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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'S OPPOSITION TO
MOTION TO AMEND AND,
ALTERNATIVELY,
MOTION TO DISMISS

I. RELIEF REQUESTED

1. Respondents Waste Management Disposal Services of Oregon, Inc. ("WM Services") and Enviro/Con & Trucking, Inc. ("E/C Trucking") request that the *Motion to Amend the Complaint* brought by Waste Connections, Inc. ("Waste Connections") be denied. Alternatively, if amendment of the Complaint is permitted, WM Services and E/C Trucking move for dismissal with prejudice of the Amended Complaint.

II. STATEMENT OF FACTS

2. The relevant facts are not disputed.¹ The precipitating events occurred in the course of an environmental remediation at the Evergreen Aluminum Smelter in Clark County,

¹ Neither the *Opposition to the Motion to Amend* nor the *Motion to Dismiss* rely on these facts, and this section is intended only for the purpose of providing background and context.

1 Washington (the "Remediation Site").² The defunct aluminum smelter and fabrication
2 plant was contaminated with polynuclear aromatic hydrocarbons, polychlorinated
3 biphenyls, petroleum hydrocarbons, cyanide, fluoride and metals.³ These contaminants
4 exceeded the levels set forth in the Washington Model Toxics Control Act, Ch. 70.105D
5 RCW ("MTCA"), the statute governing environmental cleanups.⁴ The environmental
6 cleanup of the smelter was the subject of a hazardous waste cleanup under MTCA that
7 was directed by the Department of Ecology.⁵

8 3. Work at the Remediation Site involved a massive removal of hazardous waste and
9 materials containing hazardous substances. The cleanup required demolition of the
10 aluminum smelter facilities to access contamination underneath the structures and prepare
11 the property for sale to the Port of Vancouver.⁶ According to a WM Services project
12 coordinator, less than ten percent of the waste generated at the Remediation Site was
13 nonhazardous demolition debris ("Demo Waste").⁷

14 4. On June 8, 2007, Waste Connections commenced an administrative proceeding with the
15 WUTC by filing a Complaint and, Alternatively, Petition for Declaratory Order, and
16 Application for Brief Adjudicative Proceeding ("Complaint"). Waste Connections
17 contended that E/C Trucking and WM Services (collectively, "Environmental
18 Contractors") had together assumed overall responsibility for the transportation and
19 disposal of Demo Waste from the Remediation Site, and E/C Trucking had collected and
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21 ² *Complaint and, Alternatively, Petition for Declaratory Order, and Application for Brief Adjudicative*
22 *Proceeding* ("Complaint.") ¶ 5.

23 ³ Mar. 4, 2008 Decl. of Polly L. McNeill, Ex. 2 at 5-6 (attached to *Waste Management's and Enviro/Con*
Trucking's Motion for Summary Determination).

24 ⁴ *Id.* at 6.

25 ⁵ *Id.*, Ex. 2.

26 ⁶ *Id.* at 6-9.

⁷ Mar. 4, 2008 Decl. of Troy L. Tyacke ("Tyacke Decl.") (attached to *Waste Management's and Enviro/Con*
Trucking's Motion for Summary Determination).

1 transported Demo Waste from the Remediation Site.⁸ Waste Connections complained that
2 these activities constituted the regulated collection of garbage subject to the WUTC's
3 jurisdiction under Ch. 81.77 RCW, for which a certificate of convenience and necessity (a
4 "G Certificate") was required.

5 5. In its request for relief, Waste Connections asked that the Commission either order the
6 Environmental Contractors to cease and desist from collecting and/or transporting Demo
7 Waste from the Remediation Site or issue a declaratory order that the collection of Demo
8 Waste from the Remediation Site was in violation of RCW 81.77.040 and WAC 480-70-
9 081 and required a G Certificate.⁹

10 6. Before any evidence was presented, the Environmental Contractors filed a Motion for
11 Summary Determination before Administrative Law Judge ("ALJ") Dennis J. Moss.¹⁰
12 The Environmental Contractors moved to have the Complaint dismissed because it was
13 moot and no longer presented a justiciable controversy. All the facilities at the site had
14 been demolished with the exception of three remaining structures: the scalehouse and
15 guardhouse (which was to remain on the property for the subsequent owner), and a steel-
16 sided equipment storage structure (which was to be recycled).¹¹ Work involving
17 collection and/or transportation of Demo Waste by the Environmental Contractors was
18 completed.¹² Thus, the Commission could not effectively issue a cease and desist order
19 and a declaratory order would be purely academic.

20 7. In its opposition brief, Waste Connections did not dispute that the challenged Demo
21 Waste collection was complete. Rather, Waste Connections argued that the ALJ should
22 apply a limited exception to the mootness doctrine, namely that a moot case may

23 ⁸ Complaint ¶¶ 5-6.

24 ⁹ *Id.* ¶¶ 11, 13.

25 ¹⁰ Mar. 4, 2008 *Waste Management's and Enviro/Con Trucking's Motion for Summary Determination*.

26 ¹¹ Tyacke Decl. ¶ 4.

¹² *Id.* ¶ 5.

1 nonetheless be adjudicated where it involves matters of continuing and substantial public
2 interest.¹³

3 8. On April 22, 2008, Judge Moss granted the *Motion for Summary Determination* (the
4 “ALJ’s Order”) and dismissed the case, holding:

5 Since Respondents have ceased the activities of which Waste
6 Connections complains, a cease and desist order from the
7 Commission would be meaningless. Waste Connections, as a
8 practical matter, already has obtained this form of relief that it
9 requests via it [sic] Complaint.

