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Supreme Court No. 101529-1  
Court of Appeals No. 56291-0-II

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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WASTE MANAGEMENT OF WASHINGTON, INC.,  
WASTE MANAGEMENT DISPOSAL SERVICES OF  
OREGON, INC., MJ TRUCKING & CONTRACTING, and  
DANIEL ANDERSON TRUCKING AND EXCAVATION,  
LLC,  
**Petitioners-Appellants,**

v.

WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION, an agency of the State of Washington,  
**Respondent,**

MURREY'S DISPOSAL COMPANY, INC., and  
WASHINGTON REFUSE AND RECYCLE ASSOCIATION,  
**Intervenors.**

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**ANSWER OF THE WASHINGTON REFUSE AND  
RECYCLE ASSOCIATION**

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**I. INTRODUCTION AND IDENTITY OF**  
**INTERVENOR-RESPONDENT**

Intervenor-Respondent, the Washington Refuse and Recycling Association (“WRRA”) supports the brief of Respondent, the Washington Utilities and Transportation Commission (“WUTC”), in opposition to the petition for review put forth by Waste Management of Washington, Inc., Waste Management Disposal Services of Oregon, Inc., Daniel Anderson Trucking & Excavating, LLC, and MJ Trucking & Contracting, Inc. (collectively “Appellants”).

The Washington Refuse & Recycling Association (WRRA) is a trade association that has represented Washington’s regulated solid waste industry for over 70 years. WRRA speaks for the industry as a whole and does not represent individual member companies. The vast majority of curbside solid waste collectors and residential recycling providers in the state are members of WRRA. The current action before the court involves subsidiaries of two of the

largest publicly-traded solid waste companies operating in the United States. However, the majority of WRRRA's membership is comprised of large and small privately owned solid waste collection companies. Many of WRRRA's member companies are family owned, and some have been in business for a century or more.

## **II. ISSUES PRESENTED**

Is the decision of the Court of appeals in conflict with federal law and the Supremacy Clause of the United States Constitution when Congress and the Courts have consistently recognized and upheld state and local regulation of solid waste collection and transportation?

### III. STATEMENT OF THE CASE

WRRRA supports the Answer of the UTC and will not duplicate the briefing of the relevant facts, standard of review, and procedural history provided by the other parties.

The basis of WRRRA's participation in this matter arises from the final order issued by the WUTC at the administrative level on May 3, 2021 ("WUTC Order 06"). *Murrey's Disposal Co, Inc, v. Waste Management et al.*, WA Utilities and Transportation Commission Decisions, 2021 WASH. UTC LEXIS 89, \*1<sup>1</sup>. In WUTC Order 06, at Paragraph 38, the WUTC succinctly summarized how Appellants' arguments would limit the WUTC's longstanding authority to regulate the collection and transportation of waste:

...Accepting Respondents' arguments would have repercussions far beyond the Commission and these consolidated dockets... the Respondents' preemption argument, if accepted, would preclude the Commission (or any municipality that has

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<sup>1</sup>*Murrey's Disposal Co, Inc, v. Waste Management et al.* Dockets TG-200650 and TG-200651 (Consolidated), ORDER 06 (May 3, 2021). "WUTC Order 06" is also attached as Appendix 1.

contracted for, or engages in, solid waste collection) from regulating any company that provides solid waste collection service using TOFC/COFC containers that are eventually moved via rail. The Commission would also be precluded from regulating any aspect of solid waste collection service utilizing TOFC/COFC containers, including the contents or type of the solid waste collected, transported, and disposed, the enforcement of county and city comprehensive solid waste management plans, public safety, and consumer protection.

*Id at 15.* The WUTC further explained that Appellant's preemption argument, as presented, would extend beyond just the WUTC's authority to regulate solid waste collection:

Indeed, none of the provisions of Chapters 70A.205 and 81.77 RCW and Chapter 480-70 WAC would apply to solid waste collection service using TOFC/COFC containers or the companies that provide it. Absent a showing of express Congressional intent to so preempt state authority over solid waste handling, Respondents' argument that the ICCTA preempts all local regulation of solid waste collection services using TOFC/COFC containers must fail...."

*Id.* Appellants have not articulated any limiting principle that would preclude the WUTC's assessment for waste collected in TOFC/COFC containers that are eventually moved by rail.

The Court of Appeals correctly held that Washington’s solid waste regulation is not preempted here. The federal rail regulations at issue preempt state law that has a “managing or governing effect on rail transportation” not regulation with a remote or incidental effect, as is the case with WUTC’s regulation of solid waste collection under RCW 81.77.

**IV. CONTEXT FOR THE REGULATION OF SOLID WASTE IN WASHINGTON**

Solid Waste collection in Washington is managed through a robust but nuanced and overlapping regulatory structure involving multiple state agencies and local government.

A. The “G-Cert” & WUTC Regulated Solid Waste Collection in Washington.

At its core, solid waste collection is a public health and safety issue “upon which may rest the health, safety, and aesthetic well-being of the community.” *AGG Enter. v.*

*Washington County*, 281 F.3d 1324, 1328 (9th Cir. 2002). The Washington legislature adopted RCW 81.77 to “...protect public health and safety and ensure solid waste collection services are provided to all areas of the state.” RCW 81.77.100. The proper collection and management of solid waste is an essential service both for the individual and society as a whole. *Shaw Disposal v. Auburn*, 15 Wn. App. 65, 68, 546 P.2d 1236, 1239 (1976) (quoting *Davis v. Santa Ana*, 108 Cal. App. 2d 669, 676, 239 P.2d 656 (1952)).

In Washington, A company may not operate for the hauling of solid waste without a “certificate of convenience and necessity” issued by the WUTC (colloquially and hereafter referred to as the “G-Certificate” or “G-Cert”). RCW 81.77.040. The WUTC regulates solid waste and residential recycling collection in Washington through RCW 81.77. Similar to a utility, the WUTC generally grants regulated companies an exclusive obligation to provide commercial and residential garbage, residential recycling, and yard waste

collection within the company's geographic territory. *See Dahl-Smyth v. City of Walla Walla*, 148 Wn.2d 835, 838, 64 P.3d 15, 17 (2003) (discussing company's exclusive right to provide service within a geographic territory subject to a "G-Certificate" issued by the WUTC).<sup>2</sup> Once a company obtains a "G-Cert" it must not only comply with economic regulation by the WUTC, but all other applicable laws and regulations governing safety, vehicles and equipment, operations, consumer protection, and ultimately the disposal of waste at the local and state level. RCW 81.77.030; WAC 480-70-001.

Washington has developed a body of case law and administrative decisions governing how to obtain authority from the WUTC to collect and transport solid waste.<sup>3</sup>

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<sup>2</sup> Cities can opt out of the WUTC system and contract directly with a service provider or the city can provide the service via its own municipal department.<sup>2</sup> RCW 81.77.020. RCW 35.21.120. Several exemptions in state law exist, but none of the state law exemptions are at issue here. *See Generally*, WAC 480-70-011.

<sup>3</sup> RCW 81.77.040 also establishes a process by which the WUTC can authorize more than a single company to collect waste within a geographic territory if the existing collection company "...serving the territory will not provide service to the satisfaction of the commission" or issue limited certificates. *See* WAC 480-70-041 ("Contract Carrier" definition, definition of "Class C Company" that includes specialized carriers for specific customers or waste products and "biohazardous or biomedical waste transporter" definition).

