

0050

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2

3 COMMISSION

4

5 WASTE CONNECTIONS OF )

6 WASHINGTON, INC., )

7 )

8 Complainant, )

9 )

10 vs. ) DOCKET NO. TG-071194

11 ) Volume III

12 ENVIRO/CON & TRUCKING, INC., ) Pages 50 - 92

13 a Washington corporation, )

14 ENVIROCON, INC., a corporation, )

15 and WASTE MANAGEMENT DISPOSAL )

16 SERVICES OF OREGON, INC., )

17 )

18 Respondent. )

19 -----

20 A prehearing conference in the above matter

21 was held on August 21, 2009, at 1:36 p.m., at 1300

22 South Evergreen Park Drive Southwest, Olympia,

23 Washington, before Administrative Law Judge ADAM TOREM.

24

25 Kathryn T. Wilson, CCR, Court Reporter

0051

1                   The parties were present as follows:

2

3                   WASTE CONNECTIONS OF WASHINGTON, INC., by  
4   DAVID W. WILEY (via bridge), Attorney at Law, Williams  
5   Kastner, 601 Union Street, Suite 4100, Seattle,  
6   Washington 98101; telephone, (206) 628-6600.

7

8                   ENVIRO/CON & TRUCKING, INC.; ENVIROCON, INC.;  
9   WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., by  
10   POLLY L. MCNEILL (via bridge), Attorney at Law, Summit  
11   Law Group, 315 Fifth Avenue, Suite 1000, Seattle,  
12   Washington 98104; telephone, (206) 676-7040.

13

14                   CLARK COUNTY, by E. BRONSON POTTER (via  
15   bridge), Senior Deputy Prosecuting Attorney, Clark  
16   County Prosecutor's Office, Civil Division, Post Office  
17   Box 5000, Vancouver, Washington 98666; telephone,  
18   (360) 397-2478.

19

20                   WASHINGTON REFUSE AND RECYCLING ASSOCIATION,  
21   by JAMES K. SELLS (via bridge), Attorney at Law, Ryan,  
22   Sells, Uptegraft, 9657 Levin Road Northwest, Suite 240,  
23   Silverdale, Washington 98383; telephone, (360)  
24   307-8860.

25

0052

1 P R O C E E D I N G S

2 JUDGE TOREM: We are going on the record in  
3 the third prehearing conference in Docket TG-071194.  
4 Today is Friday, August 21st, 2009. It's about 1:36.  
5 This is the Waste Connections of Washington versus  
6 Enviro/Con and Trucking, Incorporated, complaint. It  
7 is coming back on remand from Order 05, which was  
8 issued by the full Commission on October 7th, 2008, and  
9 my understanding is that the judicial review procedure  
10 in Thurston County Superior Court has also now been  
11 completed.

12 Let me take appearances from the four parties  
13 who are present on the bridge line today. We will  
14 start with Waste Connections.

15 MR. WILEY: That's David Wiley, and I'm at  
16 the same address and e-mail contacts of my original  
17 appearance.

18 JUDGE TOREM: Enviro/Con and Trucking?

19 MS. MCNEILL: Enviro/Con and Trucking and  
20 Waste Management Disposal Services of Oregon, Inc., are  
21 represented by me, Polly L. McNeill, which McNeill has  
22 two "l's", but otherwise, I'm still with Summit Law  
23 Group, and I'm still with the same address, phone  
24 number, and e-mail.

25 JUDGE TOREM: Clark County?

0053

1           MR. POTTER: Bronson Potter, Clark County  
2           Prosecutor's office.

3           JUDGE TOREM: Washington Refuse and Recycling  
4           Association?

5           MR. SELLS: Jim Sells representing WRRRA, same  
6           address and same e-mail as before.

7           JUDGE TOREM: My understanding is that this  
8           case started back on June 12th of 2007. Mr. Wiley,  
9           that's when your client filed the original complaint,  
10          and I understand from the parties that the facts that  
11          are set out in Paragraphs 4 through 7 and perhaps also  
12          some of the procedural history in Paragraphs 8 through  
13          13 of Order 05 would be sufficient for me to review,  
14          and since they are already part of the record, I won't  
15          recite any summary of them today.

16          I have reviewed that order and its direction  
17          back to the ALJ to do a number of things in Paragraph  
18          19. My understanding is that the initial order from  
19          the administrative law judge found that the Complaint  
20          as filed was moot and no remedy, particularly a  
21          cease-and-desist order, was available, but the  
22          Commission in Paragraph 19 of this Order 05 found that  
23          there was a substantial interest in an enforcement  
24          action, even if Commission staff had not brought the  
25          complaint; so therefore, a private party, as is Waste

0054

1 Connections, could bring a complaint even if the remedy  
2 originally sought was moot, and it says here the  
3 Commission is returning the matter to determine whether  
4 the Complainant wishes to amend the Complaint to seek a  
5 remedy that is available, and second, if so, whether  
6 such an amendment should be granted and this litigation  
7 allowed to continue.

8 My understanding is from there, the Order was  
9 appealed to Superior Court and upheld just recently,  
10 and maybe Ms. McNeill and Mr. Wiley, if there is  
11 anything from the Superior Court that should be made  
12 part of our record today, you could let me know, but  
13 the two issues here are, Mr. Wiley, does your client  
14 wish to amend the Complaint, and if so, I will have to  
15 subsequently make a decision as to whether that motion  
16 should be granted.

17 So today, we are going to talk about the  
18 answer to the first question, and if the answer is yes,  
19 as I suppose it is given we are all assembled, what the  
20 schedule for filing such a motion should be, and how  
21 under the Commission's procedural rules, WAC 480-07,  
22 that motion should be characterized, whether as a  
23 procedural motion or as a dispositive motion.

24 Is there anything else that we have to put on  
25 the agenda for today? Hearing none, that sounds like

0055

1 it. So Mr. Wiley and Ms. McNeill, is there anything  
2 regarding the Superior Court order that I need to know  
3 about on the record today?

4 MS. MCNEILL: I don't believe so, no.

5 MR. WILEY: Other than it was remanded back  
6 to the Commission, no, Your Honor.

7 JUDGE TOREM: The brief reading that I had of  
8 Judge Hirsch's order was simply that she upheld the  
9 Commission. She didn't say one way or the other why in  
10 the written order.