10 We similarly cannot give Waste Connections any meaningful relief
11 on the facts of this case, as pled, by declaring Respondents should
12 have had a certificate to perform some or all of the activities they
13 undertook at the Evergreen Aluminum facility. Declaratory
14 judgment relief is improper if it does not relate to a justiciable
15 controversy. Under the standards that define such a controversy,
16 there is none present here. Other than as possible disputants of an
17 academic question, there are no genuine and opposing interests
18 between these parties. There are no direct and substantial interests
19 at stake insofar as the issues were joined in this proceeding.¹⁴

20 9. On May 30, 2008, Waste Connections petitioned the Commission to review the ALJ’s
21 Order. Waste Connections conceded that its request for a cease and desist order was
22 academic and moot.¹⁵ Nonetheless, it pressed its request for declaratory relief and
23 application of the public interest exception to the mootness doctrine.¹⁶

24 10. On October 7, 2008, the Commission reversed the ALJ’s decision,

25 finding that where alternative remedies are available, the fact that
26 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

¹³ Mar. 18, 2008 *Answer to Motion for Summary Determination* at 3.

¹⁴ Apr. 22, 2008 *Order 03 Granting Motion for Summary Determination* (“Order 03”) ¶¶ 14-15 (fns. omitted).

¹⁵ June 2, 2008 *Petition for Administrative Review by Waste Connections of Washington, Inc. of Order 03 Granting Motion for Summary Determination* (“Petition for Administrative Review”) ¶ 8.

¹⁶ *Id.* ¶¶ 9, 27-34.

1 hearing to determine whether an amendment of the complaint to
2 seek alternative remedies, such as a penalty, should be allowed.¹⁷

3 11. Waste Connections had never argued that it should be granted leave to amend its
4 Complaint to seek some other form of relief and the issue was not briefed by any of the
5 parties. The Commission held that the proceedings could continue if Waste Connections
6 could identify a remedy “that would be meaningful.”¹⁸ It hinted that “if an alleged
7 unlawful activity has ceased, a penalty may be an appropriate sanction even though a
8 cease and desist order might be moot.”¹⁹ Consequently, the Commission remanded “to
9 determine whether the Complainant wishes to amend the complaint to seek a remedy that
10 is available and, if so, whether such an amendment should be granted and the litigation
11 allowed to continue.”²⁰

12 12. On November 6, 2008, the Environmental Contractors timely petitioned for judicial
13 review by the Thurston County Superior Court. On August 7, 2009, the Superior Court
14 affirmed the Commission’s Order.

15 13. Not surprisingly, Waste Connections now seeks to amend its moot Complaint. It revised
16 its original Complaint to request three “findings”: (1) that the Environmental Contractors
17 engaged in the unlawful collection and transportation of C & D waste from the
18 Remediation Site; (2) that the Environmental Contractors deprived Waste Connections of
19 revenues; and (3) that these activities “be found eligible for referral” to the State “to
20 consider seeking” the imposition of penalties because the Environmental Contractors’ past
21 activities are grounds for “potentially subjecting” the Environmental Contractors “to fine”
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23
24 ¹⁷ Oct. 7, 2008 Order 05 Granting Petition for Administrative Review; Reversing Initial Order, and Ordering
Hearing on the Merits; Granting Motion for Leave to File Reply (“Order 05”) ¶ 1.

25 ¹⁸ *Id.* ¶ 18; *accord* ¶ 37.

26 ¹⁹ *Id.* ¶ 18.

²⁰ *Id.* ¶ 19.

1 and to “such other and further relief” as the Commission “may subsequently deem”
2 appropriate.²¹

3 **III. STATEMENT OF ISSUES**

4 14. Should Waste Connections’ Motion to Amend be denied because it has failed to identify
5 any meaningful and authorized remedy?

6 15. If Waste Connections’ Motion to Amend is granted, should the Amended Complaint be
7 dismissed for failure to state a claim upon which relief may be granted?

8 **IV. EVIDENCE RELIED UPON**

9 16. In opposing the Motion to Amend, the Environmental Contractors rely on the
10 administrative record.

11 17. In moving for dismissal of an Amended Complaint, the Environmental Contractors rely
12 solely on the allegations in the Amended Complaint.

13 **IV. LEGAL ANALYSIS**

14 18. In the interests of administrative efficiency, the Environmental Contractors herein submit
15 in one pleading two different bases for dismissing Waste Connections’ lawsuit. Firstly,
16 the Environmental Contractors oppose the Motion to Amend, and present below the legal
17 reasons for denying Waste Connections’ request. If the Motion to Amend is denied, then
18 no further analysis is needed. If, however, the Motion to Amend is granted, the
19 Environmental Contractors believe the lawsuit should be dismissed for failure to state a
20 claim upon which relief can be granted.

21 **A. THE MOTION TO AMEND SHOULD BE DENIED.**

22 19. In Order 05, the Commission agreed that the matter as pled was moot.²² It then bypassed
23 the question of whether Waste Connections had met its burden of establishing a public
24 interest exception to mootness, by encouraging Waste Connections to go back and plead a

25 ²¹ Proposed Amended Complaint ¶ 10; *Motion of Complainant Waste Connections of Washington, Inc. for Leave*
26 *to File Amended Complaint (“Motion to Amend”) ¶ 2.*

1 different case than the one it pled, to pursue a different complaint than the one it filed, and
2 to seek a different remedy than the one it requested. The Commission, however, stated
3 that this proceeding might continue only “if the remedy is one that would be meaningful.”
4 It therefore conditioned the ability of Waste Connections to amend its complaint on a
5 demonstration that the proceeding could result in a “meaningful” remedy. Waste
6 Connections has failed to meet its burden of making that demonstration, and therefore its
7 Motion to Amend should be denied.