Washington courts have recognized a property interest in the “G-Cert,” the sale or transfer of which must be approved by the WUTC. *Dahl-Smyth*, 148 Wn.2d at 839; RCW 81.77.040 (sale of certificate allowed if authorized by the WUTC). In almost every authorized instance, Washington’s solid waste is collected by a “G-Cert” holder, municipal department, or municipal contractor.

## 2. Solid Waste Handling Standards & the Department of Ecology.

RCW 70A.205 establishes “a comprehensive statewide program for solid waste handling... which will prevent land, air, and water pollution and conserve the natural, economic, and energy resources of this state.” RCW 70A.205.010. The statute is sweeping and governs topics ranging from facility siting requirements and local government solid waste plans to restrictions on the disposal of materials, such as car batteries and sewage sludge. RCW 70A.205.110 (disposal facility siting); RCW 70A.205.045 (local solid waste plans); RCW

70A.205.505 (vehicle battery disposal restrictions); RCW 70A.205.205 (sewage or septic tank sludge disposal restrictions). RCW 70A.205.100 delegates authority to local jurisdictional health departments to implement and enforce local regulations consistent with RCW 70A.205.

### 3. Local Governments & Solid Waste Collection.

The Washington legislature has determined that “[it] is the responsibility of county and city governments to assume primary responsibility for solid waste management...” RCW 70A.205.005(6)(c). Counties are required to prepare comprehensive solid waste management plans that address virtually every aspect of managing the waste within their geographic boundaries. RCW 70A.205.045. To fund compliance with the plan, Counties may impose fees upon solid waste collection services. RCW 36.58.045.

Counties “have full jurisdiction and authority to manage, regulate, maintain, utilize, operate, control, and establish the

rates and charges for ... solid waste handling systems, plants, sites, or other facilities.” RCW 36.58.040(2). Smaller population counties are authorized to create special solid waste disposal districts for the purpose of funding solid waste disposal. RCW 36.58.100. Local authority to fund and operate solid waste systems is robust.<sup>4</sup>

Through mechanisms known as “flow control,” local governments may designate disposal sites, often called “transfer stations,” for solid waste collected within their jurisdictions. RCW 36.58.040 (counties); RCW 35.21.152 (cities). Flow control ordinances require all solid waste generated within a local authority’s geographic area to be delivered to the facilities designated by the local governmental body. *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 386, 114 S. Ct. 1677, 1680,

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<sup>4</sup> Cities may also produce their own solid waste plans or utilize the county plan. *See* RCW 70A.205.040. In cities that have exercised authority to “opt out” of the WUTC regulated system, the city contracts directly with a private service provider or operates its own solid waste collection program via municipal department. RCW 81.77.020. Similar to counties, cities may also “provide for the establishment of a system or systems of solid waste handling for the entire city or town or for portions thereof.” RCW 35.21.120.

128 L.Ed.2d 399, 405 (1994). Fees at designated local disposal sites fund local solid waste systems.

## V. ARGUMENT

Congress and the federal judiciary, as well as Washington Courts, have historically preserved state regulation of solid waste collection. Appellants' preemption premise has far reaching consequences for Washington's interwoven state and local solid waste regulations which directly contravenes policies established by the legislature. The Court of Appeals did not err in finding a lack of preemption here.

### A. Congress and Courts have Repeatedly Recognized Local Authority Over Solid Waste Collection in the Context of Federal Preemption.

Courts across the nation have recognized the "that waste disposal is a traditional local government function." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 263 (2d Cir. 2001). Indeed, "[for] ninety years, it has been settled law that garbage collection and disposal is a core function of local government." *USA Recycling v. Town of*

*Babylon*, 66 F.3d 1272, 1275 (2d Cir. 1995). In *United Haulers*, the Supreme Court noted that Congress has also recognized the essential role of local government in waste management, affirming that “collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.” 550 U.S. 330, 344, 127 S. Ct. 1786, 1796, 167 L.Ed.2d 655, 668 (2007) (quoting the Resource Conservation and Recovery Act of 1976, 90 Stat. 2797, 42 U.S.C. § 6901(a)(4)).

One of the most significant decisions regarding federal preemption and local solid waste collection is from the Ninth Circuit Court of Appeals, in *AGG Enterprises v. Washington County*. 281 F. 3d at 1324. Premised upon federal preemption of trucking regulation via the Federal Aviation Administration Authorizing Act of 1994, AGG challenged Washington County, Oregon’s regulation of solid waste. *Id* at 1326. AGG claimed it was not subject to the exclusive franchises for solid waste issued by Washington County due to federal preemption. *Id*.

The AGG court refused to divest state and local authority over solid waste collection “absent a “clear and manifest” purpose, if not an explicit instruction from Congress...” *Id.* at 1330.

The *AGG* Court characterized the historical treatment of solid waste collection in the context of federal preemption:

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.

*Id.* at 1328. Similarly, state and federal courts have consistently upheld the local regulation and control over the collection of solid waste. In *Kleenwell Biohazard Waste v. Nelson*, the court found that the WUTC’s regulation of solid waste does not impermissibly burden interstate commerce. 48 F.3d 391 (9th Cir. 2002). Likewise, in *Ventenbergs v. Seattle*, the Washington Supreme Court found that Seattle acted reasonably within its police powers and the authority delegated by the legislature in contracting exclusively for solid waste collection services within the city. 163 Wash.2d 92, 178 P.3d 960 (2008).

There is no shortage of case law, state, and federal, addressing the right of local government to regulate solid waste but also, at least peripherally, to enforce said regulation. Congress and federal judicial bodies, as well as Washington Courts, have historically preserved state regulation of solid waste collection.

B. Appellant's Sweeping Preemption Argument Would Impair a Valid Exercise of State Police Power to Protect Public Health and Safety.

Proper solid waste management represents a critical exercise of state police power to preserve public health. *Spokane v. Carlson*, 73 Wn.2d 76, 81, 436 P.2d 454, 457 (1968). The Washington Legislature extensively regulates solid waste collection, handling and disposal because “[i]mproper methods and practices of handling and disposal of solid wastes pollute our land, air and water resources, blight our countryside, adversely affect land values, and damage the overall quality of our environment.” RCW 70A.205.005(2). Appellants’ arguments could ultimately undermine Washington’s authority

to preserve public health and safety. Indeed, if accepted, Appellants position extends to nearly every layer of state regulation for waste collected in TOFC/COFC containers that are eventually moved by rail.

As previously discussed, the WUTC regulates the collection of solid waste under RCW 81.77 and the Department of Ecology provides comprehensive regulation of solid waste handling facilities through RCW 70A.205, both at the state level. Local governments develop and implement comprehensive local solid waste management plans, establish solid waste handling systems, disposal sites, and regulate the movement of waste.<sup>5</sup> All of this inter-governmental synergy is challenged and at risk under Appellants' preemption argument.

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<sup>5</sup> See RCW 70A.205.045 (county and city comprehensive solid waste management plans); See RCW 36.58.040 (solid waste handling systems and disposal sites authorized). RCW 70A.205.100 grants Local Jurisdictional Health Department's delegated authority to enforce the Department's regulations.

