BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

WASTE CONNECTIONS OF WASHINGTON, INC., Complainant, v. ENVIRO/CON & TRUCKING, INC., a Washington corporation; and, WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., Respondents.	DOCKET NO. TG-071194 WASTE CONNECTION OF WASHINGTON, INC.'S REPLY TO OPPOSITION TO MOTION FOR LEAVE TO FILE AMENDED COMPLAINT, AND ALTERNATIVELY, OPPOSITION TO MOTION TO DISMISS THE AMENDED COMPLAINT

I. OVERVIEW OF PLEADING STATUS

1 Pursuant to Prehearing Conference Order No. 6 in this matter, Waste Connections of Washington, Inc. ("WCW" or "Complainant"), 9411 N.E. 94th Avenue, Vancouver, Washington, 98662, files this Reply to Enviro/Con & Trucking, Inc. and Waste Management Disposal Services of Oregon, Inc. (hereinafter "Respondents")' Opposition to Motion for Leave to File Amended Complaint and its own Opposition to the Subjoined Alternative Motion to Dismiss the Amended Complaint filed by Respondents under WAC 480-07-380(1).

II. THRESHOLD ARGUMENT IN OPPOSITION TO RETRYING THE MOOTNESS DOCTRINE AT THIS STAGE OF THE PROCEEDING

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A. The Respondents' Transparent Attempts to Resuscitate Mootness as an Overarching Basis for Opposing Complaint Amendment and/or as Support for Their Motion to Dismiss Must be Rejected.

2 As anticipated, Respondents, now morphed at this stage of the administrative proceeding into the self-styled "Environmental Contractors" (and, rather legally conclusorily so), have for the eighth separate occasion,[1] made use of the present forum in whole or in part to argue that this proceeding should be dismissed as moot. Despite the Commission's unambiguous ruling to the contrary in Order No. 5, Respondents here defend their repetitive stance " . . . because the 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."[2]

3 To suggest that the Respondents "do not wish to rehash the dispute of mootness" at this successive stage of the preliminary pleadings need only be contrasted with the sheer number of pleadings, pages, appeals and arguments fashioned by Respondents since their initial motion for summary determination as a challenge to credibility on that point. Indeed, the Commission, in Order No. 5 on remand (which is, after all, the parties and hearing officer's guide here),[3] expressly found that, although the remedy sought in the original complaint was moot, the complaint itself was not. The Commission in Order No. 5, has therefore determined that issue of the case. Further direct or collateral arguments by Respondents to assert mootness as a reason to oppose

[1] Motion for Summary Adjudication (3/3/08); Reply to Answer to Summary Adjudication (3/24/08); Answer to Petition for Administrative Review (6/9/08); Petition for Leave to Reply and for Reply to Intervenor's Answers (6/16/08); Petition for Judicial Review (11/6/08); Petitioners' Opening Brief in Support Petition for Judicial Review (6/9/09); and Petitioners' Reply Brief (7/9/09).

[2] Respondents' Opposition to Motion to Amend, Alternatively Motion to Dismiss, fn. 24, ¶ 20.

[3] And unfortunately for Respondents, not the Initial Order No. 3 Granting Summary Determination, whose holdings are liberally sprinkled throughout their Opposition pleading and which order was ultimately reversed by Order No. 5.

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amendment of the complaint or dismissal of the amended complaint should be summarily rejected, or the prehearing pleading cycle will never end.[4]

III. THE PROCEDURAL SYNOPSIS OF THE PROTRACTED PRE-HEARING PROCESS TO DATE

4 Before unthreading Respondents' numerous additional arguments marshaled in Opposition to Leave to File Amended Complaint and in favor of their Alternative Motion to Dismiss, some additional discussion of the procedural and substantive context of the case seems in order.

5 As noted in Order No. 5 and the Complainant's August 25 submissions, the original complaint in this action was filed more than two years ago on or about June 12, 2007. The Respondents filed separate answers to the complaint through their joint counsel on July 3, 2007. A prehearing conference notice was issued July 16, 2007 setting a prehearing conference on August 2, 2007 which was convened in Olympia at the Commission's offices. At the prehearing conference, the first administrative law judge assigned to the case, Theodora Mace, denied the request for a brief adjudicative proceeding to resolve the issues on an accelerated basis due, in part, to Respondents' objections, issued a protective order and authorized discovery which spanned an approximately subsequent six month period. In the interim, a subsequent hearings

[4] The Commission's findings of fact and conclusions of law thus far are the law of the case and control this tribunal's consideration of all matters previously decided on appeal. The law of the case doctrine, admittedly a more "amorphous concept than *res judicata*," requires that "when a court decides a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 75 L.Ed. 2d 318, 103 S. Ct. 1382 (1983). *See also Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998) (applying the doctrine to review of administrative decisions and requiring the ALJ to conform proceedings on remand to the principles of the judicial decision).
Under the law of the case doctrine, Respondents could not now request deviation from the Commission's findings that: (1) the Complaint is not moot, even if the remedy originally pled is moot, Order No. 5 at ¶ 18; (2) the Complaint is an enforcement proceeding (and therefore incapable of conversion as discussed in detail below), Order No. 5 at ¶ 37; and (3) the Commission will not make any inference from the Commission Staff's absence in a proceeding (as urged by Respondents and refuted in detail, below), Order No. 5 at ¶ 38.