8 **a. The Proposed Amended Complaint Does Not Seek “Other Remedies**
9 **That Would Not Be Moot.”**

10 20. Waste Connections’ Proposed Amended Complaint looks much like the Complaint that
11 was dismissed by the Commission. Waste Connections still wants the Commission to
12 conduct a hearing “to establish a factual record as to whether the Respondents’ operations
13 violate RCW 81.77.040 and WAC 480-70-081, as originally alleged.”²³ The amendments,
14 however, are not substantively different from the declaratory relief requested by Waste
15 Connections in its original complaint. Waste Connections now requests a series of
16 “findings” yet mere word changes cannot disguise the essential nature of the request. The
17 Proposed Amended Complaint still seeks declaratory relief – a remedy that was found
18 moot before and is now sought again. Whether it is called a “finding” or a “declaration,”
19 the relief remains tantamount to seeking an advisory opinion.²⁴
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22 ²² Order 05 ¶ 18.

23 ²³ Motion to Amend ¶ 2.

24 ²⁴ The Environmental Contractors direct the Administrative Law Judge’s attention to the legal analysis presented
25 in the *Motion for Summary Determination*, related briefings of the parties, and the subsequent orders. At no point,
26 even in the Commission’s final Order 05, was there any dispute about the mootness of the original pleadings. In
Order 05, the Commission suggested that Waste Connections might be willing to amend its original Complaint, not
merely reconstitute it. The Environmental Contractors are surprised to find that the requested relief in the Proposed
Amended Complaint is essentially the same as what was sought in the original Complaint, and although we do not
wish to rehash the dispute of mootness, it nonetheless is unfortunately relevant given how little difference there is in
the relief requested.

1 21. None of these so-called causes of action are brought pursuant to the declaratory order
2 provisions of the Administrative Procedures Act, which prohibits the rendering of
3 advisory opinions,²⁵ and Waste Connections has strategically removed all references to
4 that statute from its Proposed Amended Complaint.²⁶ However, deleting citations to the
5 statute cannot change the nature of the request. It certainly cannot be the basis for
6 converting a heretofore meaningless and moot action into one with significance.

7 **b. The Proposed Amended Complaint Asks For Unspecified Other**
8 **Remedies That Are Too Speculative To Be “Meaningful”.**

9 22. There is, however, one new aspect to the declarations sought – a finding that the activities
10 at issue are “eligible for referral” to the State. Waste Connections is to be credited for
11 clearly stating its ultimate goal, i.e., to persuade the Commission to bring a penalty action.
12 Yet, Waste Connections could easily have done so – and presumably may have tried –
13 through a phone call or a letter to the Commission, not through this ill-conceived,
14 resource-wasting private party complaint. Not only is this the wrong avenue for the relief
15 sought, but RCW 81.04.110 does not authorize public service company complainants to
16 seek from the Commission, in its adjudicatory capacity, an advisory “referral” to the
17 Commission Staff to “consider seeking” further action in its prosecutorial capacity.²⁷

18 23. Furthermore, to the extent it seeks anything other than a declaratory “finding,” the
19 Proposed Amended Complaint is speculative. A penalty proceeding brought by the State
20 against the Environmental Contractors is dependent on the Commission’s actions outside
21 of and subsequent to this litigation. There is no present ability to effectuate the relief
22 sought, because it is dependent on the possibility that further proceedings would be

23 ²⁵ RCW 34.05.240(1)(b).

24 ²⁶ The initial Complaint’s express request for declaratory relief and reference to RCW 34.05.240 have been
removed. Compare Complaint ¶¶ 3, 11 with Proposed Amended Complaint ¶ 2.

25 ²⁷ The Commission has properly rejected other requests by a carrier pursuant to RCW 81.04.110 that the
26 Commission direct Commission Staff to perform investigations of another carrier explaining: “Such use of the
Commission and its staff by the petitioner is improper and inappropriate and, therefore, the petition will be
dismissed with prejudice.” *Midland Transportation, Inc. v. H & K Transport, Inc.*, Cause No. TV-2037 (Feb. 1988).

1 conducted, an assumption that is entirely without grounds. Although the participation of
2 the Commission in this litigation was rejected as a grounds for upholding dismissal of the
3 moot case²⁸ it is nonetheless some indication of whether the Commission would act on the
4 “referral” of this matter for fines and sanctions. It certainly could, but its interests are not
5 so obvious as to support a conclusion that it would choose to impose sanctions if this
6 matter were “referred” to it for prosecution. Relief that is contingent on the policy
7 decisions of the Commission, which has heretofore chosen to play only an adjudicatory
8 role, is hardly “meaningful”.

9 24. Waste Connections also rests its Amended Complaint on the hope that it will discover a
10 meaningful and authorized – but not plead – remedy some day in the future.²⁹ However,
11 Waste Connections’ proposed amendments may not be salvaged on the hope of some
12 unarticulated remedy.³⁰ Although the rules governing notice pleading are admittedly
13 liberal, they do not authorize such a fishing expedition. Civil Rule 8(a) requires that a
14 claim

15 shall contain (1) a short and plain statement of the claim showing
16 that the pleader is entitled to relief and (2) a demand for judgment
17 for the relief to which he deems himself entitled. Relief in the
18 alternative or of several different types may be demanded.³¹

18 25. “A complaint must at least identify the legal theories upon which the plaintiff is seeking
19 recovery.”³² Consequently, “[a] party who does not plead a cause of action or theory of
20 recovery cannot finesse the issue by later inserting the theory into trial briefs and

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22 ²⁸ In the initial order, ALJ Moss noted, “Without participation by Staff, we run the risk of a decision with
23 unintended consequences or even an erroneous decision because there is no assurance that any party will zealously
24 advocate the public interest. Order 03 ¶20. The Commission said, “We agree with the thrust of the initial order’s
25 comments about participation by Commission Staff. Order 05 ¶ 22. However, it chose to “make no inference from
26 Staff’s appearance or absence in a private complaint proceeding.” *Id.* ¶24.

²⁹ Motion to Amend ¶ 8.

³⁰ *Id.* ¶¶ 7-8.

³¹ CR 8(a) (emphasis added).

³² *Dewey v. Tacoma School Distr. No. 10*, 95 Wn. App. 18, 25, 974 P.2d 847 (1999).