An exchange during oral argument at the Division II of the Court of appeals starkly reveals the scope and potential impacts of Appellant's preemption argument:

**Judge Worswick:** So I just want to make sure I understand your position. So the position is that a waste carrier can haul any type -- any type of waste in a closed container without any sort of federal regulation, as long as it's in a closed container and being loaded onto a rail car, is that correct? It doesn't matter what's in there? Cardboard? Plutonium? It doesn't matter what's in there?

**Appellant:** Well, plutonium is not regulated by the state and so the obligation --

**Judge Worswick:** Okay, something else that's regulated by the state.

**Appellant:** It's a fair point, Your Honor. So -- but when we're talking about something like that which is regulated by the federal government, the obligation is to try and make two federal statutes work if they are in conflict. So that is what I would say for plutonium.

Other than that, yes, that is exactly the issue. This is just for the transportation part. This is not for what happens, you know, before or what happens after

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**Judge Worswick:** If the container is leaking, you know, something all over the roads, the state can't regulate that at all? They can just --

**Appellant** That is correct, Your Honor.

TR at 24-25.<sup>6</sup> The query posed by Judge Worswick initially asked whether *federal* regulation would apply under the circumstances, but the exchange quickly shifted to subsume regulations at both the *state and federal* level.

The WUTC’s authority to regulate, including the contents and types of waste collected in TOFC/COFC containers, would be completely voided when the materials are ultimately moved by rail. Similarly, Appellants’ preemption premise would also preclude enforcement of the Department of Ecology’s solid waste regulations. Similarly, local government regulations and solid waste plans related to establishing comprehensive solid waste management systems would be preempted when materials are collected in TOFC/COFC containers, a practice which could become the “universal

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<sup>6</sup> Certified Transcript of Oral Argument held September 12, 2022; Waste Management of WA, et al vs WUTC, et al prepared by Capitol Pacific Reporting, attached as Appendix 2.

regulatory avoidance” practice and expand to other operators over time.

## **V. CONCLUSION**

The Court of Appeals correctly concluded that the preemptive effect of federal rail regulation simply does not extend as far as to preempt virtually all aspects of state and local solid waste regulation when materials are simply collected in TOFC/COFC containers that are eventually moved via rail. Courts across the nation have repeatedly recognized solid waste collection as a matter not subject to overbroad preemption and have correctly deferred to state and local governments to occupy the primary role in oversight of solid waste handling in the larger interests of public health and safety.

In WUTC Order 06, the WUTC correctly expressed concerns for Washington’s overall regulatory scheme of solid waste collection and transportation. 2021 WASH. UTC LEXIS 89, \*15. As noted above, were the Court to accept Appellants’

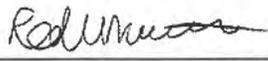
arguments here, the interdependent levels of state and local regulation could be neutralized for any waste collected in TOFC/COFC containers that merely travel by rail at some point along the continuum before reaching an ultimate destination. Similarly, “flow control” designated by the local governments as a key mechanism for funding and managing their solid waste streams would be inapplicable to such wastes. Appellants have not expressed any limiting principle within their expansive arguments that would avoid those outcomes.

As emphasized, the collection and management of solid waste is an inherently local activity, and “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.” *AGG*, 281 F. 3d at 1328.

This brief contains 3,792 words, exclusive of those identified in  
RAP 18.17 as not counting toward its word limit.

Respectfully submitted this 23<sup>rd</sup> day of January, 2023.

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**CERTIFICATE OF SERVICE**

The undersigned certified under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing Brief of the Washington Refuse and Recycle Association **via electronic service** on all counsel of record as follows:

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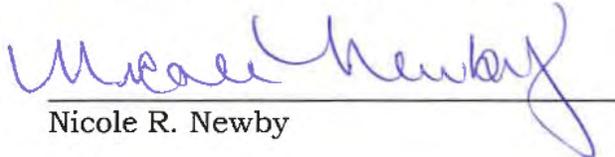
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DATED this 23<sup>rd</sup> day of January, 2023

  
\_\_\_\_\_  
Nicole R. Newby

# APPENDIX 1

# Capitol Pacific Reporting

*Court Reporters Since 1978*

2401 Bristol Court SW, Suite C-103, Olympia, WA 98502 • Ph: 800.407.0148

Waste Management of WA, et al

vs

WUTC, et al

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ORAL ARGUMENT

September 12, 2022

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NO. 56291-0-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

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WASTE MANAGEMENT OF WASHINGTON, INC.,  
WASTE MANAGEMENT DISPOSAL SERVICES OF) OREGON, INC.,  
MJ TRUCKING & CONTRACTING, and  
DANIEL ANDERSON TRUCKING AND EXCAVATION, LLC.  
Petitioners-Appellants,

v.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,  
an agency of the State of Washington,  
Respondent,

MURREY'S DISPOSAL COMPANY, INC., and  
WASHINGTON REFUSE AND RECYCLE ASSOCIATION,  
Intervenors.

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ORAL ARGUMENT

SEPTEMBER 12, 2022

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**BEFORE: CHIEF JUDGE REBECCA GLASGOW**  
**JUDGE BRADLEY A. MAXA**  
**JUDGE LISA WORSWICK**



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1           JUDGE GLASGOW: Thank you, very much. Ms. Goldman,  
2 when you're ready, you may begin.

3           MS. GOLDMAN: Thank you. Good morning, Your Honor,  
4 and may it please the Court.

5           This case concerns COFC service, which means  
6 container-on-flatcar, and I know we've thrown a lot of  
7 acronyms at you, but COFC service is a unique form of  
8 transporting cargo that requires both a rail leg and a  
9 truck leg. COFC service by definition requires the  
10 transportation of closed containers on continuous rail  
11 and truck legs.

12           The question before the Court is whether the State  
13 regulation of COFC service is preempted, not whether the  
14 State is generally preempted from regulating the  
15 transportation of solid waste.

16           I will address three key points. First, Congress  
17 directed that federal regulation of rail transportation  
18 is exclusive.

19           Second, as part of this exclusive federal  
20 jurisdiction, Congress authorized the ICC, now known as  
21 the STB, the Surface Transportation Board, to regulate  
22 matters related to a rail carrier providing  
23 transportation.

24           Third, under the exclusive authority to regulate  
25 matters related to a rail carrier providing



1 transportation, the ICC exclusively regulated COFC  
2 service in three rule-makings and adopted the federal  
3 regulation that preempts the UTC's order at issue here.

4 Turning to the first issue, Congress preempted  
5 state regulation of rail transportation, and we begin  
6 with 49 USC 10501. That is the cardinal statute. This  
7 is the general jurisdiction section of the statute that  
8 governs rail transportation.

9 In Section 10501, Congress made the ICC's  
10 jurisdiction over transportation by rail carrier  
11 exclusive. In Section 10102 of the statute, the Rail  
12 Transportation Statute, Congress defined transportation  
13 very broadly, to include services related to that  
14 movement, including receipt, delivery, elevation,  
15 transfer and transit, storage and handling, no matter  
16 who does it.