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officer, Dennis Moss, was substituted in December, 2007, who, on February 4, 2008, convened a prehearing conference which addressed and denied Respondents' requests for another set of data requests to Complainant. On March 3, 2008, Respondents filed their Motion for Summary Adjudication on the Grounds of Mootness and supported their argument by a Declaration[5] which announced that as of the February 24, 2008 declaration, "Waste Management Disposal Services of Oregon, Inc. has finished all work that involves arranging for the collection and/or transportation of C&D waste from the Evergreen Aluminum site."[6] On this basis then, the Respondents argued the matter was moot and should be dismissed. The Complainant and Intervenors answered the Motion on March 14 and 17, 2008 respectively, which Respondents replied to on March 24, 2008.[7] On April 22, 2008, the administrative law judge issued his order granting Respondents' Summary Determination Motion, to which after an extension of time to file, the Complainant filed a Petition for Administrative Review on May 30, 2009. Respondents and Intervenors all answered that Petition on June 9, 2008 and on June 16, 2008 Respondents filed a motion to Answer Intervenors' Replies to Complainant's Petition for Administrative Review which replies Complainant opposed. After the extensive briefing opposing and supporting the Initial Order, the Commission entered, on October 7, 2008, an "Order No. 5 Granting Petition for Administrative Review; Reversing Order, and Ordering Hearing on the Merits; Granting Motion for Leave to Reply."

6 However, rather than next proceeding to a prehearing conference on the matter as ordered, the Respondents, relying on an administrative/clerical/boilerplate stamp on the

[5] See Complainant's Motion of August 25, 2009, Exhibit 1.
[6] *Ibid.* at ¶5.
[7] As noted at previous stages by Complainant, an additional responsive pleading is not expressly authorized by WAC 480-07-380.

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final page of Order No. 5, claimed the interlocutory order was "final"[8] and on November 6, 2008, filed a Petition for Judicial Review of Order No. 5 in Thurston County Superior Court.[9] After initial briefing on June 9, 2009 and responsive pleading by Complainant, Intervenor WRRA and the Commission staff on June 29, and yet another reply by Respondents on July 10, 2009, the Petition proceeded to trial on July 24, 2009 before the Honorable Anne Hirsch of the Thurston County Superior Court. Judge Hirsch, after extended oral argument the same day, dismissed Respondents' Petition and affirmed Order No. 5. In her oral ruling she also upheld the staff, Complainant and WRRA's position that Order No. 5 was not a final order. Respondents had prematurely invoked the Superior Court's jurisdiction.

7 All of the preceding jurisdictional and procedural fact synopsis, WCW believes, is material to capture a full understanding of the current stage of this proceeding. Admittedly, this prolonged and tortuous procedural path has been frustrating for all. As noted, Complainant sought to preclude much of this by its original request for a brief adjudicative proceeding which is discretionary with the Commission and is admittedly difficult to obtain over other party opposition under WAC 480-07-610. Nevertheless, Complainant has consistently sought to move this case along, has formally opposed protracting the discovery phase at the prehearing conference in February, 2008, and has sought to prevent circumstances such as post-complaint activity cessation and

[8] In the same vein, Complainant notes that the caption of Order No. 5 also states " . . . Ordering Hearing on the Merits." It would hardly be genuine of it to claim that Order No. 5 directs that outcome since the content of the Commission's Order clearly makes that contingent on an initial review by the Office of Administrative Hearings now underway. "Resource-wasting" (Opposition to Motion to Amend, ¶22, line 14), does not begin to characterize the time and expense this ill-conceived judicial segue caused for Complainant, Intervenor and staff resources alike.

[9] An effort to seek judicial review of an order that our Supreme Court has admonished does not depend on the label affixed by the agency, but rather upon a realistic appraisal of the consequences of such action. *Dept. of Ecology v. City of Kirkland*, 84 Wn.2d 25, 29, 535 P.2d 1181 (1974).

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regulatory due process intervals from controlling what it believes to be its right to a fair hearing under Commission and Washington law and rule.

8 Respondents, in contrast, as noted above, have used every due process mechanism available to argue their mootness mantra now modulated by their assertion of no available remedy, and/or incorrect statutory mechanism and lack of effective relief to thwart an evidentiary hearing at which the Complainant bears the burden of proof.

9 Without any further evidence or record to place before the tribunal, the Respondents yet again seek to deprive WCW of a right to be heard on its complaint. They do so first, by unceasingly attacking the gravamen on the amended complaint as now predicated on completed conduct which they reargue renders the matter moot, and, secondly, in precluding the right of affected parties and ultimately the Commission to seek to have conduct construed under the private complaint statute under which the Commission is delegated by the legislature to principally administer and interpret law violations. They advance these goals further by circuitously arguing that because the conduct is completed, the remedies allegedly remote and futile, and in the recognition that the Commission staff has not brought the complaint, there is and cannot be any remedy for and ultimate legal consequence to their conduct.

IV. ARGUMENT IN SUPPORT OF MOTION FOR LEAVE TO AMEND AND IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

A. WCW is not Seeking to "Convert" a Complaint Action under RCW 81.04.110 into a Classification Proceeding and Has Standing to Maintain this Action.