1 contending it was in the case all along.”³³ The unnamed remedies imagined by Waste
2 Connections do not provide any – let alone adequate – notice of the remedy sought and
3 cannot save the Proposed Amended Complaint. The remedy is not meaningful in the
4 present sense of the word.

5 **c. The Proposed Amended Complaint Suggests A Remedy That Is Not**
6 **Available And Would Be Futile.**

7 26. Contrary to Waste Connections’ suggestion,³⁴ Civil Rule 15 does not liberally mandate
8 amendment of a complaint where the proposed amendment would be futile.³⁵ Indeed, a
9 trial court abuses its discretion in allowing a party to add a futile claim.³⁶ A claim is futile
10 where the proposed cause of action or remedy is not available.³⁷ As set forth below,
11 Waste Connections’ request for factual “findings” – absent a request for action upon such
12 findings other than a determination of “eligib[ility] for referral” to the Commission for
13 consideration of a possible later prosecutorial action – are futile because the proposed
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17 ³³ *Id.* at 26.

18 ³⁴ *Id.* ¶ 5.

19 ³⁵ *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 142, 937 P.2d 154, amended, 943 P.2d 1358 (1997), *cert.*
20 *denied*, 522 U.S. 1077, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998) (affirming denial of motion to amend to add due
21 process claim where due process standard could not have been satisfied and claim would have been futile). *See also*
22 WAC 480-07-395 (allowing amendments only “on such terms as promote fair and just results”).

23 ³⁶ *Shelton v. Azar, Inc.*, 90 Wn. App. 923, 954 P.2d 352 (1998) (the trial court abused its discretion by granting a
24 motion to amend to add a claim that was futile where co-worker was immune from liability to plaintiff under
25 Industrial Insurance Act); *see also, Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 278, 191 P.3d 900 (2008) (“a trial
26 court appropriately denies a motion to amend if an amended claim is duplicative or futile”; affirming denial of
motion to amend where the proposed new claims were all dependent upon the facts already developed and those
facts did not support the new causes of action); *Dewey v. Tacoma School Distr. No. 10*, 95 Wn. App. 18, 23-24, 974
P.2d 847 (1999) (absent futility of amendment, leave to amend should be freely given); *Doyle v. Planned
Parenthood of Seattle-King County, Inc.*, 31 Wn. App. 126, 132, 639 P.2d 240 (1982) (affirming denial of motion to
amend where no Washington authority existed to support the proposed claim).

³⁷ *Travis v. Tacoma Public School Dist.*, 120 Wn. App. 542, 554, 85 P.3d 959 (2004) (affirming denial of motion
to amend, where trial court had dismissed request for injunctive relief based on wrongful termination and requested
amendments “differed only in asking for money damages and asserting a claim for wrongful-termination-in-
violation-of-public-policy,” because the amendments would have been futile).

1 causes of action are not meaningful or authorized by the governing statutory regime and
2 the Motion to Amend should be denied.³⁸

3 **B. THE AMENDED COMPLAINT SHOULD BE DISMISSED**

4 27. If the Motion to Amend is granted, the Environmental Contractors move to dismiss the
5 Amended Complaint pursuant to Civil Rule 12(b)(6) and WAC 480-07-380(1) for failure
6 to state a claim for which relief may be granted. A CR 12(b)(6) motion “requires the
7 court to decide whether the allegations in a complaint constitute a short and plain
8 statement of the claim showing that the pleader is entitled to relief.”³⁹

9 28. For purposes of deciding a motion under CR 12(b)(6), all of the factual allegations in the
10 complaint are accepted as true.⁴⁰ Even if all of the allegations contained in Waste
11 Connections’ Amended Complaint were true, it still is not entitled to relief, meaningful or
12 otherwise.⁴¹

13 29. Since a motion to dismiss under CR 12(b)(6) raises only an issue of law, a trial court has
14 no discretion as to whether to dismiss a complaint if it determines it is substantively
15 insufficient.⁴² If it is clear that no relief can be granted under any set of facts that could be

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17 ³⁸ Waste Connections’ suggestion that “post-filing events” are relevant to the issues now before the Commission,
(Motion to Amend ¶ 5), is simply a red herring. The Environmental Contractors’ completion of their work at the
18 Remediation Site has no bearing on whether Waste Connections’ has stated a claim that is not futile.

19 ³⁹ *Haberman v. Washington Public Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987); *see also*,
Bowman v. John Doe, 104 Wn.2d 181, 185, 704 P.2d 140 (1985) (affirming dismissal of malpractice claim by
20 client’s mother where attorney could not be held liable under any theory of law).

21 ⁴⁰ 3A Teglund, WASHINGTON PRACTICE at 264 (5th Ed. 2006).

22 ⁴¹ Obviously, the Environmental Contractors do not agree that their activities constituted regulated collection of
solid waste, and in accepting the allegations as verities for the purpose of this Motion to Dismiss do not intend any
concession on that point.

23 ⁴² 5B Wright & Miller, FEDERAL PRACTICE & PROCEDURE (Civ. 3d.) § 1357. Waste Connections contends that
“[d]ismissal of a complaint is ... an exercise of discretion by the Commission, not a matter of right.” (Motion to
24 Amend fn. 2.) In support, Waste Connections cites only to *In re F. Allen Forler d/b/a A. F. Excavating*, App. No. P-
70777 (April 1987). *Allen Forter* does not stand for this broad proposition and is wholly distinguishable from this
25 case. First, it did not involve a complaint, but an application for a G Certificate. Second, the request to withdraw
the application came after the ALJ had issued a proposed order denying the application and the proposed order was
before the Commission for approval. The Commission noted that the “applicant offers no reasons why the
26 Commission should dismiss the application rather than affirm the proposed denial. The Commission sees no such
reasons, and believes that the proposed order denying the application should be affirmed.” *Id.*

1 proven, a claim must be dismissed. The burden is on the moving party to prove that no
2 legally cognizable claim for relief exists.