17 Second, Congress specifically authorized the ICC to  
18 regulate matters related to rail transportation. In  
19 Section 10502, the other critical statute component here  
20 that's part of the Rail Transportation Statute, Congress  
21 directed the ICC in a matter related to a rail carrier  
22 providing transportation to exempt service whenever the  
23 ICC finds that it is not necessary to carry out the  
24 transportation policy in the statute.

25 JUDGE MAXA: That's exempt from federal regulation



1     though, correct?

2           MS. GOLDMAN: That is -- that is correct -- well,  
3     yes, that is exempt from federal regulation.

4           JUDGE MAXA: And there's not a preemption provision  
5     in 502 or in the CFR, correct?

6           MS. GOLDMAN: That is correct. The preemption is  
7     in the prior section of the statute which I mentioned.  
8     So this is an exemption, as you said, Your Honor, of  
9     federal regulations. So this is part of the effort to  
10    deregulate. First, preempt all other federal and state  
11    law. Second, ask the ICC to exercise its jurisdiction  
12    to determine where it can pull back from regulations.  
13    So it's actually its own exemption. It's exempting  
14    itself from further regulation.

15           So as part of the ICC's exclusive jurisdiction,  
16    Congress also authorized the ICC in Section 10502 to  
17    revoke an exemption if it later determined that it was  
18    not accomplishing the goals of deregulation. So it all  
19    belongs to the STB whether it's exempted or not. And as  
20    directed by Congress, the ICC took over from there.

21           So, third, we have the ICC, now the STB,  
22    exclusively regulating COFC service, and the ICC did  
23    this in three rule-makings, all of which were affirmed  
24    by the federal courts of appeal.

25           Contrary to Respondent's suggestions, the source of



1 that regulatory authority comes from the rail  
2 transportation statute, not from separate authority to  
3 regulate trucks. This is what the ICC said about its  
4 authority in its second COFC rule-making in 1987: The  
5 source of our exemption authority is the "related to a  
6 rail carrier" language of what is now 49 USC 10502,  
7 which regulates rail.

8 The ICC stated that motor TOFC and COFC service  
9 that is part of a continuous rail/motor movement is  
10 obviously related to a rail carrier providing  
11 transportation, subject to the Commission's  
12 jurisdiction.

13 As noted, 49 USC 10502 is part of the STB's rail  
14 carrier authority, not its common carrier authority.

15 In the ICC's third COFC rule-making in 1989, the  
16 railroads there, as opposed to the truckers, argued that  
17 the ICC has statutory authority to exempt truck service  
18 that is related to rail.

19 On the other hand, the truckers, just as they do  
20 before this Court, argued that the ICC, quote, lacked  
21 jurisdiction to exempt any service in trucks, The ICC  
22 rejected the truckers' argument that the trucking part  
23 of COFC service is not rail-related because it is not  
24 provided by rail carriers.

25 The ICC stated that the truckers' view seems to be,



1 quoting, "That the 'related to rail' language really  
2 means provided by rail. We reject the motor carrier's  
3 arguments, as we did earlier, and find that the motor  
4 carrier services at issue here are related to rail  
5 carriers providing transportation subject to Commission  
6 jurisdiction."

7 So the source of the STB's exclusive jurisdiction  
8 to regulate COFC service comes only from its authority  
9 to regulate rail carriers.

10 JUDGE MAXA: Can I get you back to 501. And I  
11 understand your argument under 502 in the CFR, but 501  
12 preempts transportation by rail carrier. Obviously, the  
13 Waste Management entities are not rail carriers, so how  
14 -- how do you fit into that statute, which is the only  
15 preemption statute that I'm aware of, express  
16 preemption?

17 MS. GOLDMAN: Thank you, Your Honor. So you have  
18 to go to Section 10102, which precedes that, and that's  
19 the definitional section, and that defines what  
20 transportation means. Transportation, which is  
21 preempted as you note in the following section, includes  
22 a lot of things, one of which is that it includes any  
23 kind of related movement of passengers, property or both  
24 by rail, regardless of ownership or an agreement  
25 concerning use and services related to that movement.



1           So transportation when used here by Congress and as  
2 interpreted by the STB and as affirmed by the D.C.  
3 Circuit in the Central States case that affirmed the  
4 final one of these rule-makings, stands for the  
5 proposition that this authority is broad and that  
6 transportation here as used in this rail statute  
7 includes that very broad definition.

8           JUDGE MAXA: Sort of a "by rail carrier"?

9           MS. GOLDMAN: It doesn't say -- it doesn't require  
10 "by rail carrier" in the statute but defines what  
11 transportation means.

12           JUDGE MAXA: Well, except it says transportation  
13 "by rail carrier." So you've given me the definition of  
14 transportation. How do you fit into the "by rail  
15 carrier" portion?

16           MS. GOLDMAN: So that's exactly what they argued to  
17 the ICC. That is exactly what they argued, that it has  
18 to be by rail carrier, and that's exactly what the ICC  
19 rejected.

20           JUDGE MAXA: But that's under 502. I'm talking  
21 about the preemption provision in 501.

22           MS. GOLDMAN: It is -- if you look at any of the  
23 STB authority that any of us have provided to the Court  
24 on any of the various subjects, it is clear that when  
25 jurisdiction to the STB is provided under the rail -- I



1 see my time is almost up -- but the rail authority, that  
2 it preempts all other authority. And that has been  
3 interpreted in every single case, every single case  
4 addressing all of them. So there is no dispute there at  
5 the STB or by the courts that that is what is meant by  
6 this statute, that it is broad and that the ICCTA was  
7 meant to be comprehensive in its preemption of anything  
8 that fell to the STB as part of its rail authority.

9 JUDGE MAXA: So what do we do with the Hi Tech  
10 Trans cases, the two STB cases and the 3rd Circuit case?

11 MS. GOLDMAN: So, you know, those are instructive  
12 for a couple of reasons, Your Honor. Hi Tech did not  
13 concern COFC. There's no discussion of COFC. So there  
14 are all kinds of other things discussed, but COFC, which  
15 is unique and it's treated uniquely both by the statute  
16 and by the industry and by the STB, is not discussed in  
17 any of those cases. They're bringing in the stuff,  
18 they're dumping it into the hopper, they're doing stuff  
19 with the stuff in the hopper, and then they're taking  
20 the stuff from the hopper and putting it onto a train.  
21 That's not COFC. So there's no argument that it's COFC,  
22 and there's no discussion that it's COFC.

23 One thing I would note for the Court is that it's  
24 solid waste, and there's no discussion there that  
25 somehow solid waste is off the table when you're talking



1 about a commodity that is governed by the STB.

2 I see my time is almost up. I don't know if I've  
3 fully answered the Court's question?

4 JUDGE MAXA: That's fine.

5 MS. GOLDMAN: Okay. So I think I'll reserve the  
6 rest of my time, unless the Court has any questions at  
7 this point? Thank you, Your Honors.

8 JUDGE GLASGOW: Thank you, Counsel.

9 (Mr. Roberson approaches the bench.)

10 JUDGE GLASGOW: You may begin.

11 MR. ROBERSON: Good morning. May it please the  
12 Court, my name is Jeff Roberson. I'm an Assistant  
13 Attorney General representing the Respondents, the  
14 Washington Utilities and Transportation Commission.