10 The Respondents next recycle an argument that they have calibrated at previous stages of this proceeding, particularly in unsuccessfully arguing to reverse Order No. 5 in Thurston County Superior Court, beginning at page 12 of their current Opposition, by

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arguing a classification proceeding is a precondition to a private party complaint here under RCW 81.04.110.[10]

11 The Complainant has also previously addressed much of this argument in its Petition for Administrative Review of May 30, 2008 and specifically in footnotes 31 and 32 at pages 13 and 14 of that pleading, which it requests be incorporated by reference on the scope of the private party complaint statute, its analogy to private rights of action under the Consumer Protection Act, and the ability of private litigants to invoke the Commission's adjudicative authority to simply find violations of law, under RCW 81.04.110.[11]

12 What does appear new in Respondents' latest argument is their reference to the Amended Complaint's allegation of "direct damage" to WCW (an allegation admittedly not required by 81.04.110), and their protracted digression beginning at page 17 that this translates into the equivalent of "end-running" the lack of monetary damages available under the private party complaint statute and somehow belies the lack of other available remedies Respondents divine in the penalty statutes which they argue deprive Complainant of any authorized remedy here.

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[10] The resuscitation of the "conversion" argument again, like arguments of mootness and inferences to be drawn from the Commission staff's absence, is hardly original advocacy by Respondents in this proceeding. Despite Order No. 5's unequivocal ruling that RCW 81.04.110 is an enforcement proceeding brought by a private party, and the assistant attorney general's later admonition that " . . . a complaint under that statute already is an enforcement action, whether the action is initiated by the Commission or a private party, [t]hus, no conversion of Waste Connections' complaint occurred," Reply Brief of Respondent Washington Utilities and Transportation Commission, Thurston County Cause No. 08-2-02393-1 at 20, they maintain the drumbeat on remand. While fully acknowledging Respondents' due process rights and respecting the hearing officer's ruling at the prehearing conference on August 21, under WAC 480-07-380, that this Motion to Dismiss now predicated on an Amended Complaint would invoke all procedural accommodations for Respondents' further opposition under that rule, WCW continues to believe that the Commission's Order No. 5 has settled numerous issues. Those include whether RCW 81.04.110 is an independent enforcement proceeding not requiring resort to RCW 81.04.510 as a classification prerequisite, and also whether WCW is impermissibly seeking to "convert" or otherwise mix the separate enforcement statute metaphors. Complainant asks that any prospective order granting its relief and any order setting the matter for hearing preclude any such further arguments until at least any post-hearing processes.

[11] Conclusion of Law No. 2, Order No. 5, ¶ 37.

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B. By its Amended Complaint Motion, Complainant is not seeking a Declaratory Order, a Brief Adjudicative Proceeding or Any Relief Unavailable under the Private Party Complaint Statute.

13 While WCW will below answer the series of arguments Respondents make in denying the existence of any available remedies and the flawed reasoning and lack of Commission or judicial support thereof, it first responds to an earlier argument in the Opposition to the Motion for Leave to Amend that appears to be a predicate to the later discussion on available remedies in the private complaint statute and the alleged ultimate lack of standing in Complainant that Respondents now argue.

14 Order No. 5 expressly declined to address WCW's previous request for alternate consideration of the issues in a declaratory order proceeding. WCW, mindful of that ruling, did not seek to resuscitate the request despite its awareness that, by separate pleading under the cited rule in footnote 5 of Order No. 5, it might now seek to pursue that claim. Instead, it pursued an Amended Complaint only, and recognizing the substantial process to date, the potential challenge to all other potential stakeholder notification, and likely futility of requesting an expedited handling, has now removed its previously-requested request for a declaratory order and brief adjudicative proceeding. Respondent nevertheless construes these procedural choices and Complainant's reference to Order No. 5's rulings in its Motion for Leave to File and Amended Complaint by now arguing essentially that a private party Complainant cannot simply seek, by its complaint, to focus upon:

> practices of such other or others with or in respect to which the complainant is in competition are unreasonable, unremunerative, discriminatory, illegal, unfair or tending to oppress the complainant . . . the commission shall have power, after notice and hearing as in other cases, to, by its order, . . . correct the abuse complained of . . .

RCW 81.04.110.

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15 In other words, WCW, by way of a private party complaint, and not only through a declaratory judgment proceeding, has the right to contest other parties' conduct by which it alleges they are, individually, or in concert, acting as a public service company and have the Commission so find and "correct the abuse complained of" by establishing uniform " . . . rules, regulations or practices in lieu of those complained of." This in and of itself is a "meaningful and available" remedy sought by the amended complaint and does not depend upon or relate to any other adjudicative process or remedial statute mechanism of the Commission. In this sense, RCW 81.04.110 is an all-encompassing procedural, substantive and remedial statute invoked by the amended complaint, notwithstanding inferences by Respondents that by now alleging direct damage in its complaint (which specific allegation the immediately prior hearing officer cited as legally material to any Declaratory Judgment claim outcome),[12] WCW was revealing a pure monetary motivation that suggests there is no public interest impact here.

C. The Respondents Also Reargue the "Negative Inference" Premise in their Present Motion to Dismiss, Tied to their Argument on Availability of Remedies, Once Again Deflecting Order No. 5's Holdings.