11 MR. WILEY: There is a transcript, Your  
12 Honor, available of the oral ruling that she gave at  
13 the end of the argument on the 24th that probably would  
14 be available. I have not ordered it. I don't know if  
15 Ms. McNeill has, but the end result of her ruling was  
16 to uphold the Commission's decision to remand to  
17 consider the stage where we are currently.

18 MS. MCNEILL: I don't disagree with that,  
19 Your Honor. I don't think there is anything in the  
20 record before the Superior Court that would be of  
21 assistance in your evaluation of how we move forward.

22 JUDGE TOREM: Then I will leave it for the  
23 later stages of this proceeding, whatever those may be.  
24 If anyone wishes to obtain that transcript and make it  
25 part of this record, they can attach it as an

0056

1 appropriate exhibit if that time becomes appropriate.

2 So we go back to the main question. I think  
3 we all know the answer. Mr. Wiley, does your client  
4 wish, as allowed by Paragraph 19 of Order 05, to amend  
5 the Complaint and seek a remedy that is available?

6 MR. WILEY: Yes, without question, Your  
7 Honor, it does.

8 JUDGE TOREM: Do you know what remedy is  
9 available you will be seeking in that motion to amend  
10 your complaint?

11 MR. WILEY: I think there is a number of  
12 remedies that will be alluded to in the motion to  
13 amend, not the least of which is a legal conclusion  
14 from the Commission in review of the evidence of record  
15 that 81.77.040 and the corresponding WAC were violated  
16 by the conduct of the Respondent.

17 In addition, we will suggest that the record  
18 could be referred for penalty imposition by the  
19 Commission should it so choose.

20 JUDGE TOREM: So you would wish to file such  
21 a motion to amend the Complaint and seek those  
22 remedies.

23 MR. WILEY: Yes.

24 JUDGE TOREM: When are you planning on file  
25 that, or how much time would you need to do so?

0057

1           MR. WILEY: Ms. McNeill and I have discussed  
2 that preliminarily, Your Honor. We have tried to  
3 bridge the gap in terms of our differing  
4 interpretations of the motion's nature, the character  
5 of the motion and what time periods would be triggered.  
6 I think we may have a proposed compromise based on our  
7 discussion this morning; although, there is one wrinkle  
8 in terms of what Ms. McNeill would seek to do  
9 procedurally that I oppose and we would want to talk to  
10 you about that now, but let me just say the timetable  
11 that we have discussed that is agreed to in terms of as  
12 far as I'm going to go now is the following:

13           I would file a motion to amend, and of course  
14 an amended complaint, which are fairly straight forward  
15 pleadings in my review of other Commission dockets,  
16 Tuesday the 25th of August. Ms. McNeill would have  
17 approximately ten days to respond, so we are  
18 compromising between the two rules at WAC 480-07-375  
19 and 380. She would then have an answer that would be  
20 due September 4th, and I would get to reply September  
21 14th.

22           So those are the three benchmark time tables  
23 we discussed. She has another idea that she should  
24 posit and then I will respond with my opposition.

25           JUDGE TOREM: Ms. McNeill?



0058

1 MS. MCNEILL: Thank you, Your Honor. The  
2 difficulty we have in how to fit this process into the  
3 appropriate box is that our -- I don't want to use  
4 technical terms like response and reply, so I will just  
5 say that our opposition to Mr. Wiley's motion to amend  
6 is based on an argument that he is familiar with, and  
7 that is we don't believe he has statutory authority to  
8 seek any further remedies under the relevant statutes  
9 that apply to this proceeding.

10 So our opposition to his motion to amend  
11 would probably be more fairly characterized as a motion  
12 to dismiss for failure to state a claim than just a  
13 simple opposition to a motion to amend the Complaint,  
14 and as I said to him this morning, I believe that the  
15 caption on the briefing that we would file on September  
16 4th would be something like opposition to motion to  
17 amend and, if granted, motion to dismiss for failure to  
18 state a claim.

19 At that point then, it seems to me that we  
20 are the ones that are making a motion. There are  
21 cross-motions at that point. I certainly agree that  
22 under any scenario Mr. Wiley gets an opportunity to  
23 reply to that motion, and that's why we went ahead and  
24 discussed the third date, but in addition, I would  
25 request then an opportunity to reply to his reply

0059

1 because in a sense, he will have gotten an additional  
2 opportunity to argue on a motion to amend, which he  
3 would not otherwise have had. So it seems only fair  
4 that if he's responding to my motion, I would like to  
5 have the opportunity to do the final word on the motion  
6 itself, and we did discuss a date for that, which would  
7 be September 21st.

8           The difficulty that we have and the reason we  
9 wanted to have this prehearing conference today is  
10 because there is not really a rule that cleanly sets  
11 out the process for the complications that are  
12 triggered by the motion to amend the Complaint, and it  
13 seems, I think Mr. Wiley has agreed with me, it seems  
14 like a waste of energy, expense, and administrative  
15 time to have us have his motion to amend and us oppose  
16 it, and then if it were granted, for us to wait another  
17 20 days and then bring a motion to dismiss. We are not  
18 interested in protracting this proceeding.

19           So it seems although technically we wouldn't  
20 have anything to move to dismiss on until after his  
21 amendment were granted, if it were granted, the  
22 arguments that we would bring to bear is to why we  
23 think he lacks the statutory authority to seek any  
24 further relief under the relevant laws applies both to  
25 an opposition to the motion to amend as well as provide

0060

1 the support for our motion to dismiss.

2 JUDGE TOREM: Thank you, Ms. McNeill.

3 Mr. Wiley, anything further?

4 MR. WILEY: Yes. The nub or rub of our  
5 positions is on this latter reply that she talked about  
6 on September 21st, which she is correct, we did talk  
7 about the date if she were to be granted a reply, but  
8 Your Honor, I do believe that that motion of hers, a  
9 cross-motion to dismiss is clearly a second bite of the  
10 procedural apple, and the reason I say that is in WAC  
11 480-07-381, it's clear that when she filed on March  
12 2nd, 2008 a motion for summary adjudication that under  
13 1(a), the Commission would treat that as a motion to  
14 dismiss.

15 Thus in my view, she has already had the  
16 opportunity for dismissal, and that's why we are here  
17 today because an initial order was granting that was  
18 entered that concurred with her and the Commission on  
19 review reversed.