15 This case is actually fairly simple. A motor  
16 carrier is a motor carrier. Federal law has carefully  
17 preserved state regulatory authority over motor carriers  
18 who collect and transport solid waste. That's because  
19 of the overriding local health and safety considerations  
20 at issue with the provision of that service.

21 Accordingly, this Court should affirm the  
22 Commission's order for three reasons.

23 The first is that, as I just mentioned, the  
24 Petitioners are motor carriers as a matter of fact and  
25 as a matter of the law.



1           Second, Congress has spoken clearly to this issue,  
2           and it says that it does not want to preempt state  
3           regulation of motor carriers who collect and transport  
4           solid waste.

5           And third is that nothing in the rail provisions of  
6           the Interstate Commerce Commission Termination Act of  
7           1995 bears that statement of congressional intent.

8           I'd like to begin with the first reason, which is  
9           that the Petitioners are motor carriers. I'd like to  
10          make a couple of points here. The first is that as a  
11          matter of fact, the Petitioners are motor carriers.  
12          They operate under motor carrier permits, they use  
13          trucks, they travel over the public highways. They do  
14          not use railroads, they do not travel over the  
15          interstate rail system. They're motor carriers.

16          And second is that as a matter of federal law, the  
17          Petitioners are motor carriers. You can see this in the  
18          ICC's decisions, which although the ICC has been  
19          abolished, its case law continues in force until it's  
20          overruled or abrogated by the STB. The ICC determined  
21          that the ability to provide motor carrier COFC service  
22          was an operation that you needed a motor carrier  
23          certificate for. The ICC explicitly said that the  
24          authorization to provide that service was a  
25          non-severable aspect of the motor carrier certificate.



1           It approved motor carrier TOFC tariffs under the  
2 motor carrier provisions of the Act. It warned motor  
3 carriers that they could not use TOFC service to evade  
4 routing limits in their motor carrier certificates.

5           It told them that they had to continue to serve the  
6 points of service in their certificate, even if they  
7 were providing TOFC service.

8           And in the end, it told the rail carriers if you're  
9 going to provide TOFC service for the motor carrier, you  
10 need to make sure that that motor carrier has a motor  
11 carrier certificate. That's the New Haven case.

12           Again, all of those cases are good law. They have  
13 not been overruled or abrogated by the ICC or the STB.  
14 And, in fact, the federal courts recognize that the ICC  
15 was treating motor carriers providing TOFC service as  
16 motor carriers. That's the New York Central case quoted  
17 in the Commission's brief where a district court said  
18 motor carriers providing TOFC service are, "Subject to  
19 Part II of the Act," which was at the time the ICA's  
20 motor carrier provisions.

21           The discussion about the exemption statute, there  
22 are a couple of points that I would like to make that  
23 kind of fit in here, which is that Waste Management is  
24 telling you that basically if it touches a rail, it has  
25 to fall under the STB's rail carrier jurisdiction. I



1 ask you to carefully read 49 USC, Section 10501(A) --  
2 (1) (A) actually -- which says that the STB has  
3 jurisdiction over transportation by rail carrier that is  
4 only by railroad or under some circumstances by railroad  
5 and water.

6 The Petitioners' operations are clearly not only by  
7 railroad or by railroad and water. It doesn't fall  
8 within the STB's exclusive jurisdiction over rail  
9 carriers.

10 JUDGE MAXA: Subsection (c) doesn't seem to carry  
11 over that "only by railroad," right? They talk about  
12 transportation by rail carrier.

13 MR. ROBERSON: So it's not explicit in the text of  
14 the statute, but if you read the first Hi Tech Trans  
15 case, the STB says to fall within our exclusive  
16 jurisdiction, you have to fall within our jurisdiction  
17 under Section 10501(a), so Section 10501(a) defines the  
18 scope of the preemption provision in (b).

19 And again, in Hi Tech Trans that's literally, I  
20 think, why the Court -- the STB said this isn't  
21 preempted, it doesn't fall within our rail carrier  
22 jurisdiction. The state is here regulating -- New  
23 Jersey in that case -- but the state is regulating motor  
24 vehicle operations, not the interstate rail system, so  
25 it doesn't fall within our jurisdiction and it's not



1 preempted.

2 Now, Waste Management is attempting to distinguish  
3 Hi Tech by some things that don't matter. The first is  
4 that it doesn't discuss TOFC or COFC service. That only  
5 matters if somehow the use of an intermodal container  
6 transforms that into rail operations, and as I've just  
7 discussed, it's always been considered a motor  
8 vehicle/motor carrier service. And, indeed, it has to  
9 be that way because of the statutory limitation that  
10 I've just discussed, which is the "only by railroad"  
11 clause in the STB's jurisdiction.

12 The second thing is that Waste Management is  
13 distinguishing this by things that happened at the rail  
14 yard. It's important to note that the Commission's  
15 jurisdiction here is defined by statute, but it's simply  
16 over the collection and transport of solid waste. The  
17 Commission is not attempting to regulate anything at a  
18 rail yard. It's regulating the pick-up of solid waste  
19 at a mill and the bringing of it to a rail yard.

20 So with that, I'd like to turn to the second reason  
21 why this Court should affirm the Commission's order,  
22 which is that Congress has spoken clearly to this, and  
23 it has said that it has no intent of preempting state  
24 regulatory authority. Now, in any preemption case  
25 Congressional intent controls, either as a matter of



1 statutory interpretation or because an agency can't  
2 preempt state regulation in contravention of Congress's  
3 stated intent.

4 In 1994 Congress preempted state regulation of  
5 motor carriers, but the Conference Report states that  
6 the conferees specifically chose language to avoid  
7 preempting state regulation of motor carriers who  
8 collect and transport solid waste. I think it calls  
9 them solid waste haulers or something. And it did that  
10 based on an old ICC decision concerning the word  
11 "property."

12 And so Congress has very clearly said it has no  
13 intent to preempt the specific service offered by the  
14 Petitioners, which is the motor vehicle collection and  
15 transport of solid waste.

16 JUDGE MAXA: Although that -- that intent was  
17 stated in the context of a different statute, right?  
18 Not 501 and 502?

19 MR. ROBERSON: That is true, Your Honor. However,  
20 you would read the statutory scheme as a whole.  
21 Congress incorporated that statute into the ICCTA, so  
22 you would read its provisions together. You would avoid  
23 a conflict, clearly. I would say that the more specific  
24 statute is the one directly applicable to the service  
25 that the Petitioners offer, which is the motor vehicle



1       preemption statute.

2               JUDGE MAXA:  Although you both agree that statute  
3       doesn't apply here, right?

4               MR. ROBERSON:  So --

5               JUDGE MAXA:  The motor carrier preemption statute  
6       doesn't apply?  You both agree to that?

7               MR. ROBERSON:  So, yes, by its text it does not  
8       apply, but Congress -- the congressional intent behind  
9       it, which Congress specifically stated in the Conference  
10       Report, would apply, and that's Congress saying we don't  
11       -- we choose not to preempt state law here.

12               Other provisions in the federal code confirm that  
13       reading of congressional intent.  The health and welfare  
14       provisions in Title 42 -- I believe it's 42 USC Section  
15       6901(a)(4) -- there Congress says states have the  
16       primary responsibility for the collection and disposal  
17       of solid waste.