3 30. In Order 05, the Commission suggested that Waste Connections might be permitted to
4 amend its Complaint to “seek a remedy that is available.”⁴³ However, the Transportation
5 Act, Title 81 RCW, does not make available any of the remedies sought by Waste
6 Connections, and therefore the litigation should be dismissed as a matter of law.⁴⁴

7 **a. In A Private Party Dispute Against An Entity That Has Not Been**
8 **Classified And In Which The Commission Is Not Acting In Its**
9 **Prosecutorial Capacity, Penalties Are Not Authorized.**

10 31. Waste Connections complains that the Environmental Contractors engaged in the
11 collection of solid waste from the remediation project without certificate authority.⁴⁵ It
12 seeks a “finding” that the Environmental Contractors engaged in regulated operations
13 without the necessary authority required by the Commission’s laws. However, a different
14 procedural basis for administrative relief is required to reach that conclusion. A
15 classification proceeding to determine whether or not an entity is conducting business that
16 requires operating authority or approval of the WUTC would be required first.

17 Whenever **the commission** believes that any person or corporation
18 **is engaged in operations without the necessary approval or**
19 **authority** required by any provision of this title, **it may institute a**
20 **special proceeding** requiring such person or corporation to appear
21 before the commission at a location convenient for witnesses and
22 the production of evidence and bring with him books, records,
23 accounts and other memoranda, and give testimony under oath as
24 to his operations or acts, and the burden shall rest upon such

25 ⁴³ Order 05 ¶ 19.

26 ⁴⁴ So, in *Gorman v. Garlock, Inc.*, 155 Wn.2d 2d 198, 118 P.3d 311 (2005), the Court dismissed claims against a former employer brought by the estate of a man who died of lung cancer contracted from asbestos on his worksite because a federal statute limited the man’s remedies to compensation under the federally-mandated recovery fund. Similarly, in *Jeckle v. Crotty*, 120 Wn. App. 374, 386, 85 P.3d 931 (2004), the court affirmed dismissal of claims brought by a doctor against lawyers who obtained public records about the doctor’s patients from a government agency because the sole remedy under the Uniform Health Care Information Act “is an action against a health care provider or facility for actual, but not consequential, damages” and, thus, the doctor had no remedy under the statute.

⁴⁵ Proposed Amended Complaint ¶¶ 7,8.

1 person or corporation of proving that his operations or acts are not
2 subject to the provisions of this chapter.⁴⁶

3 32. Importantly, classification proceedings may only be brought by the Commission, not by
4 private parties.⁴⁷ Consequently, Waste Connections' case cannot be converted to a
5 classification proceeding. As a private party, it has no statutory authorization to obtain the
6 classification finding that the Environmental Contractors were "engaged in operations
7 without the necessary approval or authority." Without that finding, none of the other
8 issues can be addressed. A classification finding is a condition precedent to the remedies
9 sought by Waste Connections, but because only the Commission can bring a classification
10 proceeding, it is legally impossible to achieve the outcome sought.

11 33. Nor is this private-party dispute a a penalty proceeding. Only the WUTC acting in its
12 capacity as an arm of the State can bring an action for penalties. The Commission itself
13 has rejected the efforts of private parties to impose penalties. In a private complaint
14 involving the telecommunications industry and brought under utility laws parallel to the
15 transportation statutes described above, the Commission held:

16 The imposition of a penalty is an inherent aspect of
17 regulation. **The Commission exercises prosecutorial discretion,**
18 and determines when to file complaints, what consequences to
19 seek, and what level of penalties to impose. Doing so is an
20 essential aspect of the Commission's overall regulatory and
21 enforcement activity. **Mr. Glick is entitled to prosecute a**
22 **complaint for his own benefit, but not to seek penalties on**
23 **behalf of the state.** Allowing him and others to take on that role
24 could lead to vigilantism in which private parties file multiple
25 actions not on their own behalf, but as agents of the state. That
26 would ultimately destroy the Commission's ability to formulate

46 RCW 81.04.510 (emphasis added).

47 *In the Matter of San Juan Express*, Docket No. TS-940956, Fifth Supplemental Order (WUTC Dec. 19, 1994) (the Commission held that a cease and desist order against a transportation company acting without authority can issue only after a classification proceeding under RCW 81.04.510, which can only be brought by the Commission itself).

1 and execute a coherent and cohesive enforcement policy and to
2 accomplish regulation in the public interest, as the law requires.⁴⁸

3 34. This matter is a private-party dispute initiated by Waste Connections as a complaint
4 proceeding under RCW 81.04.110. The Commission is not a party. Instead, the
5 Commission has made a forum available to the private party dispute, and is acting in its
6 adjudicative function.⁴⁹ Without the participation of the Commission in its prosecutorial
7 capacity, there can be no basis for penalties in this particular proceeding.

8 35. Indeed, by asking for a finding that the alleged illegal actions are “eligible for referral” to
9 the State for prosecution, Waste Connections seems to concede that private parties may
10 not obtain penalties. Actions to recover penalties must be “brought in the name of the
11 state of Washington.”⁵⁰ Fines and penalties are paid into the State treasury.⁵¹

12 36. ALJ Moss fully recognized as much in his order:

13 [The Commission] may, or may not, later find it has probable
14 cause to complain, or to penalize [the Environmental Contractors]
15 in connection with the activities alleged here, or in connection with
16 other activities [the Environmental Contractors] or other haulers
17 may undertake in the future. In light of these considerations, it is
18 simply not true that “[the Environmental Contractors] and other
19 solid waste collection companies allegedly operating without a
20 certificate in the present or future would simply have to complete
21 or terminate their contested activities before being formally
22 pronounced in violation of the law” to avoid prosecution. The
23 Commission will exercise its discretion to prosecute in appropriate
24 cases, and will penalize companies found to have violated the law.
25 Thus the Commission can bring its authority to bear in a more
26 meaningful way than what would be accomplished by a simple
declaration here.⁵²

22 ⁴⁸ *Glick v. Verizon Northwest, Inc.*, 2005 WL 484651, Docket No. UT-040535, Order 03 (WUTC Jan. 28, 2005).

