

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

<p>MURREY’S DISPOSAL CO., INC., Complainant,</p> <p>v.</p> <p>WASTE MGMT. OF WASH., INC., WASTE MGMT. DISPOSAL SERVICES OF OR., AND MJ TRUCKING &amp; CONTRACTING, Respondents.</p>	<p>DOCKETS TG-200650 and TG-200651 (<i>Consolidated</i>)</p> <p>ORDER 02</p> <p>DENYING MOTION TO DISMISS</p>
<p>MURREY’S DISPOSAL CO., INC., Complainant,</p> <p>v.</p> <p>WASTE MGMT. OF WASH., INC., WASTE MGMT. DISPOSAL SERVICES OF OR., AND DANIEL ANDERSON TRUCKING AND EXCAVATION, LLC, Respondents.</p>	

**BACKGROUND**

1 On July 15, 2020, Murrey’s Disposal Company, Inc. (Murrey’s Disposal or Company), filed with the Washington Utilities and Transportation Commission (Commission) two separate complaints, the first in Docket TG-200650 against Waste Management of Washington, Inc. (WMW), Waste Management Disposal Services of Oregon, Inc. (WMDSO), and MJ Trucking & Contracting, Inc. (MJ Trucking), and the second in

Docket TG-200651 against WMW, WMDSO, and Daniel Anderson Trucking and Excavation, LLC (DAT) (collectively, Respondents), asking the Commission to order WMW, WMDSO, MJ Trucking, and DAT to cease and desist from engaging in the collection and transportation of solid waste without a certificate of public convenience and necessity from the Commission, and to find that certain intermodal motor carrier transportation services offered by WMW or WMDSO are not preempted by federal law (Complaint).<sup>1</sup>

2 On August 4, 2020, Respondents filed with the Commission an answer to the Complaint (Answer) and a motion to dismiss pursuant to WAC 480-07-380(1) in each docket (Motion), which argues that the Commission is preempted by federal laws regulating the transportation of property by railroad, specifically 49 U.S.C. § 10501.<sup>2</sup>

3 On August 20, 2020, Murrey's Disposal filed with the Commission a response to the motion in each docket.

4 On August 24, 2020, Respondents filed with the Commission a motion for leave to file a reply to Murrey's Disposal's response.<sup>3</sup> That same day, Murrey's Disposal filed with the Commission a response in opposition to Respondents' motion for leave to file a reply.

5 On August 27, 2020, the Commission issued Order 01, consolidating in these dockets, denying Respondents' motion for leave to reply, and setting a hearing on Respondents' motion to dismiss.<sup>4</sup>

6 On September 16, 2020, the Commission held a hearing on Respondents' Motion before Administrative Law Judge Andrew J. O'Connell.

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<sup>1</sup> Murrey's Disposal filed a complaint in *each* of Dockets TG-200650 and TG-200651. This Order refers to these complaints in the singular because of the subsequent consolidation of the dockets by the Commission on its own motion pursuant to WAC 480-07-320.

<sup>2</sup> Respondents filed an answer and a motion to dismiss in *each* of Dockets TG-200650 and TG-200651. This Order refers to these answers and motions in the singular because of the subsequent consolidation of the dockets by the Commission on its own motion pursuant to WAC 480-07-320.

<sup>3</sup> Due to the Commission's closure on August 21, 2020, Respondents' filing was received on August 24, 2020.

<sup>4</sup> The hearing was originally scheduled for September 11, 2020, at 10:30 a.m., but pursuant to a joint proposal by the parties, the Commission issued a notice on September 4, 2020, rescheduling the hearing on Respondents' motion to dismiss for September 16, 2020, at 1:30 p.m.

7 After presentations by the parties and questions from the bench, Judge O’Connell  
requested limited briefing on whether solid waste is within the regulatory jurisdiction of  
the Interstate Commerce Commission (ICC) and its successor, the Surface Transportation  
Board (STB), as “property.”