20 So my feeling is she's already had that  
21 opportunity, and secondly, a denial of the motion to  
22 amend would effectively cause a dismissal of this  
23 proceeding, and I think if you look at Order No. 5,  
24 specifically Paragraph 18, 19, and 37, which I would  
25 also call your attention to in terms of framing the

0061

1 issues on remand and where we are at this stage, I  
2 think it's very clear that the Commission expects that  
3 you will resolve this at this stage on a motion to  
4 amend the Complaint.

5           If you were to deny a motion to amend,  
6 clearly I would have to right for interlocutory appeal  
7 because that would terminate the process if Ms. McNeill  
8 were to file a motion to dismiss, which would be denied  
9 and I would say that's the second time around, the  
10 proceeding would continue without further action.

11           So I do oppose this concept of a cross-motion  
12 to dismiss because I believe the rule clearly says that  
13 that's how the Commission treated the first motion, and  
14 we've been there and done that.

15           JUDGE TOREM: Let me ask both of you --

16           MS. MCNEILL: May I say something?

17           JUDGE TOREM: Not quite yet. Let me ask both  
18 of you why we think there is a right under the  
19 Commission's rules to file any replies at all?

20           MR. WILEY: Your Honor, I'll answer that by  
21 saying that there isn't technically that right;  
22 although it was granted to Ms. McNeill last time  
23 around, and to be fair, when the shoe is on the other  
24 foot, she and I discussed the fact that a reply for the  
25 moving party would be consistent with the last process

0062

1 that was in place on the motion for summary  
2 adjudication.

3 MS. MCNEILL: Neither of us are saying that  
4 we have a right to do a reply. The question is really  
5 who is replying to what as you move along through this  
6 process, and I do take some issue with Mr. Wiley saying  
7 that I have a second bite at this apple. As Order 05  
8 clearly stated, the motion for summary determination  
9 that we brought and that was granted on the initial  
10 order by Administrative Law Judge Moss had to do  
11 strictly with an argument that the case had become  
12 moot, and we have not in the administrative proceeding  
13 ever had an opportunity to make an argument as to why  
14 the amendment that was suggested by the Commission on  
15 05 should not be permitted and the proceeding should  
16 not be allowed to be perpetuated because of the fact  
17 that there is no statutory authority for any of the  
18 remedies that Mr. Wiley is seeking, and I think if you  
19 look at Paragraph 19, what the Commission said, and I  
20 think they chose this language on purpose, it says that  
21 this is returned to you to determine whether the  
22 Complaint wishes to amend the Complaint to seek a  
23 remedy that is available, and I would say whether it is  
24 available is a question, and then if so, whether such  
25 an amendment should be granted and whether the

0063

1 litigation should be allowed to continue, and I think  
2 that our arguments that have to do with the absence of  
3 statutory authority for any of the alternative remedies  
4 that Mr. Wiley is seeking have never been presented in  
5 this administrative proceeding before.

6 MR. WILEY: Your Honor, if I could, I don't  
7 agree that those points have not been thoroughly raised  
8 in reference to the mootness issue and what could be  
9 obtained by a perpetuation of the litigation, but I do  
10 think we need to be careful not to be plowing over the  
11 same legal ground, and I believe that a motion to  
12 dismiss would clearly bring that up.

13 I also without previewing my argument, I  
14 clearly think that the private complaint statute is a  
15 lot broader than Ms. McNeill's, and we talked about  
16 that, and she would have an opportunity to address that  
17 in her answer to my motion to amend.

18 JUDGE TOREM: Mr. Wiley, if I understand  
19 correctly, you are suggesting that Ms. McNeill's  
20 original motion for summary determination that was  
21 decided and granted by Judge Moss is her one chance to  
22 file a motion to dismiss, essentially?

23 MR. WILEY: In so many words because of the  
24 Commission's procedural rule, it clearly converts a  
25 motion for summary adjudication to a motion to dismiss

0064

1 if it's supported by affidavits and other evidentiary  
2 material, which hers was, and she was seeking the same  
3 outcome, which was dismissal.

4 MS. MCNEILL: I don't know where he's seeing  
5 the rule that I'm precluded from bringing a motion for  
6 dismissal based on a change to the pleadings. These  
7 are now going to be different pleadings, and as you  
8 know, I think it changes the nature of the case. I  
9 think it's a new lawsuit, and even if it weren't a new  
10 lawsuit, I don't know where it says in the rule that  
11 you only get one motion.

12 The motion that we brought was very narrowly  
13 presented on the issue of mootness, and unfortunately,  
14 I do not agree with you that in the administrative  
15 record there is any briefing on the statutory authority  
16 question. That was all done at the Superior Court, and  
17 maybe we do need to bring the Superior Court record  
18 into play.

19 MR. WILEY: I have no objection to that, Your  
20 Honor, because I think it will also avoid costs in  
21 terms of plowing over the same legal arguments, putting  
22 aside the standing and all the APA issues that were  
23 addressed in court.

24 JUDGE TOREM: I'm looking at Ms. McNeill's  
25 motion, and this is dated, I think, March of 2008,

0065

1 March 3rd.

2 MS. MCNEILL: That's right.

3 JUDGE TOREM: It moves for summary dismissal  
4 of the action; although, it's titled "Summary  
5 Determination," Paragraph A(1) on Page 1 says you are  
6 seeking summary dismissal, so I guess we blended the  
7 two, motion to dismiss and summary determination issues  
8 into one. You say because its moot and it no longer  
9 presents a justiciable controversy.

10 MS. MCNEILL: Correct.

11 JUDGE TOREM: The final language says, the  
12 issues are now academic, and the Commission cannot  
13 provide effective relief. The case should be  
14 dismissed.

15 Now, you may be arguing, Ms. McNeill, the  
16 same point that even if additional relief is asked for  
17 by statute, I anticipate you will argue the Commission  
18 still cannot grant any other alternative relief that  
19 Mr. Wiley may seek.

20 MS. MCNEILL: Yes, but not because its moot  
21 or because there isn't a justiciable controversy. Our  
22 position is -- and I don't want to get too much into  
23 the merits of it because it's going to end up on an  
24 oral argument, but our position is that because of the  
25 statutes that are at play in a private-party proceeding



0066

1 against a company that has not been determined to be a  
2 public service company that the ability for Mr. Wiley  
3 on representing a private party in an enforcement  
4 action is constrained by statute. It has nothing to do  
5 with mootness or justiciable controversy. It has to do  
6 with under what I continue to call the new lawsuit.

