

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

WASTE CONNECTIONS OF	)	DOCKET TG-071194
WASHINGTON, INC.,	)	
	)	
Complainant,	)	ORDER 07
	)	
v.	)	INITIAL ORDER
	)	DENYING MOTION FOR
	)	LEAVE TO FILE
ENVIRO/CON & TRUCKING, INC., a	)	AMENDED COMPLAINT
Washington Corporation, and WASTE	)	
MANAGEMENT DISPOSAL	)	
SERVICES OF OREGON, INC.,	)	
	)	
Respondents.	)	
.....	)	

1 *Synopsis: This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. This Order would deny Waste Connections of Washington, Inc.’s, Motion for Leave to File Amended Complaint because it fails to request any meaningful relief available under the Commission’s complaint statute, Revised Code of Washington (RCW) 81.04.110.*

2 **NATURE OF PROCEEDING.** This matter originally involved a private party complaint, or in the alternative, a petition for a declaratory order, filed by Waste Connections of Washington, Inc. (Waste Connections), against Enviro/Con & Trucking, Inc. (ECTI) and Waste Management Disposal Services of Oregon, Inc. (Waste Management). On remand from the Commission, the matter is now focused on the availability of a meaningful remedy to a private party complaint.

3 **APPEARANCES.** David W. Wiley, Williams, Kastner & Gibbs, PLLC, Seattle, Washington, represents Waste Connections of Washington, Inc. (Complainant or Waste Connections). Polly L. McNeill, Summit Law Group, PLLC, Seattle, Washington, represents ECTI and Waste Management (Respondents). James R. Sells, Ryan Sells Uptegraft, Inc. P.S., Silverdale, Washington, represents Washington

Refuse and Recycling Association (WRRRA). E. Bronson Potter, Sr. Deputy Prosecuting Attorney for Clark County, Washington, represents Clark County.

## MEMORANDUM

### **I. Procedural History**

- 4 In Order 03, *Granting Motion for Summary Determination*, an Administrative Law Judge (ALJ) sought to dismiss Waste Connections' Complaint because the relief requested, a cease and desist order, had become moot.
- 5 In Order 05, *Order Granting Petition for Administrative Review; Reversing Initial Order, and Ordering Hearing on the Merits; Granting Motion for Leave to File Reply*, the Washington Utilities and Transportation Commission (Commission) remanded the matter to an ALJ to allow the Complainant an opportunity to file a motion for leave to file an amended complaint and then rule on whether or not this litigation should be allowed to continue.
- 6 On August 21, 2009, the Commission convened a prehearing conference in this docket before ALJ Adam E. Torem and set a filing schedule. *See* Order 06.
- 7 **Motions.** In accordance with the schedule adopted in Order 06, on August 25, 2009, Waste Connections filed a Motion for Leave to File Amended Complaint. On September 4, 2009, Respondents filed their Opposition to Motion to Amend and, Alternatively, Motion to Dismiss. On September 14, 2009, WRRRA and Clark County independently filed their responsive pleadings to both motions; also on September 14, 2009, Waste Connections filed a reply. On September 21, 2009, Respondents filed a reply.

## II. Discussion

### A. Scope of Remand

- 8 In Order 05, the Commission agreed with the ALJ that a cease and desist order, the original remedy sought in Waste Connections' complaint, had become moot.<sup>1</sup> However, the Commission questioned the ALJ's failure to inquire further and establish whether any other remedy might be meaningful to the Complainant.<sup>2</sup>
- 9 The Commission considers a private complaint to be an "enforcement action" which "seeks to enforce a state law or Commission rule or order and thus by its nature involves the public interest."<sup>3</sup> Under the Commission's complaint statute, RCW 81.04.110, other persons or entities outside the Commission have standing equal to that of the Commission itself to bring a complaint to enforce the law.<sup>4</sup>
- 10 Therefore, the Commission overturned the ALJ's dismissal order and remanded the matter for an ALJ "to determine whether the Complainant wishes to amend the complaint to seek a remedy that is available and, if so, whether such an amendment should be granted and the litigation allowed to continue."<sup>5</sup>
- 11 At the prehearing conference held on August 21, 2009, Waste Connections accepted the Commission's invitation to file a Motion for Leave to File Amended Complaint. In accordance with Order 05, the Complainant's Motion for Leave to File Amended Complaint should be liberally construed and, if the amended complaint seeks "a remedy that is available" and "meaningful," Waste Connections' motion should be granted and a hearing held.<sup>6</sup>

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<sup>1</sup> Order 05, at ¶ 16 and ¶ 18.