8 On October 8, 2020, the parties each submitted legal briefs as requested during the  
September 16, 2020, hearing.

9 Murrey’s Disposal has authority from the Commission to collect solid waste in  
unincorporated Jefferson County and Clallam County. The Complaint alleges that WMW  
has authority from the Commission to collect solid waste, but not in unincorporated  
Jefferson County or in Clallam County. DAT and MJ Trucking each have common  
carrier permits from the Commission, but lack solid waste collection authority.<sup>5</sup>

10 The Complaint alleges that Port Townsend Paper Company (PTP) in unincorporated  
Jefferson County and the McKinley Paper Company (MPC) in Clallam County were  
customers of Murrey’s Disposal for the collection and transportation of solid waste, but  
now contract with WMW or WMDSO to have DAT and MJ Trucking, respectively,  
collect solid waste that is transported via DAT and MJ Trucking motor vehicles in trailers  
on flat car or containers on flat car (TOFC/COFC), which are capable of being  
transported via truck or rail. The TOFC/COFC containers are subsequently transported  
via rail from the Olympic View Transfer Station to the WMDSO landfill in Arlington,  
Oregon. The collection and transportation of solid waste from PTP and MPC by DAT  
and MJ Trucking, respectively, is provided under one bill of lading, while the subsequent  
transportation via rail is provided under a separate, second bill of lading. The precise  
business and contractual relationships between all entities is unclear from the Complaint  
and the Answer.

11 Murrey’s Disposal alleges that WMW, WMDSO, DAT, and MJ Trucking are motor  
carriers collecting and transporting solid waste, even if it is collected in TOFC/COFC  
containers, without the appropriate solid waste collection authority from the Commission.

12 The basis for Respondents’ Motion is that the Complaint fails to state a claim on which  
the Commission may grant relief. Respondents argue that the Commission is preempted  
in this instance by the Interstate Commerce Commission Termination Act (ICCTA),

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<sup>5</sup> DAT is a motor carrier operating under USDOT Number 2489589 and Commission-issued  
Common Carrier Permit CC029397. MJ Trucking is a motor carrier operating under USDOT  
Number 935162 and Commission-issued Common Carrier Permit CC030132.

which authorizes the STB to regulate rail transportation.<sup>6</sup> Respondents' argument is centered on the containers in which the solid waste is collected and transported. The use of TOFC/COFC containers to collect and transport the solid waste, Respondents argue, is outside of Commission jurisdiction because the containers can be transported by truck or by rail and are therefore only regulable by the STB under authority granted to it by Congress in 49 U.S.C. Sections 10501 and 10502.

- 13 Murrey's Disposal argues that the federal regulatory authority granted to the STB, and to its predecessor the ICC, over motor carrier transportation does not preempt Commission regulation of solid waste collection. Murrey's Disposal argues that any preemption analysis of TOFC/COFC transportation by motor carrier on the highway is properly conducted within the authority granted by Congress to the ICC and STB to regulate the interstate transportation of property by motor carrier in 49 U.S.C. Sections 13501 and 14501, and not under the ICC and STB's rail transportation authority in 49 U.S.C. Sections 10501 and 10502.

### DISCUSSION AND DECISION

- 14 To determine whether Respondents' Motion should be granted, we must decide whether Washington's regulation of the collection of solid waste is preempted by the ICCTA, which grants jurisdiction to the STB over rail transportation, because the containers chosen for the collection of solid waste in this instance are TOFC/COFC containers. Respondents make no argument based on the Commerce Clause.<sup>7</sup>

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<sup>6</sup> 49 U.S.C. § 10501.