23 ⁴⁹ See *GTE Northwest Incorporated v. Whidbey Telephone Company*, 1996 WL 350846 (Docket No. UT-950277,
24 5th Suppl. Order, April 2, 1996) (where the Commission is merely providing a forum, any company filing a
complaint against another company bears the burden of proof).

25 ⁵⁰ RCW 81.04.400.

26 ⁵¹ *Id.*

⁵² Order 03 ¶ 21.

1 37. The exercise of that prosecutorial discretion belongs exclusively to the Commission Staff.
2 Plainly, Waste Connections wants the Commission to exercise its prosecutorial discretion
3 and pursue a penalty action against the Environmental Contractors. While there is nothing
4 stopping Waste Connections from beseeching the Commission to urge its prosecution
5 against the Environmental Contractors, it would, of necessity, be a different lawsuit.
6 However, where as here the Commission is solely acting in its adjudicative capacity, the
7 proceeding cannot be used to prosecute for penalties. To do so would impermissibly
8 compress the agency functions of prosecution and adjudication.⁵³ Keeping those
9 functions separate is necessary to “ameliorate the evils of commingling the investigating
10 and prosecuting functions from the adjudicating functions.”⁵⁴

11 38. Indeed, Waste Connections appears to be continuing this action because the Commission
12 has not been interested in prosecuting this action. The Commission Staff, as well as the
13 Attorney General’s office, have been well aware of this matter for at least two years. It is
14 an inherent in an agency’s prosecutorial discretion that it decides – not some third party –
15 when the facts, law, policy, and resources warrant penalties. Waste Connections’
16 frustration that the Commission or Attorney General’s Office has not taken a position in
17 this case is not a legitimate reason to grant relief nowhere authorized by law.⁵⁵

18 **b. Only Corrective Action Is Authorized In A Dispute Involving Two**
19 **Companies, One Regulated And The Other Not.**

20 39. Waste Connections asks for an additional finding that the Environmental Contractors
21 deprived it of revenues, “thereby directly damaging Complainant.”

22 ⁵³ Under well-settled principles of administrative law, investigation, prosecution, and adjudication are separate
23 functions that must not be merged. § 6.24 Schwartz, Administrative Law (Third Ed. 1991) at 363 (“The
24 combinations prohibited . . . are the combinations of investigating and judging and/or prosecuting and judging.”).

25 ⁵⁴ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616 (1950).

26 ⁵⁵ Waste Connections apparently relies on the testimony of Chris Rose (submitted prior to the remand by the
Superior Court) to support a broad citizen suit right that goes far afield from the legislature’s actual authorization.
(*Id.* (citing Declaration of Chris Rose ¶¶ 7, 11).) However, to the degree Mr. Rose’s testimony is relevant here, he
did not testify that “without private participation, such alleged conduct may go unregulated.” (Motion to Amend ¶
10.) In fact, he did not address the scope of the private party action authorized by RCW 81.04.110.

1 40. Essentially, Waste Connections is claiming to be aggrieved by allegedly unlawful
2 competition. The nature of its claim is that it lost business to the Environmental
3 Contractors because they were allegedly operating outside of the Commission's oversight,
4 without a certificate and without regulated tariffs. RCW 81.04.110 permits a corporation
5 to pursue an enforcement action against an entity acting as a public service company in
6 violation of law but authorizes only a limited scope of relief in lawsuits among
7 competitors or alleged competitors. A public service company such as Waste Connections
8 may file a complaint against an entity alleged to be acting as a public service company
9 based on the allegation that the latter is acting in an illegal manner. The legislature has
10 very specifically addressed the situation where two companies are competing:

11 **When two or more public service companies or a person,**
12 **persons, or entity acting as a public service company,** (meaning
13 **to exclude municipal and other public corporations) are engaged**
14 **in competition** in any locality or localities in the state, **either may**
15 **make complaint against the other** or others **that the** rates,
16 charges, rules, regulations or **practices of such other** or others
17 with or in respect to which the complainant is in competition, **are**
18 unreasonable, unremunerative, discriminatory, **illegal**, unfair or
19 intending or tending to oppress the complainant, to stifle
20 competition, or to create or encourage the creation of monopoly,
21 and upon such complaint or upon complaint of the commission
22 upon its own motion, **the commission shall have power**, after
23 notice and hearing as in other cases, **to**, by its order, subject to
24 appeal as in other cases, **correct the abuse complained of** by
25 establishing such uniform rates, charges, rules, regulations or
26 practices in lieu of those complained of, to be observed by all of
such competing public service companies in the locality or
localities specified as shall be found reasonable, remunerative,
nondiscriminatory, legal, and fair or tending to prevent oppression
or monopoly or to encourage competition, and upon any such
hearing it shall be proper for the commission to take into
consideration the rates, charges, rules, regulations and practices of
the public service company or companies complained of in any
other locality or localities in the state.⁵⁶

⁵⁶ RCW 81.04.110 (emphasis added).