<sup>2</sup> *Id.*, at ¶ 18.

<sup>3</sup> *Id.*, at ¶ 17.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, at ¶ 19.

<sup>6</sup> *Id.*, at ¶ 19 ("a remedy that is available"), ¶ 18 ("... if the remedy is one that would be meaningful.") and ¶ 37 ("... if the remedy sought would be meaningful.")

**B. Relief Requested in Proposed Amended Complaint**

12 Waste Connections' Motion for Leave to File Amended Complaint seeks relief by requesting that the Commission make the following three findings:<sup>7</sup>

- (a) Respondents violated RCW 81.77.040 by collecting and transporting solid waste without the required certificate;
- (b) Respondents' actions deprived Waste Connections of revenues; and
- (c) Respondents' actions are eligible for referral to the Office of Attorney General and to the Commission as potentially subject to the imposition of a fine.

Waste Connections explicitly recognizes that as a private party, it has no right before the Commission to directly seek the imposition of a penalty on Respondents.<sup>8</sup>

13 Waste Connections asks the Commission to conduct a hearing in order to establish a factual record on which its requested findings could be entered.<sup>9</sup>

14 Waste Connections asks that its proposed Amended Complaint be liberally construed under Commission rules to ensure a fair and just result.<sup>10</sup>

**C. Private Relief Available under Commission Complaint Statute**

15 In its entirety, RCW 81.04.110 says (emphasis added):

*Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or*

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<sup>7</sup> Waste Connections' Amended Complaint, at ¶ 10.

<sup>8</sup> Waste Connections' Motion for Leave to File Amended Complaint, at ¶ 8, n. 5.

<sup>9</sup> *Id.*, at ¶ 2.

<sup>10</sup> *Id.*, at ¶ 12. *See also* Washington Administrative Code (WAC) 480-07-395 and discussion of same in Order 05, at ¶ 19, n.4.

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

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

All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of complaints or grievances or misjoinder of parties; and in any review of the courts of orders of the commission the same rule shall apply and pertain with regard to the joinder of complaints and parties as herein provided: PROVIDED, All grievances to be inquired into shall be plainly set forth in the complaint. *No complaint shall be dismissed because of the absence of direct damage to the complainant.*

Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or company complained of, which shall be accompanied by a notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided. Rules of practice and procedure not otherwise provided for in this title may be prescribed by the commission.

- 16 The statute's first paragraph makes it clear that any entity can bring a complaint alleging a violation of law or rule within the Commission's jurisdiction. The second paragraph addresses a subset of complaints, those filed by competing companies, and empowers the Commission to "correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of." The third paragraph allows private complaints to go forward even when no direct injury is alleged. Finally, the fourth paragraph sets out due process considerations.
- 17 In Order 05, the Commission explained that RCW 81.04.110 gives "equal standing" to private parties to enforce the law by bringing a complaint.<sup>11</sup> However, Order 05 did not say that private parties enjoy enforcement powers equal to those of the Commission or that equal remedies are available to any person or entity seeking to enforce the law. In fact, a previous Commission decision held exactly the opposite.
- 18 Less than five years ago, the Commission expressed its opinion on the availability of penalties as a remedy in a private complaint action. In *Glick v. Verizon Northwest*, a private party successfully pursued a formal complaint against a public service company providing telecommunications service. After hearing, the Commission concluded that the company had violated a Commission rule as well as its own tariff.<sup>12</sup>

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<sup>11</sup> Order 05, at ¶ 17.

<sup>12</sup> *Glick v. Verizon Northwest*, Docket UT-040535. See Order 02 (Initial Order) Aug. 6, 2004, at ¶¶ 1, 6, 49-62, 82-83, and 87-88; see also Order 03 (Final Order) Jan. 28, 2005, at ¶¶ 1, 3, 5, 18, 53-63, and 82-83.