<sup>7</sup> A Commerce Clause analysis would require the development through discovery of more facts with greater detail than those afforded in the Complaint or admitted in the Answer including any particular characteristics of the solid waste, the identification, knowledge, and intent of the shipper, or customer if the customer is the shipper, must be considered as it regards any shipment across state lines, and may also impact any potential analysis under the *Pike* balancing test. The Commission is not unfamiliar with legal analyses such as the ones demanded in this case. See *In the Matter of Determining the Proper Carrier Classification of Enoch Rowland d/b/a Kleenwell Biohazard and Gen. Ecology Consultants*, Docket TG-920304, Commission Decision and Order Denying Reconsideration; Correcting Order (Feb. 22, 1993); *The Disposal Grp., Inc., d/b/a Vancouver Sanitary Serv. and Twin City Sanitary Serv., a Wash. Corp., v. Waste Mgmt. Disposal Servs. of Or., Inc., d/b/a Or. Waste Systems, a Del. Corp., and T&G Trucking & Freight Co., an Or. Corp.*, Docket TG-941154, Commission Decision and Order Adopting Initial Order on Brief Adjudication (Jan. 30, 1995).

15 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) and CR 12(c) of the Washington Superior Court Rules.<sup>8</sup> When the Commission considers a motion to dismiss it accepts the allegations in a complaint as true, construes them in the light most favorable to the complainant, and must deny the motion if those facts or facts consistent with the complaint would permit the Commission to grant relief. Accordingly, granting such a motion is only appropriate if it appears that no facts consistent with the complaint exist that would justify relief.

16 The Commission determines that dismissal pursuant to rule 12(b)(6) on the asserted basis is inappropriate. Congress did not convey any clear and manifest intent through the ICCTA's language to preempt state authority to regulate local solid waste collection by motor carriers. That the motor carriers in this case have chosen TOFC/COFC containers for their collection of solid waste which *may*, at some point along its meandering journey, be transported via rail is far afield of Congress's clear intent in the ICCTA to regulate rail transportation by rail carriers and matter related to rail transportation. Without a clear and manifest intent, the ICCTA cannot be held to preempt state authority over an area within its traditional police powers of such inherent importance to local health and safety.

17 An analysis of jurisdictional questions not presented in Respondents' Motion would require the further development of facts to be included in a *Pike* balancing test.<sup>9</sup> In any case, the facts alleged in the Complaint or facts consistent with the Complaint may permit the Commission to grant relief to Murrey's Disposal. Accordingly, the Respondents' Motion is denied, as explained below.

#### **A. Commission Authority**

18 The Commission has authority to regulate solid waste collection companies in Washington.<sup>10</sup> A solid waste collection company is any person that owns, controls, operates, or manages vehicles used in the business of transporting solid waste for

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<sup>8</sup> CR 12(b)(6) addresses motions to dismiss, while CR 12(c) addresses motions for judgment on the pleadings. CR 12(c) applies where the moving party alleges that no genuine issue material fact is in dispute. Because Respondents make no such allegation, we base our decision only on Respondents' claim that Murrey's Disposal has failed to state a claim upon which relief can be granted.

<sup>9</sup> See *Pike v. Bruce Church*, 397 U.S. 137 (1970).

<sup>10</sup> RCW 81.77.030.

collection or disposal, or both, for compensation over any public highway in Washington.<sup>11</sup>

- 19 Solid waste collection means collecting solid waste from residential or commercial customers and transporting it, using a motor vehicle, for collection and/or disposal over any public highway in Washington for compensation. A company may not operate as a solid waste collection company without a certificate from the Commission.<sup>12</sup> A company may be granted authority by the Commission to operate in a territory already served by a certificate holder only if the existing solid waste collection company serving the territory does not object to the issuance or will not provide service to the satisfaction of the Commission.<sup>13</sup>

### **B. Supremacy Clause and Preemption**

- 20 The United States Constitution and federal laws made pursuant to it are the supreme law of the land and, therefore, override any conflicting state or local law.<sup>14</sup> When Congress expresses its clear intent that federal law is “to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress’s command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”<sup>15</sup> However, when Congress legislates in a field traditionally occupied by the states, like the collection of solid waste, preemption analysis starts with the assumption that states’ historic police powers were not to be superseded unless that was the clear and manifest purpose of Congress.<sup>16</sup>
- 21 Solid waste collection is an area traditionally regulated by the states. In *AGG Enterprises v. Washington County*, the Ninth Circuit summarized the state and local interest in regulating the collection of solid waste, stating:

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<sup>11</sup> RCW 81.77.010(9).

