company or a person or entity acting as a public service company has violated the law, a Commission order or rule.³ By giving equal standing to other persons or entities to enforce the law, the statute recognizes that in bringing such a complaint, a private entity is advocating in the public interest as well as its own.

18 While mootness does apply to the remedy sought in Waste Connection's complaint, we believe the inquiry should not stop there. Because a private complaint brought under the first paragraph of RCW 81.04.110 promotes the public interest in enforcement of the law, such a proceeding may continue, whether or not the action complained of has ceased, if the remedy is one that would be meaningful. For example, if an alleged unlawful activity has ceased, a penalty may be an appropriate sanction even though a cease and desist order might be moot.

² Initial Order, ¶ 16.

³ The first paragraph of RCW 81.04.110 provides:

Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service company or any person, persons, or entity acting as a public service company in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.

- 19 WAC 480-07-395 provides that pleadings shall be liberally construed and that amendments shall be allowed to effect the ends of justice.⁴ Here, given the substantial interest in enforcement actions, and the Commission's policies of liberal construction of pleadings and allowance of amendments, we return the matter to the Administrative Law Judge to determine whether the Complainant wishes to amend the complaint to seek a remedy that is available and, if so, whether such an amendment should be granted and the litigation allowed to continue. We need not reach the issue of whether there is an applicable exception to the mootness doctrine.
- 20 The declaratory order portion of the pleading contained procedural flaws,⁵ and the matter was allowed to proceed as prosecuted, in the form of a complaint. We decline to address Waste Connection's request that we alternatively consider the issues in a declaratory order proceeding.
- 21 The Commission will issue a notice of prehearing conference to determine further steps in this matter, consistent with this Order.

B. Commission Staff Participation

- 22 We agree with the thrust of the initial order's comments about participation by Commission Staff. In essence, the order observed that in matters involving regulatory policy, the record may be enhanced by participation of Staff. Staff brings a neutral expertise to the record when it participates in a proceeding, allowing the private litigants the opportunity to consider and respond to the ideas presented, and further developing the record and the Commission's ability to act confidently in the public interest.
- 23 We are directed by statute to "Regulate in the public interest, as provided by the public service laws, all persons engaging in the transportation of persons or property

⁴ WAC 480-07-395 reads in part as follows:

(4) **Liberal construction of pleadings and motions.** The commission will liberally construe pleadings and motions with a view to effect justice among the parties. The commission, at every stage of any proceeding, will disregard errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties,

⁵ See, WAC 480-07-931(1)(a) and (1)(b).

within this state for compensation.”⁶ Unlike a court, therefore, we have a duty to view the rights, positions, and arguments of the parties in the broader context of the public interest under Title 81. Individual litigants may be unconcerned with that public interest or may have a self-centered view of the relevant public interest, and therefore may have no incentive to add evidence or argument to the record that will present a public interest perspective different from their own business interests.

24 However, while the participation of Staff can be valuable, many factors determine whether Commission Staff will participate in any given proceeding. These include competing and more immediate priorities for allocation of staff and financial resources. Thus, we make no inference from Staff’s appearance or absence in a private complaint proceeding.

C. Respondents’ Motion for Leave to File Reply

25 The Respondents filed a petition for leave to reply to the answers Clark County and WRRRA filed in support of Waste Connections’ Petition for Review, attaching a reply. Waste Connections filed in opposition of Respondents’ petition and reply. WRRRA joined in Waste Connections’ pleading.

26 A party that does not file a petition for review may challenge the initial order in its answer to the petition for review.⁷ Parties have the right to reply to address new challenges to an initial order raised in answers to petitions for review.⁸ Other than to address new challenges, parties are not entitled to reply to an answer, but may petition for leave to reply to address “new matters raised in the answer and state why those matters were not reasonably anticipated and why a reply is necessary.”⁹

27 Respondents claim that they are entitled as of right to reply to new challenges to the initial order raised by intervenors Clark County and WRRRA, specifically that the participation of Clark County should trigger the public interest exception to the

⁶ RCW 80.01.040(2).

⁷ WAC 480-07-825(4)(c).

⁸ WAC 480-07-825(5)(a).