18               So the most on-point authority from Congress, the  
19       clear statements of its authority with regard --  
20       Congress's intent with regard to this particular service  
21       is Congress saying we are not preempting, the states  
22       have a role here and we want to preserve that.

23               JUDGE MAXA:  So respond to the argument that  
24       Counsel is making that 502 authorizes exemptions from  
25       federal regulation.  CFR 1092.1, or whatever it is,



1 specifically exempts motor carrier service that involves  
2 rail, and their argument is the exercise of that  
3 jurisdiction somehow creates a preemption. What is your  
4 response to that?

5 MR. ROBERSON: So it does not, as you've stated.  
6 This is an argument about an express preemption  
7 provision, which is Section 10501(b).

8 The thing I would point out about Section 10502  
9 that I didn't point out earlier is that the courts that  
10 have looked at it have said it's not a jurisdictional  
11 statute. It doesn't grant the ICC or the STB any  
12 jurisdiction. It just allows them to exercise their  
13 jurisdiction in this specific way, which is to exempt  
14 service from regulation.

15 JUDGE MAXA: So if they're exercising that  
16 jurisdiction, why doesn't that fall within their  
17 exclusive jurisdiction?

18 MR. ROBERSON: Well, a couple of reasons. One,  
19 Congress has specifically provided for preemption in  
20 other parts of the ICCTA. That's 10501(b) and 14501(c).  
21 Those are the places where Congress is preempting state  
22 regulation.

23 The second reason why I would say that that doesn't  
24 apply here is Congress has specifically said we're not  
25 preempting state regulation of solid waste collection



1 services, and that ICC case law that is still good law,  
2 which hasn't been discussed yet, but it's an old case  
3 called Joray -- there the ICC said we choose to  
4 interpret the Act that we administer so as not to  
5 encompass this service. And so there's no reason to  
6 believe that the rule-makings that you're discussing  
7 would encompass a subject that they think -- the ICC  
8 thought it had no jurisdiction over. It can't legislate  
9 a rule over something that it has no jurisdiction over.  
10 And so there's no reason to assume that any of those  
11 rule-makings apply to the collection and transport of  
12 solid waste. And indeed, right before its abolition,  
13 the ICC represented to Congress that it had never tried  
14 to regulate solid waste, so it had never exercised  
15 jurisdiction over solid waste services.

16 So that's an indicator that it had no view that  
17 these regulations would apply. And again, the ICC or  
18 the STB can't preempt state regulation of a service in  
19 contravention of congressional intent, and Congress has  
20 specifically stated that it has no intent to preempt  
21 state regulation of this service.

22 And I see I'm out of time, unless there are further  
23 questions.

24 JUDGE GLASGOW: Thank you, Counsel.

25 (Mr. Fassburg approaches bench.)



1           MR. FASSBURG: Good morning. May it please the  
2 Court and Counsel, my name is Blair Fassburg. I  
3 represent Murrey's Disposal, and I know that my time is  
4 brief and that many of the points that I'd like to make  
5 have been addressed. What I'd like to do is hopefully  
6 state succinctly what I believe is the reason why there  
7 is not jurisdiction in the ICC or STB to regulate the  
8 specific haul here, and without that jurisdiction there  
9 is no preemption.

10           As all of the briefs, I believe, have addressed,  
11 Congress authorized the ICC and then the STB with  
12 specific authority by statute, not by rule, not by  
13 exemption, but those two statutes are currently codified  
14 as 49 USC 10501 and 49 USC 13501. Each of those are  
15 distinct statutes that confer jurisdiction based on  
16 different modes of transportation.

17           TOFC or COFC service is intermodal. Intermodal is  
18 a word used for a specific reason. It's because it is  
19 between modes. It is not a unique new type of  
20 transportation. It is two or more separate types of  
21 transportation linked together.

22           Congress did not create a statute that specifically  
23 authorizes jurisdiction over intermodal service.  
24 Instead, what it did was it authorized the STB to exempt  
25 from its own rules transportation that was related to



1 rail. And I think as Mr. Roberson was explaining, and I  
2 hope to synopsise, if that jurisdiction did not exist in  
3 the STB when it created exemptions from its own rules --  
4 or, I'm sorry, from its own jurisdictional regulations  
5 -- those would not apply to matters that were not  
6 originally within its jurisdiction.

7 So in this case, Congress granted the STB  
8 jurisdiction over motor carriers that was non-exclusive,  
9 unlike its jurisdiction over rail carriers, which was  
10 clearly exclusive. The STB co-regulates -- and, in  
11 fact, I think it barely regulates at all these days --  
12 motor carriers with the Department of Transportation.  
13 But until the Federal Aviation Administration  
14 Authorization Act of 1994, jurisdiction over motor  
15 carriers was also coordinated -- or perhaps coordinated  
16 is the wrong word -- but it was both between the federal  
17 level and the state level.

18 For that reason, we have to look at whether or not  
19 preemption applies to a motor carrier leg of an  
20 intermodal movement, based not on the rail carrier  
21 jurisdiction, but whether or not the STB's jurisdiction  
22 applied in the first place.

23 So 49 CFR 1090.2, as Counsel have addressed,  
24 created exemptions that do apply to certain types of  
25 intermodal service. But as I said, those types of



1 intermodal service would not be exempted if they did not  
2 originally fall within the STB's jurisdiction.

3 In this case, the Joray case, as Mr. Roberson  
4 addressed, clearly concluded that the ICC and now the  
5 STB did not have jurisdiction over motor carrier  
6 transportation of solid waste. Those cases have not  
7 been abrogated or overruled. In fact, those cases  
8 continue to this day and as Mr. Roberson addressed, part  
9 of the reason why Congress when adopting FAAAA of 1994  
10 -- it was intentional in its effort not to preempt that  
11 state regulation.

12 Now, this is important for a policy reason. The  
13 federal government has never taken upon itself the  
14 regulation of solid waste. It recognizes by statute  
15 that this is an important state and local interest.  
16 Without the clear exemptions -- or, excuse me,  
17 exceptions to the FAAAA -- states could not regulate the  
18 transportation of solid waste. Congress made clear that  
19 it did not intend to interfere with the scheme that  
20 solid waste transportation is an interest that is  
21 paramount to the state.

22 Now, in this case, if, despite the fact there is no  
23 authority to support the Appellants' position that TOFC  
24 and COFC service is, in fact, preempted, if the Court  
25 were to find that, in fact, it were, the impacts on the



1 states' ability to regulate extend far beyond this case.  
2 This case relates to whether or not a company can haul  
3 solid waste without a G-Certificate from the Commission.

4 But the same principle would apply to the  
5 Department of Ecology's regulations. And so if this  
6 case were to find for the Appellants -- if this Court  
7 were to find for the Appellants, the ultimate result  
8 would not just be that Waste Management and its  
9 affiliates could transport from two paper mills that it  
10 could not previously. The result would be that the  
11 state would be unable to regulate transportation so long  
12 as that solid waste was placed into a container and  
13 taken to a railroad. I don't believe Congress intended  
14 for that. In fact, it was quite clear that that was not  
15 its intent.

16 As I mentioned, there is no federal-level  
17 regulation of the types -- or at least not of the nature  
18 of the regulations that the Department of Ecology and  
19 the Utilities and Transportation Commission have placed  
20 on solid waste transportation.