7           If this lawsuit were filed today brand-new, I  
8 wouldn't be arguing that it was moot. I would instead  
9 be moving to dismiss because there is an absence of  
10 statutory authority to take the steps that Mr. Wiley, I  
11 believe, is intending to take.

12           I certainly will be interested to see his  
13 motion, but as I sit here today, that's our position,  
14 and that's an entirely different argument because it's  
15 an entirely different pleading at this point, if the  
16 motion to amend were to be granted, and that's why, as  
17 I said at the outset, if you wanted be to be very  
18 technical about this, we could just have Mr. Wiley make  
19 his motion to amend and I could reply to the motion to  
20 amend, and if that motion were granted, I could bring,  
21 I think, and I don't think the rules preclude me from  
22 doing this, I could bring a motion to dismiss based on  
23 these pleadings.

24           The moot motion was very much a summary  
25 judgment motion. There were declarations and

0067

1 affidavits and exhibits attached to the moot motion  
2 that had to do with supporting our arguments on  
3 mootness, but the arguments on this proposed amendment  
4 are very different.

5 JUDGE TOREM: Mr. Wiley, go ahead.

6 MR. WILEY: Putting aside that I do think the  
7 effective relief was a feature of the argument on the  
8 motion for summary adjudication, I don't know why that  
9 argument can't be addressed in answer to the motion to  
10 dismiss, and I would also argue that if the end result  
11 of the motion to amend is denial, then I don't think  
12 this litigation continues, Your Honor, because you  
13 would have ruled that there is no effective relief,  
14 that nothing is meaningful that we are seeking, and  
15 there wouldn't be anything left to the lawsuit.

16 So I think that the effect of the motion to  
17 amend accomplishes what Ms. McNeill is seeking, not  
18 withstanding the fact that she's already addressed  
19 effective relief to a large extent in the prior motion,  
20 and we continue to spin on interlocutory procedural  
21 motions and never get to a substantive hearing in this  
22 matter.

23 JUDGE TOREM: Let me ask at this point, since  
24 I think I understand both of your positions, whether  
25 Mr. Potter or Mr. Sells have any input at this time.

0068

1 Mr. Potter?

2 MR. POTTER: No, Your Honor.

3 JUDGE TOREM: Mr. Sells?

4 MR. SELLS: No, Your Honor.

5 JUDGE TOREM: Then I'm prepared, as I  
6 understand this, that Mr. Wiley, according to Order 05  
7 in Paragraphs 18, 19, and 37, as you've pointed out,  
8 the Commission says that your proceeding may continue  
9 even though a cease-and-desist order may not be  
10 applicable if you were seeking a remedy that would be  
11 meaningful. That's in Paragraph 18.

12 The Commission then in its action paragraph  
13 of 19 gives back to me as the administrative law judge  
14 a requirement to determine whether your request to  
15 amend the Complaint should be granted because you are  
16 seeking a remedy that is available, and if so, whether  
17 this litigation should be allowed to continue.

18 So I understand their direction to have me  
19 give you the opportunity to file the motion to amend,  
20 and you are going to do that on Tuesday, next week,  
21 August 25th.

22 MR. WILEY: Correct.

23 JUDGE TOREM: When I see the motion, from  
24 there, I will know what remedy you are alleging and  
25 contending is available in the present tense and how

0069

1 you justify the Commission being able to have the  
2 jurisdiction and the power to grant the relief you are  
3 now going to be seeking.

4 MR. WILEY: Yes. I think that's fair, Your  
5 Honor.

6 JUDGE TOREM: From there, I would  
7 characterize this as a procedural motion, and typically  
8 under WAC 480-07-375, Ms. McNeill would have five days  
9 to respond to that procedural motion. That is down  
10 under sub 4, because it's other than a motion for  
11 continuance or dispositive motion.

12 375 sub 4 gives five business days, but it  
13 does empower the presiding officer to set an additional  
14 time period as I may see fit. So having Ms. McNeill  
15 respond to the motion on Friday, September 4th, is  
16 permissible under the these rules, and I think based on  
17 your agreement on that timetable, that would be fine.

18 From there, whether or not there is just  
19 cause to allow a reply, it sounds as though there is  
20 plenty that you are not sure what she's going to say  
21 about this and I might benefit from it.

22 MR. WILEY: Right.

23 JUDGE TOREM: Ms. McNeill, if I understand  
24 your proposal, is to not only respond to Mr. Wiley's  
25 motion to amend the Complaint as directed by the

0070

1 Commission in Order 5, but also you would wish at that  
2 time to more flesh out a motion to dismiss the newly  
3 amended complaint before you know if that motion will  
4 be granted, and in doing so, you will be filing a  
5 dispositive motion, and under the rules, although a  
6 reply may not be allowed to either of these motions,  
7 you would much rather file that and have the two-part  
8 decision made by me all in one stream-lined proceeding,  
9 you would file a cross-motion to dismiss on it being  
10 granted, and from there, Mr. Wiley would get a response  
11 and you would want a final reply, and Mr. Wiley's  
12 response itself to your motion would also be the reply  
13 to your response to his original motion.

14           So what we are talking about in instead of a  
15 series of just two pleadings being filed a series of  
16 four asking not just for one decision but two.  
17 Mr. Wiley, did I characterize that correctly?

18           MR. WILEY: You did except that I would say  
19 that the second decision has already been made. That's  
20 my argument. That decision has already been made on  
21 the cross-motion to dismiss.

22           JUDGE TOREM: With that understanding, and I  
23 don't expect you to agree with that characterization,  
24 Ms. McNeill, did I characterize the four filings that  
25 you are suggesting come in on the schedule you

0071

1 previously described?

2 MS. MCNEILL: You very accurately stated it,  
3 and it's a bit of a can of worms, and I think that the  
4 way you layed it out is exactly how I would summarize  
5 it. We will be asking for not one decision but two,  
6 and it's a series of four steps.

7 I will concede in fairness, however, that the  
8 fourth step is the one that is most in question, and  
9 that would be whether I get to, in fact, respond to the  
10 new arguments that Mr. Wiley may make in his reply to  
11 my response on his motion to amend and his, on the one  
12 hand, which will also act as the response to my motion.