19 Even with the finding of a regulatory violation, the Commission robustly rejected the private party's assertion that the Commission was therefore obligated to assess penalties (emphasis added):

*There are barriers to private actions aimed at assessing penalties.* For example, RCW 80.01.100 specifically authorizes the Attorney General to institute actions and proceedings on behalf of the Commission, but does not authorize private parties to institute such actions. RCW 80.01.040 authorizes the Commission to regulate public service companies in the public interest, as provided by the public service laws, but does not authorize private parties to do so. Mr. Glick seeks to serve as a private attorney general, prosecuting a matter and imposing a fine, and to act as a private Commission, enforcing the public service laws for the benefit of the public.

The imposition of a penalty is an inherent aspect of regulation. *The Commission exercises prosecutorial discretion*, and determines when to file complaints, what consequences to seek, and what level of penalties to impose. Doing so is an essential aspect of the Commission's overall regulatory and enforcement activity. *Mr. Glick is entitled to prosecute a complaint for his own benefit, but not to seek penalties on behalf of the state. Allowing him and others to take on that role could lead to vigilantism in which private parties file multiple actions not on their own behalf, but as agents of the state. That would ultimately destroy the Commission's ability to formulate and execute a coherent and cohesive enforcement policy and to accomplish regulation in the public interest, as the law requires.*

We reject Mr. Glick's plea to impose penalties on the respondent under RCW 80.04.380 or RCW 80.04.405 and we affirm the result of the initial order.<sup>13</sup>

To date, the Commission has not reversed the position so clearly stated in *Glick*. Simply put, penalties are not an available remedy when a private party brings a complaint under the Commission's complaint statutes.

20 RCW Title 80 and RCW Title 81 are not always exactly parallel, but in this instance the relevant statutory provisions relied upon by the Commission in *Glick* are identical.

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<sup>13</sup> *Glick*, Order 03, at ¶¶ 61-63; see also ¶ 84.

The Commission’s complaint statutes, RCW 80.04.110 and RCW 81.04.110, contain the same language with regard to who may bring a complaint; competitor complaints, clarifying that there is no need for direct harm to the complainant; and due process concerns. Further, both RCW 80.04.400 and RCW 81.04.400 direct that “actions to recover penalties . . . shall be brought in the name of the State of Washington.” Finally, the “additional penalties” provisions of RCW 80.04.405 and RCW 81.04.405 (referenced in the parties’ legal briefs) also generally track each other.

21 In sum, private parties are free to initiate their own complaints under RCW 81.04.110. If, after hearing, the Commission finds an act or omission by another public service company (or any entity acting in that capacity), the private complainant can seek an appropriate remedy. Private complainants may seek relief from the Commission that corrects the abuses of a competitor, but they may not seek the imposition of penalties.

**D. Waste Connections’ Amended Complaint Seeks Relief Available but not Meaningful or Wholly Unavailable under RCW 81.04.110.**

22 In this case, the Commission held that private litigation under RCW 81.04.110 may continue, even when the action complained of has ceased, so long as the remedy sought would be meaningful.<sup>14</sup> Therefore, the Commission afforded Waste Connections an opportunity to seek to amend its complaint with “a remedy that is available” and meaningful so as to justify allowing the litigation to continue.<sup>15</sup>

23 The 8<sup>th</sup> Edition of Black’s Law Dictionary defines the term “remedy” as follows:

**remedy, n. 1.** The means of enforcing a right or preventing or redressing a wrong; legal or equitable relief. — Also termed *civil remedy*. **2.** REMEDIAL ACTION . Cf. RELIEF. — Also termed (in both senses) *law of remedy*. — **remedy, vb.**

“A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged. The two most common remedies are judgments that plaintiffs are entitled to collect sums of money from

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<sup>14</sup> Order 05, at ¶ 18 and ¶ 37.

<sup>15</sup> *Id.*, at ¶ 19.



defendants and orders to defendants to refrain from their wrongful conduct or to undo its consequences. The court decides whether the litigant has been wronged under the substantive law; it conducts its inquiry in accordance with the procedural law. The law of remedies falls somewhere between substance and procedure, distinct from both but overlapping with both.” Douglas Laycock, *Modern American Remedies* 1 (3d ed. 2002).