21 And I believe I'm out of time, so I'll stop there  
22 unless you have questions.

23 JUDGE GLASGOW: Thank you, Counsel.

24 MR. FASSBURG: Thank you.

25 (Ms. Goldman approaches bench.)



1 MS. GOLDMAN: My time is brief, and I'd like to run  
2 through several of the issues that were raised by  
3 Counsel.

4 If the Court has not yet read Central States two or  
5 three times, I'd highly recommend that the Court do so.  
6 That is the decision of Ruth Bader Ginsburg for the DC  
7 Circuit affirming the COFC regulations, the final one of  
8 the regulations, and rejecting the arguments that are  
9 made here, agreeing with the approach taken by the then  
10 ICC. And those decisions, those three decisions, the  
11 three rule-makings, are unequivocal that the basis for  
12 that authority comes from the rail authority.

13 This is unique. This is not as Counsel would  
14 suggest, just dumping stuff in a container and tagging  
15 it because of putting it in the container.

16 The courts have dealt with that very differently as  
17 the court saw in Hi Tech in, you know, bringing in the  
18 container, dumping it on the ground, putting it into  
19 another container. That is not COFC.

20 So the regulation of COFC here, which presupposes  
21 jurisdiction as the DC Circuit held, is based on the  
22 jurisdictional statement in the rail statute. That's  
23 the basis for it, and that's what the DC Circuit  
24 affirmed.

25 JUDGE WORSWICK: So I just want to make sure I



1 understand your position. So the position is that a  
2 waste carrier can haul any type -- any type of waste in  
3 a closed container without any sort of federal  
4 regulation, as long as it's in a closed container and  
5 being loaded onto a rail car, is that correct? It  
6 doesn't matter what's in there? Cardboard? Plutonium?  
7 It doesn't matter what's in there?

8 MS. GOLDMAN: Well, plutonium is not regulated by  
9 the state and so the obligation --

10 JUDGE WORSWICK: Okay, something else that's  
11 regulated by the state.

12 MS. GOLDMAN: It's a fair point, Your Honor. So --  
13 but when we're talking about something like that which  
14 is regulated by the federal government, the obligation  
15 is to try and make two federal statutes work if they are  
16 in conflict. So that is what I would say for plutonium.

17 Other than that, yes, that is exactly the issue.  
18 This is just for the transportation part. This is not  
19 for what happens, you know, before or what happens after  
20 --

21 JUDGE WORSWICK: If the container is leaking, you  
22 know, something all over the roads, the state can't  
23 regulate that at all? They can just --

24 MS. GOLDMAN: That is correct, Your Honor. And I  
25 would also point the Court for ease and understanding of



1 why that is the case to the statute that was passed in  
2 2008, which is the Clean Railroads Act, and in that  
3 statute the court discussed -- Congress discussed  
4 deregulation of solid waste rail transfer facilities.  
5 And it specifically exempted from federal regulation --  
6 from state regulation -- those facilities that actually  
7 just deal with the transfer in those COFC containers.  
8 It took it out.

9 So that is 49 USC. 10908. It not only establishes  
10 that point, Your Honor, but it establishes the fact that  
11 rail carrier service has always included regulation of  
12 solid waste. I mean, we see that in Hi Tech, and we see  
13 that in this latest statute.

14 And we also see the discussion of this as a  
15 commodity, not as the property that was the basis for  
16 the FAA ruling, and I would cite to the Court the 9th  
17 Circuit decision in A.G.G. Enterprises, which is the 9th  
18 Circuit 2002 case, where the court looked at the FAAAA  
19 and this reference to this old Joray case and said, eh,  
20 not so quick, it's not so clear. There's been case law  
21 all over the point by the STB in those 1960's  
22 situations. But the point is Congress with the FAAAA  
23 specifically thought that that's what the deal was.  
24 That's what it says in the congressional history.

25 That's not the case here when we're talking about



1 the regulation of rail, and so the regulation -- the  
2 more recent exclusion of the rail transfer facilities.  
3 No state regulation of those to the degree that it's  
4 talking about this type of intermodal transportation.

5 This idea that the jurisdiction comes from two  
6 totally different sets of statutes, there's no support  
7 for that at all. You have the ICC's ruling about the  
8 basis for its authority, which sounds nothing like what  
9 you heard here, and it says it's based on the rail  
10 transportation statute.

11 And then you have the federal Court of Appeals  
12 affirming the basis for that jurisdiction as being  
13 presupposed and, therefore, the authority being  
14 exclusive under the grant of jurisdiction.

15 I see my time is about to be up. Your Honors, thank  
16 you for your time. We ask that the Court reverse the  
17 UTC and grant summary judgment for the Petitioners.  
18 Thank you.

19 JUDGE GLASGOW: Thank you, Counsel. And thank you,  
20 all of you, for your helpful arguments this morning.

21 The remainder of the cases on our docket will be  
22 decided without oral argument. Division II is adjourned  
23 for the day. Thank you.

24 CLERK OF COURT: All rise.

25 (END OF RECORDING)



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C E R T I F I C A T E

I, MARY JEAN BERKSTRESSER, a Certified Stenographic Court Reporter in and for the State of Washington, residing at Olympia, Washington, do hereby certify:

That the foregoing proceedings were electronically recorded; that I was not present at the proceedings; that I was requested to transcribe the electronically-recorded proceedings; that a transcript was prepared by me by listening to the recorded proceedings;

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# APPENDIX 2

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

|  |   |
|--|---|
| <p>MURREY'S DISPOSAL CO., INC.,<br/>Complainant,</p> <p>v.</p> <p>WASTE MGMT. OF WASH., INC.,<br/>WASTE MGMT. DISPOSAL<br/>SERVICES OF OR., AND MJ<br/>TRUCKING &amp; CONTRACTING,<br/>Respondents.</p>                    | <p>DOCKETS TG-200650 and<br/>TG-200651 (<i>Consolidated</i>)</p> <p>ORDER 06</p>  |
| <p>MURREY'S DISPOSAL CO., INC.,<br/>Complainant,</p> <p>v.</p> <p>WASTE MGMT. OF WASH., INC.,<br/>WASTE MGMT. DISPOSAL<br/>SERVICES OF OR., AND DANIEL<br/>ANDERSON TRUCKING AND<br/>EXCAVATION, LLC,<br/>Respondents.</p> | <p>GRANTING COMPLAINANT'S<br/>MOTION FOR SUMMARY<br/>DETERMINATION, DENYING<br/>RESPONDENTS' MOTION FOR<br/>SUMMARY DETERMINATION</p> |

**BACKGROUND**

1 On July 15, 2020, Murrey's Disposal Company, Inc. (Murrey's Disposal), filed with the Washington Utilities and Transportation Commission (Commission) a complaint against Waste Management of Washington, Inc. (WMW), Waste Management Disposal Services of Oregon, Inc. (WMDSO), and MJ Trucking & Contracting, Inc. (MJ Trucking). Murrey's Disposal filed a second complaint against WMW, WMDSO, and Daniel

Anderson Trucking and Excavation, Inc. (DAT) (respondents in both complaints; collectively, Respondents). The complaints allege that Respondents are providing solid waste collection services in Murrey's Disposal's service territory in Jefferson County and Clallam County without a certificate of public convenience and necessity and request that the Commission order Respondents to cease and desist.