13 JUDGE TOREM: Mr. Wiley, I have to rule  
14 against you on the characterization of Ms. McNeill  
15 getting a second bite at the apple. I do see this as  
16 an amended complaint, and the amended complaint cannot  
17 possibly have already been argued against. It is  
18 something new by its very nature. The Commission is  
19 allowing by Order 05 you to breathe life back into a  
20 complaint that Judge Moss found was moot and that the  
21 Commission disagreed with for other reasons and is  
22 allowing you to recharacterize the relief you are  
23 seeking and to allow the Commission to determine  
24 whether it is in a position to grant that.

25 Now Ms. McNeill apparently only argued

0072

1 against the relief you were seeking in her previous  
2 motion for summary determination, and there is nothing  
3 in the rules that I can see under WAC 480-07-375 or 380  
4 that limits a party to filing a single motion to  
5 dismiss. If a motion to dismiss were to be denied or  
6 granted in a case, particularly if it were to be  
7 denied, I think the judge would be well advised to deny  
8 in concept a follow-on motion to dismiss for another  
9 reason that's being filed that could have been done all  
10 in the same previous motion. That might be denied as  
11 the second bite at the apple and thinking of new  
12 arguments when the case has not changed in procedural  
13 posture.

14 Here the case has been decided and remanded,  
15 and the remand is not the same case. The remand is by  
16 its own terms requiring and allowing you upon your  
17 discretion and your client to alter the original terms  
18 that were filed two-plus years ago. So I do believe  
19 that due process requires Ms. McNeill to be allowed to  
20 reset the clock on any motions to dismiss depending on  
21 what she sees in your new amended complaint, so she may  
22 not only answer the motion whether or not you should be  
23 allowed to amend, but in doing so as she finds  
24 necessary, and as she's described it today, file a new  
25 motion to dismiss to which you will have an opportunity

0073

1 to respond, and as has been given the tradition in this  
2 case, I will find that there is cause under WAC  
3 480-07-370, sub Paragraph 1(d), the reply can only be  
4 authorized upon a showing of just cause. So I'm now  
5 verbally finding just cause to allow the four filings I  
6 previously described.

7           So within the ambit of the Commission rules  
8 then, Mr. Wiley, you will find your original motion to  
9 amend your complaint and describe the new relief you  
10 believe is available. That's required by Order 05,  
11 Paragraphs 19 and 37. I do suggest you keep in mind  
12 Paragraph 18, as you brought up, in describing why that  
13 remedy would be one that is meaningful, and although  
14 the word "meaningful" was not necessarily contained  
15 within the Commission's rules or applicable statutes,  
16 clearly from Order 05, Paragraph 18, the Commission  
17 wanted to insure that allowing this litigation to go  
18 forward would only occur if the remedy would be  
19 meaningful.

20           They don't use the word "significant," but  
21 they use the word "meaningful," and I'm not sure  
22 exactly how to take the intended meaning of that. I  
23 trust you will allow in the filings that come in the  
24 month ahead me to have some judgment as to how to  
25 interpret the word "meaningful" with regard to the new



0074

1 remedy, Mr. Wiley, that your client will be seeking via  
2 the motion to amend the Complaint.

3 MR. WILEY: Are you through?

4 JUDGE TOREM: I think so.

5 MR. WILEY: Of course the Commission doesn't  
6 say meaningful to whom, and I will clearly argue that  
7 meaningful to the Complainant and to the Intervenors  
8 may have a different significance than to the  
9 Respondent's --

10 JUDGE TOREM: Mr. Wiley, make it meaningful  
11 to me. I'm the one making the decision.

12 MS. MCNEILL: Can I just say that I think you  
13 said that out appropriately for him to respond to, and  
14 I don't think today is the time to allow him to make  
15 arguments as to why it's meaningful.

16 JUDGE TOREM: I don't need to know why today,  
17 but persuade me in your filings that are going to come  
18 in. So I've ruled procedurally that this is going to  
19 be a new complaint.

20 MR. WILEY: Can I ask you a question on that,  
21 Your Honor, because I don't necessarily agree with that  
22 or at least I need to clarify.

23 JUDGE TOREM: Go ahead and clarify. I'm not  
24 looking for agreement. I'm telling you how it's going  
25 to be.

0075

1           MR. WILEY: I wanted to interrupt you  
2 initially because Ms. McNeill has argued that we are  
3 trying to convert this into a new action, and I clearly  
4 don't agree with that. The facts, the timing, all of  
5 the backdrop remains the same. The only thing that our  
6 amendment will seek to address is the availability and  
7 meaningfulness of the remedies, but nothing else will  
8 change in terms of the allegations, and I think it's  
9 important to make that distinction, because if you view  
10 this as a whole new complaint, that's almost  
11 presupposes dismissal, and I clearly don't want that to  
12 be the premise.

13           JUDGE TOREM: I agree and disagree at the  
14 same time. There is no presupposition as to how this  
15 case should go. I don't think that the commissioners  
16 would have wasted all of our time in sending this back  
17 for a procedural nicety to allow you to amend a  
18 complaint that would not have an opportunity to change  
19 the arguments and the outcome that Judge Moss initially  
20 set out back in April of this last year. I don't think  
21 that they would have sent it back if there wasn't a  
22 chance for the litigation to continue.

23           What's new are not the facts and premise of  
24 the complaint but the remedy you are going to seek. I  
25 do agree with you there. However, Ms. McNeill could

0076

1 only file a motion to dismiss based on what had come in  
2 back of June of 2007, and that's what Judge Moss ruled  
3 on based on the mootness arguments in April of 2008.

4           The Commission in October of 2008 said from  
5 the perspective that it may be moot and that a  
6 cease-and-desist order is no longer applicable that you  
7 as a private bringer of a complaint essentially are  
8 standing in the shoes of the Commission's enforcement  
9 authority under the statute, and you could seek any  
10 remedy that the Commission could have sought on its own  
11 two feet.

12           It's similar to what I will characterize as  
13 the private attorney general statutes that are out  
14 there in environmental law or other areas where a  
15 private citizen; in this case your client corporation,  
16 can come in and seek to enforce the laws as they are  
17 written. So what's new is you are coming back now not  
18 just as a private company wanting the other to stop  
19 doing something in competition with them, but now also  
20 seeking other remedies as you've suggested there may be  
21 a penalty or some declaratory order from the Commission  
22 that this sort of behavior was a violation to support  
23 that penalty that you might seek. That's something  
24 that wasn't in the original Complaint; is that correct?