16 As noted previously in the mootness doctrine overview beginning at page 2 above, Respondents also disregard another Commission directive in Order No. 5, this time of Conclusion of Law No. 3 ¶ 38, where it states "[t]he Commission makes no inference from the Commission Staff's appearance or absence in a proceeding."[13] The "negative

[12] Initial Order at fn. 15, ¶ 15.

[13] Admittedly, this theme may have sounded less familiar had it not just been voiced earlier in the same pleading, in the Opposition to Motion to Amend at page 9, paragraph 23. There, while duly giving lip service to Order No. 5's express finding " . . . the participation of the Commission in this litigation was rejected as a grounds for upholding dismissal . . ." in the quotation ellipsis that immediately follows, readvances Respondents' other major theme by adding: . . . "**of the moot case.**" Compounding the *déjà vu* circumstance, Respondents then quote initially from the administrative law judge's holding while secondarily acknowledging the Commission's finding on lack of inference in staff participation. WCW respectfully asks if due process here has yet reached its finite

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inference" claim, however, is raised to fight another day by the Respondents, now in its Motion to Dismiss on the identical premise of inference of the state's absence from the proceeding. They again begin the discussion here with reference not to the Commission's conclusion, but to a selected passage from the Initial Order whose ultimate ruling was effectively reversed by the Commission's Order Granting Administrative Review, and continue on the next page by unabashedly announcing: "...Waste Connections appears to be continuing this action because the Commission has not been interested in pursuing this action,"[14] undeniably supporting their argument on the negative inference holding the Commission expressly rejected in Conclusion at Law No. 3, above.

17 While their advancement of the premise is now linked to the alleged lack of availability of remedies, the refrain is unmistakable and again epitomizes "resource-wasting"[15] arguments already resolved in this matter, typifying the unrelenting nature of the Respondents' abject opposition to any hearing on this relatively uncomplicated legal challenge.

18 Ultimately, the Respondents appear to believe that despite the Commission's unequivocal holdings to the contrary, if they simply repeat their primary arguments on mootness, "conversion" of the classification statute, and the negative inference from the Commission Staff's continued absence from the proceeding,[16] calibrating them to the

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conclusion. They immediately rely upon the inverse of that proposition to discredit the availability of fines and sanctions here. As previously noted, Complainant cites this as another example of Respondents' use of recurring issues of law allegedly addressed by the Commission in this case, now repackaged to resuscitate the prior unsuccessful argument.

[14] Respondents' Opposition to Motion to Amend/Alternatively, Motion to Dismiss ¶38.

[15] Again, a term used by the Respondents to describe the complaint action, *Ibid.* ¶22.

[16] Moreover, despite numerous accusations and inferences by Respondents to the contrary in earlier pleadings such as their Reply to Opposition to Summary Adjudication of March 23, 2008, their Answer to Petition for Administrative Review in June, 2008 and now, once again, in their current Opposition and Alternative Motion to Dismiss, Complainant has never opposed participation in this proceeding by the Commission staff. While it is

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current issues on remand, they will somehow succeed in securing the incremental rulings they have long sought since their initial Motion for Summary Determination eons ago in this proceeding, either by the current presiding officer or in hoping the Commission will eventually contravene the findings and conclusions it made in Order No. 5.

D. In Their New Motion to Dismiss, Respondents Face, and Have Not Met, a Procedurally High Burden Under Law to Succeed.

19 Moreover, Respondents' subjoined Motion to Dismiss the Amended Complaint faces a stringent standard for being granted. Under CR 12(b)(6) and 12(c) and appellate articulations thereof, dismissal of a complaint is warranted only if the court concludes beyond a reasonable doubt that the plaintiff cannot recover under any set of facts that would justify relief.[17] Moreover, the Court presumes all facts alleged in the plaintiff's complaint are true and may also consider hypothetical facts supporting the plaintiff's claim.[18] Respondents face not only this procedural presumption and hurdle in their Motion to Dismiss, but Commission case law and the private party complaint statute which all militate in favor of denial of the Motion to Dismiss.

Respondents who have characterized this dispute as a "private dispute between two large garbage companies over one big job," (Reply to Opposition to Summary Determination, March 23, 2008, at ¶ 8), WCW and the Intervenors have, from the initial pleading stage, claimed far broader implications to the complained of activities, but as indicated, consciously chose to initially pursue a private complaint in a brief adjudicative context, ironically, to expedite resolution of an outcome. That original election has been indirectly critiqued by the prior hearing officer through his negative inference finding, and openly, by Respondents as both an indicia of a fatal flaw subjecting the complaint to dismissal with prejudice and now a disqualification from any available remedy. As noted earlier, WCW views that choice as reflective of the availability of resources of the state and undoubtedly a decision up to now by the Commission staff that the pertinent parties' interests are adequately represented in development of a hearing record without its participation. Staff, of course, has the right up to hearing to seek to actively intervene in this action under WAC 480-07-355(3). Again, as addressed above, and even more directly by the Commission in Conclusion of Law No. 3, Order No. 5, "[t]he Commission makes no inference from, the Commission Staff's appearance or absence in a proceeding."

[17] *Tenore v. AT&T Wireless Svcs.*, 136 Wn.2d 322, 329-330, 962 P.2d 104 (1998).

[18] *Hofer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988).