<sup>12</sup> RCW 81.77.040.

<sup>13</sup> RCW 81.77.040.

<sup>14</sup> U.S. Const. art. VI.

<sup>15</sup> *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)

<sup>16</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605, 611 (1926); *Allen-Bradley Local v. Wis. Emp’t Bd.*, 315 U.S. 740, 749 (1942); *Savage v. Jones*, 225 U.S. 501, 533 (1912); *Reid v. Colo.*, 187 U.S. 137, 148 (1902).

One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community. The historic responsibility of local governments to ensure safe and comprehensive garbage collection posts a strong caution against the possibility that Congress lightly would preempt local regulation in this field.<sup>17</sup>

22 Given the importance and inherently local nature of collecting solid waste from a Washington residential or commercial customer, only a clear and manifest intent by Congress to preempt state regulatory authority over the local collection of solid waste could support Respondents' Motion. The presumption against preemption of Washington's solid waste collection laws must be overcome for the Respondents' Motion to prevail.<sup>18</sup> As discussed further below, Respondents have failed to show that Congress expressed such intent in the ICCTA and cannot, therefore, overcome the presumption against preemption.

### C. ICC and STB Authority

23 Congress granted jurisdiction to the STB and its predecessor, the ICC, over the interstate transportation by motor carrier of persons and property.<sup>19</sup> Congress also granted jurisdiction to the STB and ICC over transportation by rail carrier by railroad and services related to that movement within the agency's jurisdiction.<sup>20</sup> Respondents' argument that the STB's jurisdiction over rail transportation extends to preempt state regulation over local solid waste collection and transportation by motor carrier is misplaced.

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<sup>17</sup> *AGG Enter. v. Wash. Cty.*, 281 F.3d 1324, 1328 (9th Cir. 2002) (citing *Cal. Reduction Co. v. Sanitary Reduction Works of S.F.*, 199 U.S. 306, 318 (1905); *Kleenwell Biohazard Waste and Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995)). Internal citations omitted.

<sup>18</sup> See *Cal. v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); see *Hillsborough Cnty. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 716 (1985).

<sup>19</sup> 49 U.S.C. § 13501. This authority is shared with the Department of Transportation, e.g. the Federal Motor Carrier Safety Administration. Congress specifically noted the preemption of certain state authority over motor carriers in 49 U.S.C. Section 14501.

<sup>20</sup> 49 U.S.C. § 10501(a)(1)(A); 49 U.S.C. § 10501(b)(1); 49 U.S.C. § 10102(6); 49 U.S.C. § 10102(9); see 49 U.S.C. § 10502(a).

24 TOFC/COFC containers are distinct because they can be transported either via truck or rail. The STB has authority to regulate TOFC/COFC containers both when they are transported via rail and when they are transported interstate via motor carrier because they are bimodal and cannot be compartmentalized into only the regulation of rail transportation or transportation by motor carrier.<sup>21</sup> Thus, the STB's regulatory framework for both must be considered.