Thus, Waste Connections must identify some means for the Commission to redress the alleged violations committed by the Respondents. All in all, the question here is whether the Commission is empowered to do something meaningful to address Waste Connections’ complaint against the Respondents. We address each form of relief sought by Waste Connections in turn.

24 *Commission Finding of Statutory Violation.* Waste Connections’ first requested remedy is a Commission finding that “Respondents violated RCW 81.77.040 by collecting and transporting solid waste without the required certificate.” Under both the first and second paragraphs of RCW 81.04.110, the Commission is authorized to make such a finding. Therefore, the first portion of the Complainant’s requested relief is available.

25 Nevertheless, a Commission finding that Respondents violated RCW 81.77.040 has no meaning in the present context. This requested relief is akin to a declaratory judgment, a remedy previously sought in Waste Connections’ original complaint. However, as noted in Order 03, declaratory judgment relief is improper if it does not relate to a justiciable controversy.<sup>16</sup> In the context of a lawsuit seeking damages, such a declaration would be necessary (*see discussion below*), but its significance is directly connected to the tribunal’s ability to take action as a result of the finding.

26 As now re-pled, Waste Connection’s proposed amended complaint alleges direct financial harm,<sup>17</sup> but this modification to its complaint does not cure the academic nature of the question presented, particularly given that there is no ongoing violation. The Commission is not in a position to make Waste Connections whole (*see discussion below*). Further, there is no further abuse or wrongful behavior to be

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<sup>16</sup> Order 03, at ¶ 15; *see also* ¶ 10.

corrected. Therefore, the requested Commission finding is not, by itself, a meaningful remedy.

27 *Commission Finding of Improper Competition.* Waste Connections’ second requested remedy is a Commission finding that “Respondents’ actions deprived Waste Connections of revenues.” Under the second paragraph of RCW 81.04.110, the Commission would be authorized to make such a finding and enter an order correcting the abusive practice. Therefore, the second portion of the Complainant’s requested relief is also available.

28 Again, however, as with the first part of the Complainant’s requested relief, such a finding is without meaning in the present case. All parties agree that the Respondents’ alleged behavior has already ceased and the Commission’s remand order recognizes that a cease and desist order is now moot. The requested finding regarding economic harm to Waste Connections would have meaning if the Commission was empowered to make the Complainant whole, but Title 81 RCW provides no such authority to the Commission.

29 RCW 81.04.440 provides Waste Connections with a different forum in which to pursue such relief:

In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the commission, *such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom*, and in case of recovery if the court shall find that such act or omission was wilful, it may, in its discretion, fix a reasonable counsel or attorney's fee, which shall be taxed and collected as part of the costs in the case. *An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.*

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<sup>17</sup> *Id.*, at ¶ 15, n.15.

Thus, if Waste Connections wishes to pursue a claim for damages, it must take its case to superior court.

30 We recognize that RCW 81.04.510 reserves to the Commission the question of whether or not an entity is conducting business requiring operating authority from the Commission. Thus, in the case Waste Connections chooses to pursue this matter as a claim for damages in superior court, we would expect the court to refer that question back to the Commission and, upon receiving the Commission's finding, further adjudicate the claim for damages.<sup>18</sup>

31 As with Waste Connections' first requested remedy, the requested Commission finding regarding deprivation of revenues is not a meaningful remedy. However, it would be a different question if a court weighing a claim for damages were to request a finding of that nature from the Commission.

32 *Commission Finding of Eligibility for Referral for Fine.* Finally, Waste Connections third requested remedy is a Commission finding that "Respondents' actions are eligible for referral to the Office of Attorney General and to the Commission as potentially subject to the imposition of a fine." In other words, the Complainant asks that the Commission penalize the Respondents for their alleged violations of law and regulation, but not in this proceeding.

33 In essence, the Complainant invites the undersigned ALJ create a procedural route for avoiding the restrictions on private complaints explicitly set down in *Glick*. This invitation must be declined. To be sure, the Commission suggested in Order 05 that "if an alleged unlawful activity has ceased, a penalty *may* be an appropriate sanction even though a cease and desist order might be moot."<sup>19</sup> However, the undersigned ALJ does not interpret this statement to overturn the Commission's clear language and previous ruling in *Glick*.

