BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MURREY'S DISPOSAL COMPANY, INC. Complainant, v. WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., AND MJ TRUCKING AND CONTRACTING, INC., Respondents.	NO. TG-200650 COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

TABLE OF CONTENTS

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

TABLE OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

ADMINISTRATIVE DECISIONS AND RULEMAKINGS

FEDERAL STATUTES

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

STATE STATUTES

RULES

REGULATIONS

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

I. INTRODUCTION

1 Murrey's Disposal Company, Inc. (hereinafter "Murrey's"), files this Response in Opposition to Waste Management Disposal Services of Oregon, Inc. ("WMDSO"), Waste Management of Washington, Inc. ("WMW") (WMW and WMDSO collectively referred to as "WM"), and MJ Trucking and Contracting, Inc.'s ("MJ") motion to dismiss ("WM's Motion"). A motion to dismiss under Rule 12(b)(6) presupposes the law on its face, as framed by the pleadings, is so irrefutable that any adjudicator would be wasting its time to more fully review the question. Even a cursory review of the legal issues posed by the parties at this juncture suggests the fallacy of such a premise here.

II. STATEMENT OF FACTS

2 For the sake of brevity and to avoid repetition, Murrey's refers the Commission to the facts alleged in its Complaint.

3 It is undisputed that WM and MJ collect and transport solid waste from the McKinley Paper Company (hereinafter "McKinley") in Port Angeles, Clallam County for disposal without certificated authority under RCW 81.77. On behalf of WM, this waste is transported by MJ from McKinley to the Olympic View Transfer Station. WMW subsequently loads the solid waste onto rail cars for transportation to and disposal at the Columbia Ridge Landfill owned by WMDSO. Neither WM nor MJ are licensed rail carriers. In short, WM subcontracts with both a motor carrier (MJ) and rail carrier (Union Pacific Railroad) to transport solid waste from McKinley to the landfill in Oregon.

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

III. ARGUMENT

A. Under 12(b)(6), dismissal based upon preemption fails where there is any daylight for the Commission to regulate the transportation of solid waste by motor carrier to a rail carrier

4 WAC 480-07-380(1)(a) provides that "a party may move to dismiss another party's case on the asserted basis that the opposing party's pleading fails to state a claim upon which the Commission may grant relief." In deciding whether to grant or deny a motion to dismiss, the Commission considers the standards applicable to a motion made under Civil Rule (CR) 12(b)(6) of the Washington Superior Court Rules. When the Commission considers a motion to dismiss, it is required to accept the allegations in the complaint as true, and deny the motion if those facts would sustain the complaint. *In re GHOSTRUCK, INC.*, Dkt. TV-161308, Order 03 Denying Motion to Dismiss, (Mar. 21, 2017) *citing Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007), *see also Rodriquez v. Loudeye Corp.* 144 Wn. App 709, 717-18, 189 P.3d 168 (2008)(On a 12(b)(6) motion, "[a]ll facts alleged in the plaintiff's complaint are presumed true.") Dismissal under 12(b)(6), is inappropriate unless there is no set of facts consistent with the complaint which could support a recovery. *San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831, 842 (2007)(addressing standards applicable to 12(b)(6) motion). In considering whether facts could support a claim, courts are also permitted to consider hypothetical facts not in the record that could support a claimant's complaint. *Keodalah v. Allstate Ins. Co.*, 194 Wn.2d 339, 362, 449 P.3d 1040, 1043 (2019). Accordingly, 12(b)(6) motions should be granted " 'sparingly and with care,'

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *San Juan Cty.*, 160 Wn.2d at 164.

5 There is no dispute that the transportation of solid waste by motor carrier is subject to the Commission's regulatory authority under RCW 81.77. Thus, WM cannot demonstrate that Murrey's failed to state a claim under state law. WM's Motion instead presents the question of whether the entire field of state regulation of solid waste transportation to or from a rail carrier is preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501(b)(1) ("ICCTA").