25           MR. WILEY: Correct. You know the issue

0077

1 about the original declaratory order issue, but yes,  
2 and I think your clarification -- I'm just concerned  
3 about the term "new lawsuit," because Ms. McNeill has  
4 argued that, and we clearly don't agree. I think you  
5 put the context much more clearly for me now.

6 JUDGE TOREM: What I'm seeing in new is what  
7 you are seeking now in the amended complaint, which I  
8 will see what it is exactly you are seeking next week,  
9 and as long as that's going to be meaningful, then by  
10 the Commission's order, I would allow you to amend the  
11 Complaint.

12 Whether that relief would actually be granted  
13 in the end would remain to be seen, and Ms. McNeill is  
14 attempting to do what I will say is in the interest of  
15 judicial efficiency not only for this commission but  
16 for the parties involved in the time and effort and  
17 money that has been spent on all of us that are on the  
18 line today that we decide sooner than later if the  
19 Commission is in such a position to grant her motion  
20 saying that this relief is not available, even though  
21 it might be meaningful.

22 Ms. McNeill, is that what you intend to offer  
23 in your cross-motion to dismiss depending on what comes  
24 in next week?

25 MS. MCNEILL: Yes, something like that.

0078

1                   JUDGE TOREM:  So no matter how much more  
2  discovery goes on, Mr. Wiley, about the case, if it's  
3  already ripe to show that there is reason by law that  
4  the Commission cannot grant under its authority the  
5  relief you are going to seek now, then I think it's in  
6  everyone's interest to have this four-part filing,  
7  which is a two part question for me to address, and  
8  under the rules, there is a reason to allow a reply on  
9  both of those issues.

10                   If you would like, Mr. Wiley, to make sure  
11  this is clear, you will file your motion to amend the  
12  Complaint.  Ms. McNeill will file perhaps a  
13  consolidated but a two-part filing on September the  
14  4th.  One is apparently her opposition to allowing you  
15  to amend the Complaint, but upon the perchance that it  
16  is granted, she wishes the Commission to know that she  
17  thinks the new relief being granted, whatever that  
18  might be specified as in your motion, cannot be granted  
19  and should not as a matter of law be available.

20                   Therefore, she's asking the Commission, even  
21  if it allows the amendment, to dismiss the case yet  
22  again on new grounds, not on mootness but on something  
23  else, then you may not only on September 14th reply to  
24  her opposition, but assuming your motion is granted,  
25  respond to her motion to dismiss, and on September

0079

1 21st, she would then have a reply to your response to  
2 her motion, but she would no longer talk about the  
3 motion to amend the Complaint because she will have  
4 already responded to that. She will simply reply to  
5 whatever arguments you might raise in your response to  
6 her cross-motion to dismiss your complaint.

7 MR. WILEY: That clarification is  
8 appreciated, Your Honor.

9 MS. MCNEILL: I appreciate it as well. You  
10 stated it more clearly and succinctly than I was able  
11 to.

12 MR. WILEY: I have just one slight question  
13 that sort of remained unresponded to, if I might ask  
14 you.

15 JUDGE TOREM: Go ahead.

16 MR. WILEY: The only thing that I see in this  
17 process, and I share your concern not to engage in  
18 proceedings that get repeated yet again, I would view  
19 the hypothetical denial of the motion to amend.  
20 Wouldn't you believe that would be in effect a  
21 dismissal of the litigation in reading Order 05? That  
22 was always my problem with this additional motion to  
23 dismiss.

24 JUDGE TOREM: You are correct that if I do  
25 not grant your motion, then I need not consider

0080

1 Ms. McNeill's motion to dismiss the case because it  
2 wouldn't exist.

3 MR. WILEY: Okay, fair enough.

4 JUDGE TOREM: Essentially, it's a conditional  
5 motion to dismiss that I don't need to address any of  
6 its grounds until and unless I grant your motion to  
7 amend the Complaint.

8 MS. MCNEILL: That's correct.

9 JUDGE TOREM: Let me now ask the other  
10 parties, if they are still with us, first, Mr. Potter,  
11 if you followed all of that, your client from Clark  
12 County may wish to respond to either of those motions.  
13 Given the anticipated subject matter of either, do you  
14 want to let us know if you plan on filing anything?

15 MR. POTTER: Yes. At this point, I obviously  
16 wouldn't be filing anything initially. I would  
17 probably wait until Ms. McNeill had filed her response  
18 to the motion to amend, if that would be all right, to  
19 decide if there were issues that I felt the County  
20 needed to address?

21 JUDGE TOREM: So what you are suggesting is  
22 the earliest filing we would see from the County might  
23 be Monday, September the 14th, and that would be  
24 essentially a response to Ms. McNeill's response to the  
25 motion.

0081

1 MR. POTTER: Right, for the motion to  
2 dismiss.

3 MS. MCNEILL: Your Honor, I think that's a  
4 fair reaction. I think I would be remiss if I didn't  
5 at least point out the fact that in reality, this is a  
6 case in which there is three lawyers on one side and  
7 one on the other, and I think whatever needs to be done  
8 to prevent people from piling it on, I would appreciate  
9 any efforts in that regard. I don't think it would be  
10 fair or inappropriate participation by the County or  
11 the WRRRA to just simply start dividing amongst  
12 themselves additional arguments and giving me three  
13 briefs to which I need to reply.

14 MR. WILEY: Your Honor, I think Ms. McNeill  
15 would acknowledge that we have been pretty good about  
16 avoiding that in this litigation, and I would also say  
17 that the intervenors should be heard on the subject of  
18 meaningful and available remedies, particularly, and we  
19 want to avoid the cross-reply issue that came up during  
20 the petition for administrative review.

21 If Ms. McNeill is going to get the last bite  
22 of the apple on the 21st, let's clarify whether they  
23 get to respond by the 14th or the 21st, I would  
24 suggest.

25 JUDGE TOREM: That what I'm hearing from



0082

1 Mr. Potter is that his date that he would file anything  
2 would be after seeing your motion and Ms. McNeill's  
3 cross-motion to dismiss, he's proposing that his filing  
4 would come in on the 14th; is that correct, Mr. Potter?