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E. Dismissal of a Complaint by the Commission under RCW 81.04.110 is not Strictly Controlled by Civil Court Rules[19] and is Based On the Events Extant at the Time of the Filing of the Complaint.

20 One of the many apparent misperceptions the Respondents appear to have about the Commission's broader authority under RCW 81.04.110 to regulate in the public interest, and even potentially contrasting outcome in courts and administrative agencies on motions for summary dismissal, is starkly highlighted by Paragraph 29, Footnote 42 at page 11 of the Respondents' Opposition. There, they again critique Complainant's reliance upon an *application* case rather than a *complaint* case in a citation by Complainant in support of its Motion for Leave to File an Amended Complaint.[20]

21 Unfortunately for Respondents' arguments, the Commission has previously ruled directly to the contrary on both points addressed by them. Indeed, the Commission has previously succinctly found: 1) that the relevant activities should be measured at the time of the filing of a **complaint**; and, 2) that even a joint request by the movant and respondent party for dismissal of a complaint does not mandate that relief.

22 In a Title 81 complaint case, Order SBC No. 490, *Clipper Navigation, Inc. v. Puget Sound Express, Inc.*, TS-900977 (Feb. 1992), the Commission refused to grant dismissal of a complaint requested by both opposing parties and concisely distinguished the discretion of trial courts on motions to dismiss (again, upon which Respondents expressly rely here in their Paragraph 29) from the broader jurisdiction of the Commission:

> The Commission will not dismiss the complaint. A complaint proceeding before the Commission differs significantly from a private cause of action in Superior court. The Commission does not act merely to vindicate the interest of any private party; its task is to serve the public interest. [Echoing the Commission's

[19] WAC 480-07-380(i)(a), while noting the Commission will consider the applicable standards under CR 12(b)(6) and 12 (c), clearly does not constrain the Commission's jurisdictional scope thereby.
[20] Order M.V.G. No. 135801, *In re Allen Forler d/b/a A.F. Excavating*, App. No. P-70777 (April, 1987).

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explicit findings in Order No. 5]. The cases and court rules cited by *Clipper* relate to a very different forum: one that exists to provide a peaceful means of resolving private disputes. The Commission has ruled that dismissal of a proceeding before it calls for an exercise of its discretion and is not a matter of right. [*Forler* citation omitted.][21]

23 Thus the Commission has previously defined the breadth of its jurisdiction in a motion to dismiss under the private party complaint statute. It has done so not only in retaining causes of action in complaint cases in contrast to the more circumscribed and technical power of the courts in civil actions in CR 12(b)(6) motions, but has expressly tied this to its plenary power under law to regulate "in the public interest." By further announcing "its review of a complaint, like its review of an application, will be based on the factual situation extant at the time the complaint is filed,"[22] the Commission has additionally signaled that its authority under RCW 81.04.110 will not be unilaterally limited by ameliorative/remedial conduct or third party events over which neither the complainant nor the Commission have control, which WCW argues now should "moot" the mootness argument once and for all.[23]

F. <u>As is their New Monetary Direct Damage Argument, Respondents' Familiar Rendition of the Enforcement Proceeding Statutes and their Claim of "Conversion" of the Commission Classification Statute by Complainant is Incorrect</u>.

24 Indeed, Respondents' argument in favor of dismissal goes further, offering their novel, unsupported interpretation that where two private entities are competing for business,[24]

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[21] *Clipper Navigation, Inc. v. Puget Sound Express, Inc.* at 5, 6.
[22] *Clipper Navigation, Inc. v. Puget Sound Express, Inc.* at 7.
[23] This ruling is also in accord with recent U.S. Supreme Court precedent, cited by Complainant in its Reply in the Thurston County Superior Court Judicial Review action, *Friends of the Earth Incorporated v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000), where the Supreme Court admonished against "conflating" standing and "mootness," and noted " . . . a defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Ibid.*, at 174.
[24] Albeit, notwithstanding the allegation that one of these private entities is doing so illegally.

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the Commission's enforcement statues are narrow.[25] Apparently, a private complaint predicated in part upon an alleged "loss of business" reveals a purely pecuniary interest impact entitled to little deference in Respondents' rendition of the interests adjudicated under RCW 81.04.110.

25 Respondents' renewed and related argument that the determination as to the lawfulness of their subject activities is only available in a classification proceeding first, is also either disingenuous or calculated to refocus their mootness mantra yet again. As all parties concur, RCW 81.04.510 is a penalty classification procedure reserved to **the Commission** to initiate.[26] The first paragraph of that provision provides:

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[25] As with many of Respondents' arguments, there are serious public policy implications raised if theories such as this are vindicated in this proceeding. In addition to the frankly serious concern that would be posited by requiring all private formal enforcement disputes be initiated by the Commission staff in an era of drastically declining governmental budgets and resources, Respondents are here supporting a further diminution or leveling of the playing field between regulated providers and those alleged to be illegally competing with them. Witness their statement: "[T]he public interest in protecting the customer is not implicated directly in these disputes." (Respondents' Opposition to Motion to Amend, Alternatively Motion to Dismiss, ¶ 41, lines 3, 4). Rereading and contemplating that statement may crystallize the public policy dispute posed by this proceeding no more clearly. The Respondents self-servingly argue here that their alleged misconduct has no direct bearing on either the public interest or the customers of public service companies. Nothing could be further from the truth. When companies acting as public service companies operate without authority in violation of law they unlawfully divert regulated revenues from providers whose rates and service levels are strictly established and approved by this commission under RCW 81.77.030. The unlawful siphoning off of regulated revenues decreases solid waste collection companies' gross revenues, increases their incremental costs and, by logical correlation, directly implicates regulated rates customers pay their lawful providers. To suggest that the complaint statute is narrowly circumscribed when the "first line impact" of an unregulated provider is only upon the public service provider and that this impact occurs in a statutory and remedial vacuum without direct public interest impacts, is not only naïve and incorrect, but seeks to justify an unlevel regulatory playing field with dangerous and negative consequences for the entire regulated industry and its customers under Title 81.77 RCW and its legislative purpose codified in WAC 480-70-001 as applied in WAC 480-70-006(4) and (5).

[26] Classification/show cause proceedings are not routinely initiated in the regular course of business by the Commission staff in overseeing the regulated solid waste industry. In an informal review of classification proceeding dockets over the past decade, it appears a total of approximately three classification proceedings have been initiated by staff in the solid waste arena involving allegations of illegal operations. Those are: Order M.V.G. 1840, *In re Drop Boxes Are Us/Puget Williamette Express, Inc.*, H-5039, H-5040, (October, 1998), *In re Troy Lautenbauch d/b/a T&T Recovery*, TG-041481 (Mar. 2005) and, TG-072226, *In re Glacier Recycling et al.*, a 2007 proceeding still pending with the Office of Administrative Proceedings. In all three cases, Complainant and/or its affiliate, Island Disposal, Inc., have been active as an intervenor in support of the staff position. WCW is by experience then, quite familiar with the provisions of both the Commission and private party enforcement mechanisms and does not view either provision as mutually exclusive. As a public service company it has the

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> Whether or not any person or corporation is conducting business requiring operating authority, or has performed or is performing any act requiring approval of the commission without securing such approval, shall be a question of fact to be determined by the commission. **Whenever the commission believes that any person or corporation is engaged** in operations without the necessary approval or authority required by any provision of this title, **it may institute a special proceeding requiring such person or corporation to appear before the commission** at a location convenient for witnesses and the production of evidence and bring with him books, records, accounts and other memoranda, and give testimony under oath as to his operations or acts, and the burden shall rest upon such person or corporation of proving that his operations or acts are not subject to the provisions of this chapter. The commission may consider any and all facts that may indicate the true nature and extent of the operations or acts and may subpoena such witnesses and documents, as it deems necessary. [Emphasis added].

26 The second sentence highlights also suggest that a classification proceeding, whether predicated on present or past acts as described in the opening sentence of the statute, may potentially be limited to initiation only when any person or corporation **"is engaged"** in operations without the necessary approval or authority, an interpretation which would now make even a staff-initiated classification proceeding unavailable. [Emphasis added].

27 While this and many other of the penalty provisions of Title 81.04 have apparently not been expanded upon by appellate courts on this subject, the limitation premise is consistent with Respondents' argument and citation to a 1994 Commission case[27] that a cease and desist remedy is only available after the Commission itself enters an order requiring termination of operations without authority. However, the premise that only the Commission can initiate a classification proceeding and that by its private party

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legal right to elect whether it wishes to rely primarily on the Commission staff's resources under RCW 81.04.510, or choose to initiate and pursue its own action and remedies thereunder pursuant to RCW 81.04.110, dependent upon the varying circumstances it evaluates at the time relative to factors such as investigative evidence, burden of proof, timing, WUTC enforcement staff availability, urgency to seek relief and other indicia all bearing upon its election of which statute or course to pursue.

[27] TS-940950, *In re San Juan Express* (Dec. 2004).

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complaint, WCW is seeking to "convert" this to a classification proceeding, **is a red herring** of which Complainant has been so frequently accused in prior pleadings (including their latest) by Respondents.[28]

G. Respondents' "Catch-22" Rendition of Complaint Versus Classification Proceeding Conversion and Remedy Unavailability and "Futility" Predicated Thereon Should be Rejected; *San Juan Express* is Actually Instructive on Other Issues of Law than the Mooted Cease and Desist Remedy Reemphasized by Respondents.

28 Since no one is disputing that Respondents' contested operations have ended, neither WCW nor the Commission's staff would contend a classification proceeding is necessary or appropriate because the cease and desist remedy (whether available to a private party litigant or not) is now moot. Even Respondents acknowledge this, yet seek to defeat a hearing under RCW 81.04.110 and amendment of the complaint by revising their "conversion" argument, facilely suggesting both that post-filing events **can** defeat a ruling of the lawfulness of documented events and activity, and, that "a classification" finding is a condition precedent to the remedies sought by Waste Connections. Finally, they reason because only the Commission can bring a classification proceeding, it is legally impossible to achieve the outcome sought.[29]

29 WCW finds this bold and circuitous pronouncement particularly ironic based particularly on Respondents' renewed reliance on the *San Juan Express* case,[30] which it earlier provided the Superior Court and referred to in its briefing and argument at the Superior Court level. Aside from the now admittedly academic issue of whether a cease and desist order remedy is available to a private litigant, *San Juan Express* largely contravenes Respondents' present arguments. There, a pleading denominated a

[28] Respondents' Opposition to Motion to Amend/Alternatively, Motion to Dismiss, fn. 38, ¶ 27.
[29] Respondents' Opposition to Motion to Amend/Alternatively, Motion to Dismiss ¶ 32.
[30] *Ibid.* at ¶ 32, fn. 47.