6 Analysis of preemption of a state's authority to regulate starts with a presumption that "Congress does not intend to supplant state law." *See AGG Enterprises v. Washington Cty.*, 281 F.3d 1324, 1328 (9th Cir. 2002)(citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654, 115 S. Ct. 1671, 1676, 131 L. Ed. 2d 695 (1995)). Federal preemption of state law that would prevent states from regulating within their traditional police powers, will only be found where it is the "clear and manifest purpose of Congress." *New York State Conference*, 514 U.S. at 654; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947).

7 Congress has expressly stated that the collection and transportation of solid waste is primarily a function of the state. 42 U.S.C. § 6901(a)(4). Because solid waste collection and disposal is also considered a matter of public health and safety for which state and local authorities have a legitimate interest, courts are reluctant to limit states' authority to regulate solid waste disposal. *See Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v.*

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

Nelson, 48 F.3d 391, 398 (9th Cir. 1995)(holding state regulation of interstate solid waste transportation does not violate the Commerce Clause).

8 As a result, a number of attempts to avoid the application of state regulation like that of respondents here have failed. For example as noted, the Ninth Circuit has held that Washington's regulation of interstate transportation of solid waste under RCW 81.77 does not violate the Commerce Clause. *Kleenwell*, 48 F. 3d 391. It has also held that the FAAAA does not preempt state regulation of the transportation and disposal of mixed solid waste and recyclable commodities. *See AGG Enterprises v. Washington Cty.*, 281 F.3d 1324, 1328 (9th Cir. 2002); *Woodfeathers, Inc. v. Washington Cty.*, Or., 180 F.3d 1017 (9th Cir. 1999).

9 If indeed all state regulation of TOFC/COFC solid waste transportation is preempted, WM could theoretically prevail. However, because there are limits to the scope of ICCTA preemption, WM may only prevail if it can first overcome the presumption against preemption and then demonstrate that there are no facts (either alleged or hypothetical) under which state regulation would be permitted. As Murrey's will demonstrate, ICCTA preemption applies only to transportation *by* rail carriers and not transportation *to* rail carriers. Thus, the ICCTA does not preempt all state regulation of solid waste transportation by respondents and there plainly exist facts under which Murrey's claim may proceed.

B. <u>ICCTA preemption applies only to "transportation by rail carriers" and no party alleges Respondents meet these requirements</u>

10 As noted in WM's Motion, the ICCTA preempts certain types of state regulation of rail transportation. However, it does not preempt all state regulation affecting a rail carrier.

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007)); *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). Nor does it apply to preempt state regulation of every activity performed by a rail carrier. *Id*. at 247 (discussing that manufacturing activities of rail carriers not integrally related to the provision of rail transportation are not preempted). Instead, in interpreting whether a particular facility or service is preempted under 49 U.S.C. § 10501(b)(1), the primary test applied by courts is whether the service is considered "transportation by a rail carrier." *See Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 305 (3d Cir. 2004); *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007).

11 The determination of whether ICCTA preemption applies is a two-step process. First, the activity must be "transportation" and second it must be "by a rail carrier." *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 530 (5th Cir. 2012). WM avers that "rail transportation" is interpreted broadly, citing to opinions addressing whether activities that take place at a rail transload facility are considered "transportation." WM's Motion. ¶ 20. Despite the broad interpretation of "transportation," WM fails to address the second step, whether it should be treated as a rail carrier. If, as is the case here, there are facts (either alleged or hypothetical) under which any of the respondents are not considered rail carriers under the ICCTA, dismissal is wholly inappropriate.

12 "The ICCTA defines a 'rail carrier' as a 'person providing common carrier railroad transportation for compensation.' 49 U.S.C. § 10102(5). There are formal procedures that

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

must be followed to obtain the STB's authorization to act as a rail carrier." *Hi Tech Trans*, 382 F.3d at 305.