5 MR. POTTER: That's correct, as a response,  
6 and then Ms. McNeill would have an opportunity to  
7 reply. I don't think it's persuasive to duplicate  
8 other arguments so I would avoid doing that.

9 JUDGE TOREM: Mr. Sells, how about you?

10 MR. SELLS: If I could have just a minute,  
11 I'm working on my wrists with a dull letter opener  
12 here. Maybe I can hit a vein. I will reply to what  
13 appears to be necessary to be replied to within the  
14 time limits set, and if we have anything new to argue,  
15 we will say so, and if all we want to say is, "Me too,"  
16 as far as WCI is concerned, that's all we will say, but  
17 probably on the 14th would be the first filing.

18 JUDGE TOREM: Do either you or Mr. Potter  
19 anticipate having need or desire to file anything after  
20 the 14th?

21 MR. WILEY: Your Honor, wouldn't that kind of  
22 depend on what is said by me on the 14th? I guess we  
23 could coordinate that, but I would like them to have an  
24 opportunity by the 21st to get a comment at the same  
25 time Polly does.

0083

1           MR. SELLS: I would like to have the ability  
2 to comment on the 21st, but again, I'm not going to do  
3 it to do it, and if it's not necessary, we won't.

4           JUDGE TOREM: Remind me here... I got the  
5 impression from Ms. McNeill's description of the other  
6 parties that they are aligned with one side or the  
7 other. Mr. Sells, which side is your WRRRA aligned  
8 with?

9           MR. SELLS: Waste Connections, Inc., is a  
10 member of WRRRA.

11          JUDGE TOREM: Mr. Potter, which side is the  
12 County aligned on?

13          MR. POTTER: Waste Connections.

14          JUDGE TOREM: What I'm inclined to tell you  
15 is you apparently would support the motion to have  
16 Mr. Wiley's client come back now with a new remedy, and  
17 the only meaningful documents you will be responding to  
18 are not, Hey yeah, I agree with what Mr. Wiley says on  
19 the 14th and I want to state that again on the 21st,  
20 but that on the 14th, you will be filing your client's  
21 individual positions as intervenors in this lawsuit  
22 with separate and meaningful positions to advance in  
23 addition to that of Waste Connections.

24                 You will be telling me, along with Mr. Wiley,  
25 three different possible ways to view the cross-motion

0084

1 to dismiss and also be able to file your replies to the  
2 motion to amend and any response to that. I don't know  
3 what else you would have to respond or reply to on the  
4 21st. I'm failing to see that.

5 MR. POTTER: I agree with you that I think  
6 the 14th is what I'll be responding to the motion to  
7 dismiss, and I doubt that I will be needing to  
8 otherwise file anything responsive to the motion to  
9 amend. So if I have my opportunity to do a response to  
10 the motion to dismiss, I think that's adequate.

11 JUDGE TOREM: Mr. Sells, do you concur?

12 MR. SELLS: I wouldn't disagree with that.

13 JUDGE TOREM: I'm not going to allow, unless  
14 you file a motion under WAC 480-07-370(1)(d), a showing  
15 of cause for any other filing besides the one on the  
16 14th for the County or for the WRRRA. I don't see that  
17 there is anything to respond to after that. Because  
18 you will be essentially replying or responding to  
19 yourselves, there are no other intervening filings from  
20 Ms. McNeill except for those which come in on the 4th,  
21 to which you are already being given an opportunity to  
22 respond on the 14th, because she's not filing anything  
23 on the 14th. Ms. McNeill, your filing dates are on the  
24 4th and the 21st; isn't that correct?

25 MS. MCNEILL: That's correct.

0085

1           JUDGE TOREM: So the other parties' filing  
2 dates will be on the 14th. If there is anything in  
3 addition to be said, it has to come in with a request  
4 for leave to file that and showing of cause as to what  
5 else there is to respond to.

6           MR. WILEY: Your Honor, just one comment.  
7 The only irony I see that I would note is that the  
8 Complainant doesn't get the last bite at the apple  
9 under the process. The Respondent does, and that is  
10 unusual as the party with the burden to go forward.

11           JUDGE TOREM: You are forgetting that we are  
12 combining two processes.

13           MR. WILEY: I'm not forgetting it. I'm just  
14 saying that the last bite of the apple is the last time  
15 around for Ms. McNeill as well, but I will live with  
16 the way the chips have fallen.

17           MS. MCNEILL: Well, I lost both of them so  
18 maybe that's good for you.

19           JUDGE TOREM: I'm going to reduce this to  
20 writing in such a way that the schedule is set out in a  
21 prehearing conference order. I'm going to have to get  
22 to that today. Hopefully it will be issued on Monday.

23           Again, it's August 25th is the opening  
24 filing, the motion to amend the Complaint. Friday  
25 September 4th will be the response from Ms. McNeill as

0086

1 well as any cross-motion to dismiss she wishes to  
2 combine with this two-part decision for me. Replies to  
3 the response to the motion to amend the Complaint as  
4 well as any responses to a cross-motion to dismiss are  
5 due on September the 14th.

6           The following Monday, September 21st, will be  
7 Ms. McNeill's final, as you put it, bite at the apple  
8 to reply to any of those responses to her motion to  
9 dismiss. To be clear, the WRRRA and Clark County will  
10 have an opportunity to file their pleadings on these  
11 issues on Monday, September the 14th, and those will be  
12 both any comments in support of the motion to amend the  
13 Complaint and any comments responding in opposition to  
14 the Enviro/Con and Trucking as well as Waste Management  
15 Disposal of Oregon's motion to again seek to dismiss  
16 this matter based on the new relief being sought.

17           Were there any other procedural matters that  
18 we want to take up that the parties see?

19           MR. WILEY: Your Honor, can authorize e-mail  
20 service? Particularly since the 25th with these  
21 additional items is coming fast, I would propose that  
22 we be able to serve by e-mail by five p.m. with hard  
23 copies in the mail, of course, as always, and you rule  
24 on how many copies you want, hard copies of that.

25           MS. MCNEILL: Thank you for bringing that up,

0087

1 David. I concur in that request.

2 MR. POTTER: I don't have any objections.

3 MR. SELLS: Fine with me.

4 JUDGE TOREM: Under the current rules the  
5 Commission has amended, that is anticipated, so let me  
6 be clear that that rule will be followed in this case  
7 from this point forward. As far as the service list, I  
8 will need to see how many additional copies are coming  
9 in. The original orders in this case I don't think  
10 have been changed.