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"Petition for a Cease and Desist Order" under RCW 81.04.510 was filed by a private party and "converted" into a private party complaint under RCW 81.04.110 by the Commission, which in turn convened a brief adjudicative proceeding without any party's objection to determine whether or not the complained-of activities required a certificate of public convenience and necessity from the Commission.

30 Significantly, as noted, the Commission, ostensibly acting on its own motion to liberally construe pleadings and to "effect justice" (WAC 480-07-395 (4) and (5) duly relied upon by WCW in its Motion for Leave to File an Amended Complaint), there "converted" the proceeding from a Petition brought under RCW 81.04.510 by the Petitioner to a "private party complaint" under RCW 81.04.110.[31] [32] The *San Juan Express* order went on to enter explicit factual findings and legal conclusions as to whether the complained-of activities, on-going at the filing of the "converted" private party complaint, required authority from the Commission. This of course is exactly what Respondents here argue cannot be sought by this Complainant, suggesting, for instance as also previously noted, that the Commission must first classify the Respondents under RCW 81.04.510 prior to any remedies provided by RCW 81.04.110 being available and before invoking specific penalty provisions thereunder. Moreover, despite finding a cease and desist remedy unavailable to the private party Complainant in *San Juan Express*, the Commission, as addressed, **did** proceed to determine whether the Respondents' ongoing operations required authority and expressly found it had

[31] *In re San Juan Express* at 2.

[32] Likely demonstrating again the liberality in construction of pleadings before the Commission, a recent Initial Order in a solid waste case similarly construed a letter as a "Complaint," and a subsequent response by letter from the Respondent to a formal customer complaint as both an "Answer" and a "Motion to Dismiss," *In re Points Recycling and Refuse, LLC*, Order Nos. 3 and 1, TG-080913, 080914, 081089 and 082129 (Dec. 2008).

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jurisdiction to do so under RCW 81.04.110 without reference to any prerequisites in RCW 81.04.510 or a Declaratory Order proceeding under RCW 34.05.240.

H. Respondents' "Statutory Silence" Argument Against Availability of Penalties in this Case is Directly Refuted by the Interplay Among the Pertinent Statutes.

31 Indeed, the Washington State Legislature has constructed a statutory framework comprised of component parts that, when taken together, authorize and validate the remedial approach taken by Complainant in its current pleadings:

- a complaint may be brought by a private party, RCW 81.04.110;
- the private party complaint may have the lawfulness of alleged activities adjudicated, RCW 81.04.110 and *San Juan Express*[33];
- if the adjudication finds a violation pursuant to a complaint, penalties may be imposed, i.e., RCW 81.04.405.

32 Although the discretion to impose penalties is at all times retained by the Commission, the Legislature should be presumed to have avoided construction of an empty, obliquely contingent or otherwise self-contradicting provision. Had the Legislature intended that penalties be unavailable on private party complaints, it easily could have clarified as much; instead, by its wording, it did precisely the opposite. It expressly provided for broad imposition (subject to Commission discretion) of penalties against all companies found in violation pursuant to a complaint under RCW 81.04.110,[34] and

[33] Because the Commission did not find a violation of certificate laws under RCW 81.84.010 in that proceeding, there was no need to discuss the availability of penalty provisions under subsequent statutes and possible limitations therein.

[34] In asserting that a finding of violation of law by a respondent in a private party complaint is legally insufficient to lead to any subsequent fines, the Respondents' also familiarly broad brush a previous Commission motor carrier case in support of their persistent denial that this complaint proceeding could ever serve as a basis for fines under RCW 81.04.385, .387 or .405. TV-2037, *Midland Transportation, Inc. v. H & K Transport, Inc. and Art Nordang Trucking, Inc.* (Feb. 1988), is not support for that premise. There, the Commission dealt with a Complaint and a Petition, the latter requesting the Commission to perform economic audits and other specific directives including, *inter alia*, suggesting contact of specified personnel inside and outside of the respondent companies. The Commission in *Midland*, though, bifurcated its rulings, dismissing the Petition with prejudice,

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does not limit the availability of penalties to only those complaints instituted by the Commission.

33 Assuming for our purposes here that the Commission, in appropriately accepting jurisdiction under this consistently-requested private party complaint action pursuant to RCW 81.04.110, were to find as requested that the Respondents' activities ultimately violated RCW 81.77.040 and Commission rule, then for instance, RCW 81.04.405 penalty provisions are directly and expressly invoked, contrary to Respondents' specific countervailing arguments. Those provide that:

> [i]n addition to all other penalties provided by law . . . every person or corporation violating the provisions of any cease and desist order issued pursuant to RCW 81.04.510 and every person or entity found in violation pursuant to a complaint under RCW 81.04.110, shall incur a penalty of one hundred dollars for every such violation . . . [Emphasis added].