13 The ICC and STB historically extended the definition of "rail carrier" to entities without rail carrier authority like WM and MJ in very limited circumstances applicable only to agents of railroads operating at rail transload facilities. In that context, the STB stated "[w]hether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case, fact-specific determination." Town of Babylon & Pinelawn Cemetery, FIN 35057, 2008 WL 275697, at 3 (S.T.B. Jan. 31, 2008).

14 In assessing the facts in a case-by-case basis, the STB followed standards first developed by the ICC which determine whether transportation is by a rail carrier depending upon the degree of control a railroad exercises over the activity:

> The Interstate Commerce Commission (ICC), the Board's predecessor, developed standards to determine whether terminal-type companies that are commonly owned by, or contract with, railroads to provide services are themselves rail carriers. The Board's jurisdiction extends to the rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier or the rail carrier holds out its own service through the third party as an agent or exerts control over the third-party's operations.

Town of Babylon & Pinelawn Cemetery, FIN 35057, 2008 WL 275697, at *3 (S.T.B. Jan. 31, 2008); *see also Grosso v. Surface Transp*. Bd., 804 F.3d 110, 114 (1st Cir. 2015)("Whether an activity is conducted by a "rail carrier" is a case-by-case factual determination based on, inter alia, how much control a rail carrier is exercising over the activity."); *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 531 (5th Cir. 2012) (The STB considers the following factors to determine whether transloading is

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

performed by a rail carrier: "whether the rail carrier holds out transloading as part of its business, (2) the 'degree of control retained by the [rail] carrier,' (3) property rights and maintenance obligations, (4) contractual liability, and (5) financing").

15 A review of the authority cited by Respondents supports the premise that ICCTA preemption applies only to authorized rail carriers and their agents. *City of Seattle v. Burlington N. R. Co.*, 145 Wn.2d 661, 663, 41 P.3d 1169, 1170 (2002*)* and *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1028 (9th Cir. 1998), as amended (Oct. 20, 1998) both involved authorized rail carriers. Interpreting the Interstate Commerce Act ("ICA") rather than the ICCTA, which was enacted several decades later, *City of Chicago v. Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 87, 78 S. Ct. 1063, 1069, 2 L. Ed. 2d 1174 (1958) merely held that the ICA expressly prohibited a municipality from regulating transfer service offered by a railroad or its agent.

16 Murrey's complaint is not limited to transportation at transloading facilities nor does it involve a transfer service. Instead, it addresses transportation by respondents from the solid waste generator's facility by motor carrier to the transloading facility. Thus, there exists no basis for extension of the STB's case-by-case analysis to these facts.

17 Moreover, none of respondents either claim to be rail carriers nor do they assert they serve as the agent of the railroad. To the contrary, WMDSO insists it subcontracts *to* the Union Pacific Railroad a portion of WMDSO's transportation service. WM's Answer. ¶ 17. Consequently, WM apparently avers that service is exempt because its service involves

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

transportation *to* a rail carrier. That argument has also been squarely rejected by the courts in the context of solid waste transloading facilities. *See Hi Tech Trans*, 382 F.3d at 308.

18 In *Hi Tech Trans, LLC v. New Jersey*, the 3rd Circuit considered whether a solid waste transloading facility that loaded solid waste onto railcars was preempted under the ICCTA. The court stated:

> Even if we assume *arguendo* that Hi Tech's facility falls within the statutory definition of "transportation" and/or "railroad," the facility still satisfies only a part of the equation. **The STB has exclusive jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a), (b) (emphasis added). However, the most cursory analysis of Hi Tech's operations reveals that its facility does not involve "transportation *by* rail carrier." The most it involves is transportation "*to* rail carrier."** Trucks bring C & D debris from construction sites to Hi Tech's facility where the debris is dumped into Hi Tech's hoppers. Hi Tech then "transloads," the C & D debris from its hoppers into rail cars owned and operated by CPR, the railroad. **It is CPR that then transports the C & D debris "by rail" to out of state disposal facilities**. As we noted above, Hi Tech operates its facility under a License Agreement with CPR. Pursuant to the terms of that license agreement, Hi Tech is permitted to use a portion of CPR's OIRY for transloading. Hi Tech is responsible for constructing and maintaining the facility and CPR disclaims any liability for Hi Tech's operations. License Agreement, ¶¶ 4(d), 7. Thus, the License Agreement essentially eliminates CPR's involvement in, and responsibility for, the operation of Hi Tech's facility. Hi Tech does not claim that there is any agency or employment relationship between it and CPR or that CPR sets or charges a fee to those who bring C & D debris to Hi Tech's transloading facility."

Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 308 (3d Cir. 2004) (italics in original, emphasis added). The same logic has been applied to hold that ICCTA preemption did not apply to transloading facilities that were owned or operated by entities other than rail carriers. *See, e.g., New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 73 (2d Cir. 2011).

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

19 Similarly, WM alleges that WMDSO subcontracts the transportation of loaded containers from McKinley to the Olympic View transfer station, where WMW employees load the containers onto rail cars. Nothing about these activities constitutes "transportation *by* a railroad." Instead, as the Court held in *Hi Tech Trans*, these activities constitute "transportation *to* a railroad."

20 Finally, following the Third Circuit's interpretation of the ICCTA finding that *solid waste* transloading facilities could be preempted, Congress took action designed to preclude this result, enacting 49 U.S.C. § 10908, which makes clear that Congress did not intend to preempt state regulation of solid waste being transported to the rail carrier.

21 Thus, if neither WM nor MJ are rail carriers or under the control of a rail carrier (as WM acknowledges they are not), WM's Motion should be denied without further consideration.

C. WM's assertion of broad preemption of TOFC/COFC service erroneously relies upon opinions interpreting the authority to exempt under 49 CFR § 1090.2, the same rule WM expressly rejects as a basis for preemption

22 Despite the limitations of ICCTA preemption addressed above, WM broadly asserts that ICCTA preemption extends to all TOFC/COFC service (intermodal transportation by which a freight-laden container is transported by both truck and train in a continuous movement), rejecting that its preemption claim can rest at all upon exemptions from federal law contained in 49 CFR § 1090.2. WM's Motion. ¶¶ 20-21. Thus, WM proposes that the source of preemptive authority is dispositive in this case. In other words, WM asserts that federal exemptions from regulation (or the express exception thereto) cannot serve as the source for its preemption claim.

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

23 If WM's premise were accepted as true, a review of the cases on which WM relies demonstrates that WM cannot prevail. Rather than determining the scope of ICCTA preemption, both *I.C.C. v. Texas*, 479 U.S. 450, 107 S. Ct. 787, 93 L. Ed. 2d 809 (1987) and *Central States Motor Freight Bureau, Inc. v. Interstate Comm. Comm'n*, 924 F.2d 1099 (D.C. Cir. 1991), addressed the extent of the ICC's authority to adopt rules exempting types of TOFC/COFC service from federal regulation under the Staggers Rail Act of 1980, 49 U.S.C. § 10505 (1987) rather than preemption of state regulation. *See* Improvement of TOFC/COFC Regulations (R.R.-Affiliated Motor Carriers & Other Motor Carriers), 3 I.C.C.2d 869, 873 (I.C.C. June 11, 1987), *corrected sub nom.* IMPROVEMENT OF TOFC/COFC REGULATIONS (R.R.-Affiliated Motor Carriers & Other Motor Carriers) (I.C.C. June 26, 1987).