25 The STB has authority to regulate TOFC/COFC containers transported by rail carriers pursuant to the authority granted by Congress in 49 U.S.C. Section 10501 and authority to exempt TOFC/COFC transportation that is "related to a rail carrier" pursuant to 49 U.S.C. Section 10502.<sup>22</sup> The exemption authority as it relates to TOFC/COFC transportation is not a limitation, but an example of exemption authority granted to the STB.<sup>23</sup> The STB exercised this authority to exempt TOFC/COFC transportation provided by a rail carrier or related to a rail carrier in 49 C.F.R. Part 1090.2.<sup>24</sup> The exemption applies where a motor carrier is the agent of the rail carrier or provides the transportation jointly with the rail carrier, regardless of the ownership or type of the motor carrier.<sup>25</sup> The

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<sup>21</sup> *Am. Trucking Ass'n. v. Atchison, T. & S. F. R. Co.*, 387 U.S. 397, 420 n. 10 (1967); *Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers)*, 3 I.C.C.2d 869 (1987), hereinafter [*Improvement of TOFC/COFC Regulations (1987)*].

<sup>22</sup> 49 U.S.C. § 10501; 49 U.S.C. § 10502(a). "Matters related to a rail carrier," in the context of exempting TOFC/COFC transportation from federal regulation has been interpreted to mean the transportation of TOFC/COFC containers via rail *or* truck as long as the transportation is offered jointly by the rail and motor carrier or the motor carrier is the agent of the rail carrier. *See Improvement of TOFC/COFC Regulations (1987)*.

<sup>23</sup> 49 U.S.C. § 10502(f); *Cent. States Motor Freight Bureau Inc. v. ICC*, 924 F.2d 1099, 1105-08 (1991); *Improvement of TOFC/COFC Regulations (1987)*.

<sup>24</sup> 49 C.F.R. § 1090.2; *see Improvement of TOFC/COFC Regulations (1987)*.

<sup>25</sup> *Improvement of TOFC/COFC Regulations (1987)*, stating:

Under 49 U.S.C. 10505, we find that the over-the-road portion of rail/motor TOFC/COFC service that is held out by railroads using motor carriers as agents, or jointly by rail and truck, is a matter related to rail carrier transportation, and that application of the Interstate Commerce Act is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power. Plan I TOFC, which is primarily transportation held out by motor carriers, albeit in cooperation with the railroads, is not being exempted at this time.



language of 49 C.F.R. Part 1090.2 is clear that the STB's exemption does not apply when the rail carrier is the agent of the motor carrier, or "Plan I."<sup>26</sup>

26 The STB has authority to regulate TOFC/COFC containers when transported interstate by a motor carrier pursuant to the authority granted by Congress in 49 U.S.C. Section 13501.<sup>27</sup> TOFC/COFC containers are capable of being transported solely via motor carrier from origin to destination.<sup>28</sup> Bearing in mind that the regulatory framework for TOFC/COFC containers is not limited to only STB authority over rail transportation and matters related to rail carriers, it is important to also consider the limits of ICC and STB motor carrier authority. Such limits have long been established: the ICC, STB, and federal authority over motor carriers does not extend to the local collection of non-nuclear solid waste.

27 In *Joray Trucking Corp. v. Common Carrier Application*, the ICC established that waste is not "property" within its regulatory jurisdiction and thereby created the "negative value" test for determining whether it had authority to regulate.<sup>29</sup> Thus, material that has a negative or no value as a commodity and is transported solely for disposal is not subject to ICC regulation.<sup>30</sup> Since *Joray*, the negative value test has been implemented and used

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<sup>26</sup> *Improvement of TOFC/COFC Regulations* (1987); *Am. Trucking Ass'n.*, 387 U.S. at 403 (explaining that Plan I (Joint Intermodal) is: "Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs, and the railroad's compensation is arrived at by negotiation between the two carriers."); *Central States Motor Freight Bureau Inc.* 924 F.2d at 1109 (explaining that "More than six years later, the Commission issued final rules in *Sub-No. 6*. The rules deregulated TOFC trucking service when performed by motor carriers operating as agents of railroads or as their joint-rate partners. While the Commission did not deregulate independently arranged pickup and delivery service, it did offer a reasoned analysis justifying its authority to do so.").

In this case, consideration of whether the rail carrier is the agent of the motor carrier, or vice versa, would require a more precise understanding of the business and contractual relationships between the entities involved than provided by the Complaint or the Answer.