11 MS. MCNEILL: I don't think there were any  
12 additional copies required.

13 JUDGE TOREM: In Order 01, Paragraph 13, that  
14 directs the parties to file an original plus six. Let  
15 me go and find out why. Typically, three of those are  
16 for the commissioners, and Mr. Cedarbaum may yet be  
17 receiving copies as well. I will find out who those  
18 six copies are going to and see if I can change that.

19 MR. WILEY: You will put that in the order, I  
20 assume.

21 JUDGE TOREM: I will. Probably a clause to  
22 the effect that Order 01's paragraphs are amended to  
23 reflect the new electronic submission of documents  
24 rule. That's Paragraph 16 in Order 01, and Paragraph  
25 13 I'll amend if necessary or reiterate it's still six

0088

1 copies if that's what it has to be.

2 MS. MCNEILL: Thank you.

3 MR. SELLS: Let me ask a question as well of  
4 the other parties. Are we going to have Cedarbaum on  
5 the service list or wait and see?

6 MS. MCNEILL: No, we are not. I've spoken  
7 with Mr. Cedarbaum following the arguments on appeal,  
8 and it's his view that he's done.

9 MR. SELLS: Okay.

10 JUDGE TOREM: If you want to send him a  
11 courtesy copy by e-mail, please feel free --

12 MS. MCNEILL: Actually, Your Honor, I think  
13 he would prefer that we not. In my communications with  
14 him, or maybe you should talk to him yourself, but he  
15 expressed an interest in actually not being involved so  
16 that he would be able to maintain neutrality if the  
17 issue came back up again and anybody came to the AG's  
18 office about petitions or anything like that. You  
19 should talk to him yourself.

20 JUDGE TOREM: I will speak to Sally Brown,  
21 the head attorney general, to find out who might be  
22 available if anything is needed for an advisor to the  
23 administrative law division at this stage of the  
24 proceeding.

25 MS. MCNEILL: That's the point exactly, and

0089

1 Mr. Cedarbaum feels he cannot serve that role because  
2 of his participation on the appeal.

3 JUDGE TOREM: I would concur. I would not be  
4 seeking out his advice or viewpoints on any of this.  
5 If I do choose to use an attorney general to knock some  
6 ideas around with, it will not be Mr. Cedarbaum but  
7 somebody designated to do so who is not representing an  
8 interest in the case and hasn't done so.

9 Let me ask one other question, and I do this  
10 hesitantly. Is there any anticipation that the parties  
11 are going to want any oral argument on these motions  
12 before I issue an order deciding both questions that  
13 you are going to be presented to me, and I will have  
14 all the information on September 21st. Mr. Wiley, is  
15 there any desire on your client's part to spend time  
16 and energy on an oral argument?

17 MR. WILEY: Ms. McNeill and I have discussed  
18 that preliminarily. I think we could probably come to  
19 some agreement potentially on that issue. Right now, I  
20 don't think we need to address it. I don't know how  
21 she feels.

22 MS. MCNEILL: I don't think oral arguments  
23 should be necessary, given the proceeding that you have  
24 allowed, but I would certainly say, Your Honor, that  
25 you have the option of inviting oral argument. I would



0090

1 not feel need to request it as I sit here today, and I  
2 know that both Mr. Wiley and I have the option at the  
3 end of all the briefing to request you to entertain it,  
4 but I certainly wouldn't want to foreclose you from  
5 requesting it of us if you feel that that would assist  
6 in your evaluation.

7 JUDGE TOREM: I just wanted to know if there  
8 would be a need, and right now, it sounds as though the  
9 answer is no. Things could change, but right now no.  
10 I will let you know if I have read everything and still  
11 have questions that remain unanswered.

12 As I see the ultimate question then is what  
13 will happen once I get everything in on September the  
14 21st, I will tell you that I'm beginning what appears  
15 to be a fully litigated electric and gas rate case with  
16 Avista Utilities. The hearing date for that is October  
17 the 5th through the 9th. My energies are going to be  
18 quite focused on that case leading up to it, so I do  
19 not know if I will be able to get an order out to you  
20 on either of the issues, and I would imagine I would do  
21 best to have one consolidated order either granting or  
22 denying the motion to amend the Complaint, and if I  
23 grant it, then determining the issues as raised by  
24 Ms. McNeill's motion to dismiss the proceeding as  
25 amended.

0091

1           So I don't know if I will be able to get an  
2 order out until at least 30 days after the filing,  
3 which is our usual performance standard, somewhere  
4 within 30 to 60 days, and I just want to make sure the  
5 parties understand that up front. I will be here, but  
6 the Avista Utilities case is going to eat up a lot of  
7 my time between now and September 30th when we have our  
8 public comments hearings and get the commissioners  
9 ready for the case, which begins that first full week  
10 of October. So I wouldn't expect to see an order on  
11 this case until late October as it stands.

12           MR. WILEY: Fair enough, Your Honor. I would  
13 say that if the order is to grant the motion to amend  
14 and allow the case to proceed to hearing, I will  
15 probably be asking for a hearing date on a mutually  
16 convenient but fairly quick fashion just because of how  
17 long this has been pending.

18           JUDGE TOREM: I would concur if the  
19 procedural posture of the case after the order is  
20 issued allows the motion to amend the Complaint and  
21 denies the motion to dismiss it at that point that  
22 there would be a need for us to stand up quickly a  
23 prehearing conference, and as soon as that order is  
24 issued, I would probably be in touch with you the next  
25 day to determine how quickly we could all get together

0092

1 and determine the procedural path from that point  
2 forward.

3 MR. WILEY: Thank you.

4 JUDGE TOREM: If it comes out the other way  
5 that there is a denial of your motion or a granting of  
6 yours and a granting of Ms. McNeill's motion to  
7 dismiss, then I would imagine there would be either a  
8 motion to reconsider or a motion for it to go up on  
9 appeal again to the commissioners, and that would be a  
10 timetable dictated by rule and not something to  
11 discretion.

12 Mr. Sells, if you will pass me the paper  
13 clip, I'm about at that point myself. Is there  
14 anything else for the record today?

15 MR. SELLS: Nothing from here, Your Honor.

16 JUDGE TOREM: We are adjourned.

17 (Prehearing conference adjourned at 2:46 p.m.)

18

19

20

21

22

23

24

25