24 In *I.C.C. v. Texas*, the United States Supreme Court considered whether the ICC exceeded its statutory exemption authority when it exempted Plan II TOFC/COFC service (intermodal service where the motor carrier portion of transportation is provided via trucks owned by the railroad) from regulation. The exemption at issue provided that intermodal transportation provided by a rail carrier was exempt from the application of Subtitle IV of Title 49: "Railroad and truck transportation provided by a rail carrier as part of a continuous intermodal movement is exempt from the provisions of Subtitle IV of Title 49 with certain exceptions." 479 U.S. at. 453, n. 3 (addressing authority to adopt 49 CFR § 1039.13 (1986)). Thus, under WM's theory, the exemption at issue there does not preempt state regulation and applies only to federal regulation. Moreover, the Supreme Court held that

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

because Plan II TOFC/COFC service involves continuous intermodal transportation in trucks owned by the railroad, all elements are "by a rail carrier" over which the ICC has jurisdiction. *I.C.C. v. Texas*, 479 U.S. at 457. Accordingly, the court had no issue finding that the ICC had authority to exempt motor carrier service offered by vehicles owned by the railroad when in a continuous intermodal movement. This plainly is not the case here, as WM (which is not a rail carrier) subcontracts *to* a railroad.

25 Likewise, *Central States* involved the judicial review of a rulemaking of the ICC in Improvement of TOFC/COFC Regulations (Pickup & Delivery), 6 I.C.C.2d 208 (I.C.C. Nov. 27, 1989). 924 F.2d 1099. That rulemaking addressed another specific TOFC/COFC exemption addressing local pickup and delivery service arranged independently by the shipper or receiver set forth in 49 CFR § 1090.2. Thus, applying WM's own premise, *Central States* also cannot support the preemption of state law.

26 Moreover, even assuming that the provision of 49 CFR § 1090.2 addressed in *Central States* actually could result in the preemption of state law, it neither demonstrates broad preemption nor the application of any specific exemption to these facts. As addressed in *Central States*, the ICC exempted specific types of TOFC/COFC service in two previous rulemakings (1) economic regulation of all TOFC/COFC provided in vehicles <u>owned</u> by a rail carrier, and (2) TOFC/COFC motor carrier operations offered by a motor carrier <u>as the agent of the rail carrier or as a joint-rate partner</u>. 924 F.2d at 1100. Those exemptions were considered to be service by the railroad because the railroad was either directly responsible

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

for service as the principle, or because the service under the joint rate was considered to be a "unitary service" offered by both the railroad and the motor carrier:

> Moreover, although the statute only requires a related-to-rail finding to qualify a service as an exemption candidate, in this case we also find that from a legal perspective these trucking services are in fact "provided by" rail carriers and thus within the scope of §10505(f). In the case of agency arrangements the principal (the railroad) provides the service because it holds out the service to the shipper and "assumes exclusive responsibility for the successful performance of door-to-door transportation." And in light of the well recognized unitary nature of joint rates, and the responsibility of each participating carrier for the operations of the others, with the exception of unique areas of regulatory overlap such as international joint rates, we do not believe that the components of a TOFC/COFC joint rate service can be compartmentalized and viewed as if each portion is separately provided by each of the participating carriers. Rather, in a legal sense each leg of the joint service is provided by both the rail and motor carrier.
>
> We accordingly find that TOFC/COFC services of motor carriers that are agents of or joint rate partners with railroads are matters related to rail carriers and in fact are services provided by rail carriers.

Improvement of TOFC/COFC Regulations (R.R.-Affiliated Motor Carriers & Other Motor Carriers), 3 I.C.C.2d 869, 875 (I.C.C. June 11, 1987), corrected sub nom. IMPROVEMENT OF TOFC/COFC REGULATIONS (R.R.-Affiliated Motor Carriers & Other Motor Carriers) (I.C.C. June 26, 1987)

27 At issue in *Central States* was the latest and last of the exemptions authorized by the ICC, which related solely to local pickup and delivery service. 924 F.2d at 1100. Each of these services was held to fall within the ICC's authority to exempt because each was integrally related to a transportation service provided by a rail carrier.