<sup>27</sup> The Commission is unaware of any rules, regulations, or exemptions issued or granted by the ICC or the STB pursuant to its interstate motor carrier authority over TOFC/COFC containers. This does not mean, however, that the ICC or STB lack the authority to issue such rules, regulations, or exemptions pertaining to the regulation of TOFC/COFC containers within its jurisdiction.

<sup>28</sup> *Improvement of TOFC/COFC Regulations* (1987).

<sup>29</sup> *Joray Trucking Corp. Common Carrier Application*, 99 MCC 109, 110-11 (Jun. 29, 1965).

<sup>30</sup> *Id.*; *Transp. of "Waste" Prod. for Reuse and Recycling*, 114 M.C.C. 92, 103-08 (1971).

to determine whether the STB and its predecessor, the ICC, has authority in specific cases regarding the interstate transportation of non-nuclear solid waste by motor carrier.<sup>31</sup> In addition to this legal precedent, federal legislation and case law pertaining to the Federal Aviation Administration and Authorization Act of 1994 (FAAAA) support the determination that the regulation of solid waste collection is outside the jurisdiction of federal authority.<sup>32</sup> We are unaware of any federal legislation, case law, or precedent that supports the preemption of state authority to regulate the local collection of solid waste by motor carriers.

#### **D. Conclusion**

28 Solid waste is a distinct designation of material, the collection of which cannot be preempted without clear and manifest intent by Congress. Murrey's Disposal argues:

Considering that solid waste collection was not within the federal government's jurisdiction under [49 U.S.C. Section 13501 and Section 14501] in the first place . . . the notion that Congress intended to completely preempt every type of Highway TOFC service through nothing more than the exemption authority [in 49 U.S.C. Section 10502(f)] it granted the STB over incidental-to-rail trucking is inconceivable.<sup>33</sup>

We agree. When solid waste is collected locally in TOFC/COFC containers and transported via truck, its regulation falls outside the jurisdiction of the STB and state regulation is not preempted by the ICCTA due to the intrinsically local nature of solid waste collection, which may impact the health, safety, and aesthetic well-being of the community.

29 Absent a showing of Congress's clear and manifest intent to preempt state regulation of solid waste collection, Respondents' argument that the ICCTA preempts all state

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<sup>31</sup> See *Long Island Nuclear Serv. Corp., Common Carrier Application*, 110 M.C.C. 395 (Sep. 9, 1969); *ICC v. Browning-Ferris Indus., Inc.*, 529 F. Supp. 287 (N.D. Ala. 1981); *Wilson v. IESI N.Y. Corp.*, 444 F. Supp. 2d 298 (M.D. Pa. 2006).

<sup>32</sup> *AGG Enter. v. Wash. Cty.*, 281 F.3d 1324, 1329 (9th Cir. 2002) (explaining that the legislative history of the FAAAA showed that Congress believed that solid waste was not property under ICC case law and that garbage collectors would be unaffected, and citing H.R. Conf. Rep. No. 103-677, at 85 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1757).

<sup>33</sup> Complainant's Supplemental Brief at 3-4, ¶ 7.

regulation of TOFC/COFC transportation, including the collection of solid waste, must fail.<sup>34</sup> We determine that Respondents have failed to overcome the presumption against preemption and failed to show that the ICCTA preempts the Commission's authority granted in chapter 81.77 RCW. Accordingly, Respondents' Motion should be denied.

**ORDER**

30 THE COMMISSION ORDERS THAT Respondents' Motion to Dismiss is DENIED.

DATED at Lacey, Washington, and effective October 19, 2020.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ *Andrew J. O'Connell*

ANDREW J. O'CONNELL  
Administrative Law Judge

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<sup>34</sup> See Respondents' Motion at 7, ¶ 21, n. 4.

**NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-07-810*.**