34 The inclusion of the highlighted language in RCW 81.04.405 specifically ties findings of violations of law in private party actions to the imposition of monetary penalties for such violations. For the Respondents to argue as they do in their latest opposition that there is no present ability to effectuate the relief requested, because it "is dependent on the possibility that further proceedings would be conducted, an assumption entirely without grounds"[35] at best overlooks the verbiage of the penalty statutes they profess to be analyzing, or worse, distorts the express statutory language to the contrary.

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but dismissing the complaint specifically without prejudice, finding much of the subject matter of the complaint was " . . . unclear and imprecise. In many instances it was not made known whether the complainant was, in fact, even in competition with the respondent carriers . . . The dates of various violations alleged by the complainant were not clear..." TV-2037 at 1.

Despite the numerous procedural arguments and rulings to date, no party has suggested the factual allegations and alleged violations of law by complainant under RCW 81.04.110 were unclear nor is that the asserted basis of Respondents' present Motion to Dismiss. WCW here is not seeking to compel Commission action; it has merely requested a threshold determination regarding the lawfulness of Respondents' conduct, a determination expressly permitted by *San Juan Express*.

[35] Opposition to Motion to Amend/Alternatively, Motion to Dismiss at ¶ 23.

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35 Again, despite *San Juan Express's* obvious silence on all "available remedies" other than cease and desist order applicability, it clearly *does* stand for a pertinent proposition here. It clarifies the Commission's broad remedial and jurisdictional authority to not simply unilaterally amend both the type and actionable statutory provision in a pleading of a party, shifting from one statutory jurisdictional section to another to reach a question of law it found inherent in RCW 81.04.110, but also refutes any claim that the classification statute is a prerequisite to relief to a private party Complainant. Finally as noted, it clarifies that the ruling of lawfulness of the challenged activity in and of itself is sufficiently substantive as the gravamen of the complaint to withstand summary dismissal with prejudice under WAC 480-07-380 (1).

V. CONCLUSION

36 The Commission, after more than two years, is now poised to determine whether the underlying complaint of June, 2007 can be amended as it had first ruled be considered in its Order No. 5 almost a year ago. Now, after what Complainant views as an ill-conceived judicial appeal interval, and in the wake of finally considering that procedural amendment, the underlying private party complaint is subject to yet another motion for dismissal with prejudice, this time based on the contingent approval of the Motion for Leave to Filed an Amended Complaint.

37 The Complainant, as noted, well understands the need to afford the Respondents all due process protections under law and rule to fully exhaust their objections to the Complaint and to a hearing. It also understands that Respondents are, by Order No. 6, being afforded the proverbial "last bite at the apple" by being permitted to reply within the week to the Complainant's Opposition to their Motion to Dismiss the Amended

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Complaint in what will be their ninth argument iteration since they first sought to have the Complaint dismissed on a Summary Determination basis over 18 months ago.

38 In considering Respondents' September 4 and upcoming reply arguments, WCW now asks that the hearing officer and Commission focus on a few summary/concluding points. First, that Motions to Amend, as with other Commission pleadings, are to be construed to "effect justice," WAC 480-07-395(4), and that pleading amendments are liberally granted "to promote fair and just results," WAC 480-07-395(5), and with broad presumptions favoring upholding a threshold complaint against summary dismissal by both courts and by the Commission. Moreover, that due to the Commission's charge to regulate in the public interest, private complaints are subject to dismissal only in the Commission's discretion, which will in turn broadly view the spectrum of interests it regulates and the impacts of conduct of regulated parties and alleged illegal operators in making a decision to dismiss, even where all parties may advocate that outcome. Second, that, as highlighted in footnote 4, page 3 above, Order No. 5 of October 7, 2008 has resolved a number of important substantive issues in this case. WCW believes those are binding as the law of the case even when attempted to be borrowed, modified or distinguished by Respondents to address their new arguments on complaint amendment and "effective remedies." Peeling back those arguments again reveals their interrelation to and dependence upon the claims of mootness, conversion of a classification proceeding and inference from Staff's absence in the proceeding, all of which were convincingly and conclusively resolved in October, 2008, at least until any post-hearing processes. Finally, and at the risk of redundancy (which admittedly is a significant one considering the depth and breadth of the voluminous pre-hearing arguments and motion practice by both sides to date), WCW asks that the

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presiding officer and the Commission consider whether it is consistent with due process, the public interest and regulatory policy to, at this still preliminary stage, summarily deny a forum to a public service company who seeks adjudication of a complaint of illegal conduct against parties which it argues has direct and indirect consequences on it and the regulated industry, its ratepayers, local law and the broader public interest, even where the featured activity has ceased and the Respondents have heretofore, relying upon all the procedural protections afforded to date, successfully thwarted consideration at an evidentiary hearing of its threshold claims.

39 For all of the specified reasons argued above and in its Motion for Leave to File an Amended Complaint, Waste Connections of Washington, Inc. again asks that its Motion for Leave to File Amended Complaint be granted, that Respondents' Enviro/Con Trucking, Inc.'s and Waste Management Disposal Services of Oregon, Inc.'s Motion for Summary Dismissal be denied, and in so doing, that Order No. 5's pertinent rulings be adopted as the law of the case, and that this matter be ordered to scheduling conference to finally set a date for hearing.

Respectfully submitted,

DATED this 14th 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 14th day of September, 2009.

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