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

28 Neither WM nor MJ is a rail carrier providing motor carrier service. Neither WM nor MJ is an agent of the railroad. In fact, the opposite is true according to WM because it subcontracts service to the railroad. Nor do WM or MJ provide pickup and delivery service. By ICC rule, pickup and delivery service is performed solely within a terminal area or commercial zone. *See* Commercial Zones & Terminal Areas, 128 M.C.C. 422 (I.C.C. 1976); Commercial Zones & Terminal Areas, EX PARTE MC-37, 1988 WL 485187 (I.C.C. Mar. 15, 1988); 49 U.S.C. § 10523; *see also* RCW 81.80.410 (1982).

29 Finally, because WM subcontracts to the railroad, at most, the railroad serves only as WM's agent. Such an arrangement is expressly carved out of the exemptions set forth in 49 CFR § 1090.2, which provides as follows:

> Except as provided in 49 U.S.C. 10502(e) and (g) and 13902, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Motor carrier TOFC/COFC pickup and delivery services arranged independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier are similarly exempt. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. **The exemption does not apply to a motor carrier service in which a rail carrier participates only as the motor carrier's agent** (Plan I TOFC/COFC), nor does the exemption operate to relieve any carrier of any obligation it would otherwise have, absent the exemption, with respect to providing contractual terms for liability and claims.

49 CFR § 1090.2 (emphasis added). Thus, to the extent such exemptions could provide the source of preemption of state regulation, they expressly exclude the service supplied by Respondents.

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

IV. CONCLUSION

30 WM's Motion requests the Commission to ignore that respondents are not rail carriers and rule that ICCTA preemption is so vast that it subsumes all transportation by truck to a railroad despite the lack of clear expression of intent to do so by Congress. Because ICCTA preemption falls well short of the activities at issue in this proceeding, the Commission should instead deny WM's Motion to Dismiss and hold that preemption does not apply under the facts alleged here.

RESPECTFULLY SUBMITTED this 20th day of August, 2020.

WILLIAMS, KASTNER & GIBBS PLLC

s/ Blair I. Fassburg
Blair I. Fassburg, WSBA #41207
David W. Wiley, WSBA #08614
Sean D. Leake, WSBA #52658
601 Union Street, Suite 4100
Seattle, WA 98101-2380
dwiley@williamskastner.com
bfassburg@williamskastner.com
sleake@williamskastner.com
Telephone: (206) 628-6600
Fax: (206) 628-6611
Attorneys for Complainant Murrey's Disposal Company, Inc.

CERTIFICATE OF SERVICE
TG-200650

I hereby certify that on August 20, 2020 I served the attached documents via E-mail to the following parties:

Andrew M. Kenefick
Senior Legal Counsel
Waste Management of Washington, Inc.
750 – 4th Avenue STE 400
Kirkland, WA 98033-8136
akenefick@wm.com

Waste Management of Washington, Inc, Waste Management Disposal Services of Oregon, Inc.

Jessica Goldman, WSBA #21856
Jesse L. Taylor, WSBA # 51603
SUMMIT LAW GROUP
315 Fifth Avenue S., Ste 1000
Seattle, WA 98104
Ph: (206) 676-7000
Fax: (206) 676-7001
jessicag@summitlaw.com
jesset@summitlaw.com

Waste Management of Washington, Inc, Waste Management Disposal Services of Oregon, Inc.; MJ Trucking & Contracting, Inc.

Andrew J. O'Connell
Administrative Law Judge
PO Box 47250,
Olympia, WA 98504-7250
T. 360-664-1285
F. 360-878-0578
andrew.j.oconnell@utc.wa.gov

Sally Brown
Assistant Attorney General
WUTC
PO Box 47250
Olympia, WA 98504
(360) 664-1193
(360) 664-1225
sally.brown@utc.wa.gov

Signed at Seattle, Washington this 20th day of August, 2020.

s/ Maggi Gruber
Maggi Gruber
Legal Assistant
Williams Kastner & Gibbs PLLC
601 Union Street
Suite 4100
Seattle, WA 98101
mgruber@williamskastner.com