1 41. Where two private entities are competing for business, the policies behind the
2 Commission's enforcement statutes are narrow, and the remedy is for the Commission to
3 "correct the abuse complained of." The public interest in protecting the customer is not
4 implicated directly in these disputes. A consumer bringing an action – or the Commission
5 itself initiating a complaint – under the first paragraph of the complaint statute may
6 arguably require a greater scope of remedies. Under the second paragraph, however, the
7 Commission is authorized to fix the problem, and its remedial authorities are of an
8 equitable nature.⁵⁷

9 42. To be sure, the first paragraph of the complaint statute is broader than the second one
10 relating to competitive behavior. The Commission, in Order 05, characterized the
11 litigation as one a broadly-based enforcement action under the first paragraph of RCW
12 81.04.110, authorizing a private entity like Waste Connections who "is advocating in the
13 public interest as well as its own."⁵⁸ However, the Commission was unaware of the real
14 motivation behind this lawsuit because in its original Complaint, Waste Connections was
15 not as forthright about its real interest: there was no allegation regarding its allegedly
16 being deprived of revenue in the record before the Commission.⁵⁹ However, in this
17 instance the nature of the complaint is obviously a loss of business. At its heart, the
18 gravamen of the complaint is that Waste Connections was monetarily damaged. The
19 concern expressed by the Commission about the lack of Staff participation is now
20 apparent, when it said "Individual litigants may be unconcerned with that public interest
21 or may have a self-centered view of the relevant public interest, and therefore may have

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23 ⁵⁷ See, e.g. *Evergreen Trails, Inc. v. San Juan Airlines, Inc.*, Docket No. TC-900407 (Order M.V.C. No. 1893,
24 November 1990) (restrictively amending a certificate to prohibit operations in an area where the defendant willfully
25 and repeatedly violated Commission orders). See also, *AT&T Communications of the Pacific Northwest, Inc. v.*
26 *Verizon Northwest, Inc.*, 227 P.U.R.4th 399, 2003 WL 21961998 (Docket No. UT-020406, 11th Suppl. Order,
August 12, 2003) ("The statutes do not provide a remedy for actual damages, but for practices that can produce such
damages.")

⁵⁸ Order 05 ¶17.

⁵⁹ Compare original Complaint with Proposed Amended Complaint ¶ 10.

1 no incentive to add evidence or argument to the record that will present a public interest
2 perspective different from their own business interests.”⁶⁰

3 43. Waste Connections, of course, does not actually ask for an award undoubtedly because it
4 is aware that the WUTC is not authorized to impose damages.⁶¹ Waste Connections
5 should not be permitted to ignore the express legislative stricture applicable to private
6 party complaints between business entities. The Transportation Act, Title 81 RCW, and
7 its enabling regulations set forth a comprehensive administrative mechanism for
8 regulating public service companies, authorizing broad authority and multiple
9 enforcement tools to the Commission. In contrast, the statute and regulations grant
10 limited authority to public service companies to police other companies subject to – or
11 potentially subject to – the Commission’s jurisdiction. Waste Connections contends that
12 its Amended Complaint is proper because this is an “enforcement proceeding” pursuant to
13 RCW 81.04.110 and “alludes to possible fines under RCW 81.04.385, RCW 81.04.387
14 and RCW 81.04.405 ... that may be available”⁶² The requested “findings” and
15 “referral” remedies Waste Connections now pursues are neither meaningful nor
16 authorized by any of the cited laws.

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20 ⁶⁰ Order 05 ¶ 23.

21 ⁶¹ *Tanner Electric Cooperative v. Puget Sound Power & Light Company*, 128 Wn.2d 656, 683, 911 P.2d 1301
22 (1996); *Hopkins, Inc. v. GET Northwest, Inc.*, 89 Wn. App. 1, 947 P.2d 1220 (1997). See also, *Moore v. Pacific
Northwest Bell*, 34 Wn. App. 448, 453, 662 P.2d 398 (1983) (distinguishing between a court’s jurisdiction over a
tortious injury unique to one and an agency’s jurisdiction over unreasonable practices suffered by all).

23 ⁶² *Id.* ¶ 8. Waste Connections looks to a 1981 decision regarding the power of the Washington State Human
24 Rights Commission to argue that the Commission here should have unfettered authority to “fashion a selected
25 remedy,” albeit a remedy not yet known. However, *Skold v. Johnson*, 29 Wn. App. 541, 630 P.2d 456 (1981),
26 concerned a statute aimed at protecting against housing discrimination which gave the regulatory agency an
“admittedly broad” power to fashion a remedy. That statute authorized the agency “to take such action ‘as, in the
judgment of the tribunal, will effectuate the purposes of (the) chapter.’”⁶² In marked contrast, the statute that
prescribes the remedies available to a public service company under the Transportation Act are limited and do not
include the relief Waste Connections now requests

1 c. **Although A Limited Private Party Action Is Authorized By RCW**
2 **81.04.110, It Does Not Authorize Penalties And Rights Not Expressly**
3 **Stated Should Be Not Be Implied.**

4 44. To a certain extent RCW 81.04.110 creates a limited private right of action. Under it,
5 Waste Connections is authorized to pursue enforcement of the Commission's laws.
6 However, the limited scope of relief in lawsuits among competitors or alleged competitors
7 authorized by RCW 81.04.110 effectuates the Legislature's intent that the Commission
8 primarily control the Transportation Act's enforcement power. The statute's remedial
9 provisions are in direct contrast to other statutes where no administrative agency is
10 responsible for regulatory oversight and the Legislature has authorized equal enforcement
11 power to private parties. For example, in the Consumer Protection Act (the "CPA"), the
12 Legislature authorized broad citizen suit rights – precisely the type of rights Waste
13 Connections advances here but which are wholly absent from the Transportation Act. The
14 CPA provides in relevant part:

15 Any person who is injured in his or her business or property by a
16 violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or
17 19.86.060 ... may bring a civil action in the superior court to
 enjoin further violations, to recover the actual damages sustained
 by him or her, or both, together with the costs of the suit, including
 a reasonable attorney's fee⁶³

18 45. None of this relief is authorized in private party complaints before the Commission under
19 RCW 81.04.110. The remedies created by the legislature are limited when the nature of
20 the dispute between two private companies is based on a loss of business revenues. In no
21 event does RCW 81.04.110 authorize an advisory "referral" to the Commission to
22 "consider seeking" a prosecution. The express language only gives the Commission the
23 "power to correct the abuse complained of" – and does not mention a right to request that
24 the agency assess penalties.