⁹ WAC 480-07-825(5)(b).

mootness doctrine.¹⁰ In the event we find the Respondents do not have a right to reply, they seek leave to reply to new matters that were not reasonably anticipated.¹¹

28 Waste Connections argues that the issue that Clark County and WRRRA raise is neither a new challenge nor a new issue that was not reasonably anticipated. Waste Connections notes that the public interest role of the County in seeking compliance with its solid waste management plan is not a new issue; Waste Connections asserts that the parties addressed the issue at the first prehearing conference when addressing Clark County's petition for intervention.¹² Given the prior arguments on this issue, Waste Connections argues that Respondents should have anticipated the intervenors would address the issue in answers to the petition for review.

29 We find that the issue raised in the intervenors' answers is a new challenge to the initial order, and that Respondents have a right to file a reply to address the issue. The issue of compliance with Clark County's solid waste management plan and the County's interests as a basis for a public interest exception to the mootness doctrine are not new or unanticipated in the litigation. However, the issue was not addressed in Waste Connections' petition for review, and is thus a new challenge to the initial order, to which parties may respond as of right under our procedural rules. We allow Respondents' reply and grant the motion for leave to reply.

FINDINGS OF FACT¹³

30 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

¹⁰ Respondent's Petition for Leave to Reply, ¶ 7.

¹¹ *Id.*

¹² Waste Connections' Opposition, ¶¶ 5-7.

¹³ We recognize that the only record at this point on which facts may be based are the complaint and the parties' pleadings, but we state these agreed facts as the setting in which we make this decision.

- 31 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate the rates, rules, regulations, practices, and accounts of public service companies, including solid waste companies.
- 32 (2) Waste Connections is a solid waste company and a public service company subject to Commission jurisdiction, holding Certificate of Public Convenience and Necessity No. G-253.
- 33 (3) Waste Connections alleges in its complaint that Respondents ECTI and Waste Management engaged in, or were responsible for, the collection and transportation of construction debris and /or construction and demolition (C & D) waste over the public highways of the state of Washington from the Evergreen Aluminum Smelter environmental remediation site in unincorporated Clark County, Washington, to Hillsboro, Oregon, without a certificate of public convenience and necessity issued by the Commission, in violation of RCW 81.77.040.
- 34 (4) The collection and transportation of C & D waste at the Evergreen Aluminum site was completed by the time the Respondents filed their motion for summary determination.

CONCLUSIONS OF LAW

- 35 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:
- 36 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings.
- 37 (2) A complaint brought by a private entity under the first paragraph of RCW 81.04.110 alleging violation of laws or rules is an enforcement proceeding that

may continue, whether or not the action complained of has ceased, if the remedy sought would be meaningful.

- 38 (3) The Commission makes no inference from the Commission Staff's appearance or absence in a proceeding, as many factors determine whether Staff will participate in any given proceeding.
- 39 (4) Parties are entitled to reply to an answer to a petition for review of an initial order if the answer raises new challenges to the order not raised in the petition for review. *WAC 480-07-825(5)(a)*.

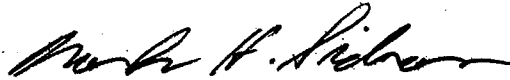
ORDER

THE COMMISSION ORDERS:

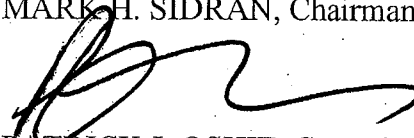
- 40 (1) The Petition for Administrative Review filed by Waste Connections of Washington, Inc., is granted.
- 41 (2) Order 03, the Initial Order in this proceeding, is reversed.
- 42 (3) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective October 7, 2008.

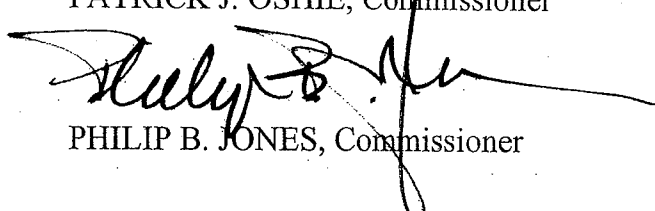
WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION



MARK H. SIDRAN, Chairman



PATRICK J. OSHIE, Commissioner



PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.