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<sup>18</sup> This exact sequence of events proved necessary in the *San Juan Express, Inc.*, case cited in the parties' arguments. See Docket TS-940956, *In re the Matter of the Petition of San Juan Express, Inc., for a Cease and Desist Order*, 4<sup>th</sup> Supplemental Order (Nov 4, 1994) and 5<sup>th</sup> Supplemental Order (Dec 20, 1994).

<sup>19</sup> Order 05, at ¶ 18 (emphasis added).

34 Even so, “referral” of a finding to Commission Staff for consideration of additional action is not wholly without precedent. Disputes being adjudicated may result in discovery of some act or omission that merits the Commission to evaluate its prosecutorial duties in a subsequent proceeding. However, under *Glick*, it would be improper to allow a private litigant to seek a remedy that ultimately only the Commission is empowered to impose.<sup>20</sup> Waste Connections’ third category of requested relief seeks to bifurcate the normal hearing process and force Commission Staff to evaluate a violation for subsequent penalties after the private litigation is complete. Prosecutorial discretion rests with the Commission and a private party may not attempt to use the complaint hearing process to direct Commission Staff’s handling of any particular case.

35 *Is there any Meaningful Remedy Available?* It appears that the procedural posture of this case, combined with the ruling in *Glick* and Commission Staff’s failure to participate, strictly limit the remedies available to Waste Connections. It could be that there are no further meaningful remedies available directly from the Commission. Although the Amended Complaint would seek three findings as remedies, none of these forms of relief are “meaningful” beyond the satisfaction Waste Connections might take in being declared “right” in this dispute.

36 This does not mean that RCW 81.04.110’s empowerment of private complainants is illusory. In the *Glick* case, the Commission’s refusal to impose penalties as the result of a private complaint action did not prevent Mr. Glick from achieving a meaningful result. There, the parties proposed a waiver of certain charges and a credit to the customer’s account as resolution of the company’s violation of Commission rule and tariff.<sup>21</sup> In that instance, the private complainant achieved a meaningful remedy and was made whole without the Commission assessing any penalties on the Company.

37 Waste Connections and Mr. Glick are not similarly situated with regard to the companies they are complaining about. Waste Connections is not one of

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<sup>20</sup> Respondents question whether or not Complainant did seek to have the Commission bring this case on its own motion, but as directed by Order 05, ¶ 22-24, we can draw no inference from Staff’s failure to appear in this case. See Respondents’ Opposition to Motion to Amend, at ¶ 22.

<sup>21</sup> *Glick*, Order 02, at ¶ 61; see also Order 03, at ¶ 59.

Respondents' customers and thus a bill adjustment is irrelevant here. However, Waste Connections does have other remedies available, albeit not before the Commission. As noted above, RCW 81.04.440 creates a path forward, but that lies in superior court. Unless the Commission wishes to revise its ruling in *Glick*, Waste Connections cannot act as a private attorney general and seek imposition of penalties, even in an indirect fashion.

- 38 Waste Connections has not identified any available and meaningful remedy that the Commission can implement in this docket. Therefore, in accordance with the provisions of Order 05, this litigation should not be permitted to go any further. Waste Connections' Motion for Leave to File Amended Complaint must be denied and this matter, once again, should be dismissed.

**ORDER**

- 39 THE COMMISSION ORDERS That Waste Connection of Washington, Inc.'s Motion for Leave to Amend Complaint is denied. Accordingly, this matter is dismissed.

Dated at Olympia, Washington, and effective November 19, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM  
Administrative Law Judge

**NOTICE TO PARTIES:**

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party of this proceeding has twenty (20) days after the entry of this Initial Order to file a Petition for Administrative Review. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an Answer to Petition for Review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order, any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the commission calling for such answer.

RCW 80.01.060(3) provides that an Initial order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and **8 copies** of any Petition or Answer must be filed by mail delivery to:

Attn: David W. Danner, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
P.O. Box 47250  
Olympia, Washington 98504-7250