25
26 _____
⁶³ RCW 19.86.090 (emphasis added).

1 46. Where an express provision authorized limited private party actions, remedies – and
2 particularly punitive remedies – should not be implied. In *Middlesex County Sewerage*
3 *Authority v. National Sea Clammers Ass’n*, 453 U.S. 1, 17, 101 S.Ct. 2615 (1981), the
4 Supreme Court held that the Federal Water Pollution Control Act and Marine Protection,
5 Research, and Sanctuaries Act did not create any implied rights of action independent of
6 the citizen suit provisions in those acts. It said the crux of the decision in determining
7 whether an implied right of action exists under a statute is the legislative intent.⁶⁴ Courts
8 are to look first to the express statutory language, particularly to the provisions for
9 enforcement and relief and then, if it exists, a court reviews legislative history and other
10 traditional aids of statutory interpretation to determine congressional intent.⁶⁵ Following
11 this analysis, the Middlesex court found that no implied right of action for damages
12 existed when the statute expressly provided for citizen suits for injunctive relief but did
13 not provide for private suits for damages.

14 “[I]t is an elemental canon of statutory construction that where a
15 statute expressly provides a particular remedy or remedies, a court
16 must be chary of reading others into it.” (quoting *Transamerica*
Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-20, 100 S.Ct.
17 242, 247, 62 L.Ed.2d 146, 154-55 (1979)).⁶⁶

18 47. Courts have similarly construed the private right of action in the Resource Conservation
19 and Recovery Act, the federal statute Waste Connections refers to as support for
20 unbounded authority to bring citizen suits here.⁶⁷

21 ⁶⁴ *Id.* at 13.

22 ⁶⁵ *Id.*

23 ⁶⁶ *Id.* at 14-15 (“In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude
that Congress provided precisely the remedies it considered appropriate.”)

24 ⁶⁷ See, e.g., *Polcha v. AT & T Nassau Metals Corp.*, 837 F.Supp. 94, 97 (M.D.Pa., 1993) (“To summarize, then,
25 no private cause of action for damages due to personal injury is expressly created by RCRA or CERCLA, and none
26 is impliedly created. In fact, the express language of these statutes limits recovery and prohibits recovery for
personal injury, demonstrating a clear legislative intent.”). See also, *Haberman v. Washington Public Power Supply*
System, 109 Wn.2d 107, 181, 744 P.2d 1032, 1077 (1987) (in the securities law context, standing for the proposition
that the general remedial purpose of a statute is not enough to interpret a statute more broadly than its language and
history permit).

1 d. **None of the Other Statutory Citations Authorize the Requested Relief,
2 Either.**

3 48. Likewise, the several other citations invoked by Waste Connections do not authorize any
4 cause of action or relief to a private party pursuing a perceived competitor. RCW
5 81.04.385⁶⁸ defines when conduct by a transportation companies is a criminal offense. Of
6 course, it does not authorize a private party to prosecute any such offense or seek an
7 advisory invitation for Commission prosecution. Similarly, RCW 81.04.387 and RCW
8 81.04.405,⁶⁹ authorize an action for penalties only “in the name of the State of
9 Washington” and must be venued in Superior Court.⁷⁰ According to Waste Connections,
10 “general fund violation fines would be ‘meaningful’ as sanctions to deter further
11 violations by these or any other Respondents who operate without certificate authority.”⁷¹
12 Assuming that penalties would be meaningful to Waste Connections in some theoretical
13 way, still the Attorney General’s Office would need to bring an action by the State in
14 Superior Court to recover them.

15 49. None of the citations to Chapter 81.77 RCW authorize the remedies sought here either.
16 RCW 81.77.040⁷² defines when a G Certificate is required. RCW 81.77.030,⁷³ in turn,
17 authorizes a complaint against the holder of a G Certificate and the suspension,
18 revocation, alteration or amendment of such Certificate. However, neither of the
19 Environmental Contractors is the holder of a G Certificate. RCW 81.77.100⁷⁴ authorizes
20 the Commission to regulate solid waste companies to the full extent permitted by the
21 United States Constitution and authorizes no private party action.

22 ⁶⁸ Proposed Amended Complaint ¶10

23 ⁶⁹ *Id.* ¶¶ 2, 9.

24 ⁷⁰ RCW 81.04.400.

25 ⁷¹ Motion to Amend ¶ 8.

26 ⁷² Amended Complaint ¶ 2.

⁷³ *Id.* ¶ 1.

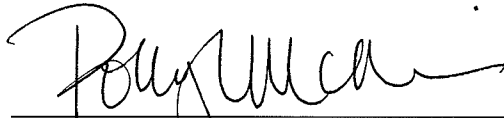
⁷⁴ *Id.*

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VI. CONCLUSION

50. The Commission's power to conduct fact finding hearings is tied directly to its statutory authority to consider a request for relief. Having abandoned its moot request for declaratory relief and a cease and desist order, Waste Connections now asks the Commission to conduct a fact finding hearing for the sole purpose of making a series of "findings" and recommending to the Commission Staff that it "consider seeking imposition" of penalties. These are not meaningful remedies – let alone authorized ones – and the Commission should reject the invitation that it participate in an advisory fact-finding exercise.
51. The Environmental Contractors respectfully request that the Motion to Amend be denied and, alternatively, that the Amended Complaint be dismissed for failure to state a claim upon which relief may be granted.

DATED this 4th day of September, 2009.



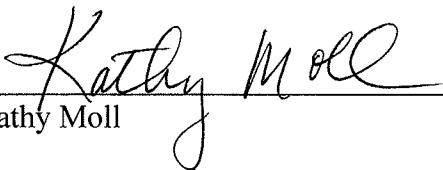
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CERTIFICATE OF SERVICE

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 4th day of September, 2009.



Kathy Moll