2 On August 4, 2020, the Respondents filed answers to the complaints and motions to dismiss. Respondents contend that the Commission lacks jurisdiction over the complaints because federal law preempts Commission regulation of the intermodal rail and motor carrier transportation of solid waste that Respondents provide.

3 On August 20, 2020, Murrey's Disposal filed responses opposing the motions to dismiss.

4 On August 27, 2020, the Commission entered Order 01, consolidating these dockets.

5 On October 19, 2020, following a hearing and supplemental briefing from the parties, the presiding Administrative Law Judge Andrew J. O'Connell entered Order 02, denying Respondents' motions to dismiss.

6 On October 29, 2020, Respondents filed a petition for interlocutory review of Order 02.

7 On December 7, 2020, after receiving a response from Murrey's Disposal opposing Respondents' petition for interlocutory review, the Commission entered Order 03, granting interlocutory review of Order 02 and affirming Order 02's denial of the motions to dismiss.

8 On December 18, 2020, the Commission convened a virtual prehearing conference before Judge O'Connell. At the conference, the Parties agreed to collaborate and file jointly with the Commission a stipulation of material facts by January 15, 2021, and agreed that the Commission should hold a subsequent status conference to determine a further procedural schedule.

9 On January 13, 2021, the Commission entered Order 04, Prehearing Conference Order, memorializing the agreed procedural schedule and setting a status conference for January 26, 2021.

10 On January 15, 2021, the Commission issued a notice continuing the deadline for the Parties' joint stipulation of material facts (or a letter explaining the Parties' inability to agree) until January 21, 2021, pursuant to the Parties' request.

- 11 On January 21, 2021, Murrey's Disposal filed with the Commission a letter indicating that the Parties were unable to reach an agreed stipulation of facts.
- 12 On January 26, 2021, the Commission convened a virtual status conference before Judge O'Connell to discuss further process due to the Parties' failure to stipulate to a list of agreed facts. The Parties presented an agreed procedural schedule, but did not indicate an agreed hearing date. The Parties also indicated the need for a protective order in these consolidated dockets.
- 13 On January 27, 2021, the Commission entered Order 05, Protective Order, in these consolidated dockets.
- 14 On January 29, 2021, the Commission issued a notice modifying the procedural schedule and notice of evidentiary hearing (set for August 5-6, 2021) in these consolidated dockets. The modified procedural schedule provided for, among other things, simultaneous motions for summary determination to be filed on March 16, 2021, and required responses to the motions by April 7, 2021.
- 15 On March 16, 2021, the Parties filed with the Commission motions for summary determination, supported by declarations and exhibits.
- 16 On April 7, 2021, the Parties filed responses to the motions for summary determination. Respondents also filed additional declarations.

### **DISCUSSION AND DECISION**

- 17 The Commission may grant a motion for summary determination when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>1</sup> Here, based upon the declarations and exhibits submitted by the Parties and viewed in the light most favorable to Respondents, there is no genuine issue of material fact. Respondents are providing solid waste collection service in Jefferson County and Clallam County (within Murrey's Disposal's certificated service territory) without the statutorily required certificate of authority from the Commission. We therefore determine that Murrey's Disposal is entitled to judgment as a matter of law as explained below.

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<sup>1</sup> WAC 480-07-380(2)(a).

- 18 Murrey's Disposal has authority from the Commission to collect solid waste in unincorporated Jefferson County and Clallam County.<sup>2</sup> WMW also has authority from the Commission to collect solid waste, but not in Jefferson County or Clallam County.<sup>3</sup> DAT and MJ Trucking each have common carrier permits from the Commission, but lack authority to operate as solid waste collection companies.<sup>4</sup> WMDSO holds no authority from the Commission, but "provides solid waste disposal services and contracts with third parties to collect and transport solid waste to provide these services."<sup>5</sup>
- 19 Port Townsend Paper is located in unincorporated Jefferson County and McKinley Paper is located in Port Angeles, Clallam County.<sup>6</sup> Both are former customers of Murrey's Disposal for the collection and disposal of solid waste in the form of Old Corrugated Cardboard Rejects (OCC Rejects).<sup>7</sup> It is undisputed that OCC Rejects are solid waste and have no positive market value.<sup>8</sup>
- 20 Port Townsend Paper currently contracts with WMDSO for the collection and disposal of solid waste (OCC Rejects).<sup>9</sup> WMDSO subcontracts with DAT to collect solid waste in trailer on flatcar or container on flatcar (TOFC/COFC) containers from Port Townsend Paper and deliver the solid waste via motor vehicle over public highways to the Olympic View Transfer Station operated by WMW under contract with Kitsap County and also to a facility owned and operated by North Mason Fiber Company (NMF) in Mason County near Belfair, Washington.<sup>10</sup>

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<sup>2</sup> Murrey's Disposal: Certificate G-009.

<sup>3</sup> WMW: Certificate G-237. Declaration of Michael Weinstein at 1, ¶ 3.

<sup>4</sup> DAT: Common Carrier Permit CC029397, USDOT Number 2489589. MJ Trucking: Common Carrier Permit CC030132, USDOT Number 935162.

<sup>5</sup> Declaration of Justin Wheeler at 1, ¶ 3.

<sup>6</sup> Declaration of Eric Evans at 2-3, ¶¶ 8-9.

<sup>7</sup> Respondents' Motion at 1-2, ¶ 5. Murrey's Disposal provided solid waste collection services to the prior owner and operator of McKinley Paper. *Id.*

<sup>8</sup> See Respondents' Motion at 1, ¶¶ 3-4; Murrey's Disposal's Exhibit 3.1 at 11, Response to Data Request No. 67.

<sup>9</sup> Declaration of Eric Evans at 2, ¶ 7; Murrey's Disposal's Exhibit 3.1 at 25, Response to Data Request No. 97; Murrey's Disposal's Exhibit 3.19 at 5, Response to Data Request No. 11.

<sup>10</sup> Declaration of Eric Evans at 1-3, ¶¶ 3-4, 9; Murrey's Disposal's Exhibit 3.1 at 23, Response to Data Request No. 92. MJ Trucking has collected solid waste in TOFC/COFC containers from

- 21 After arriving at the Olympic View Transfer Station or NMF's facility, the containers of solid waste from Port Townsend Paper are subsequently loaded onto rail cars and transported via railroad by Union Pacific Railroad (Union Pacific RR) under a preexisting contract with WMDSO to the Columbia Ridge Landfill in Arlington, Oregon, which is owned by WMDSO, where the solid waste is disposed.<sup>11</sup>
- 22 McKinley Paper currently contracts with WMDSO for the collection and disposal of solid waste (OCC Rejects).<sup>12</sup> WMDSO subcontracts with MJ Trucking to collect solid waste in TOFC/COFC containers from McKinley Paper and deliver the solid waste via motor vehicle over public highways to the Olympic View Transfer Station, NMF's facility, and Union Pacific RR's facility in Seattle, Washington (the Argo Yard).<sup>13</sup>
- 23 After arriving at the Olympic View Transfer Station, NMF's facility, or the Argo Yard, the containers of solid waste from McKinley Paper are subsequently loaded onto rail cars and transported via railroad by Union Pacific RR under a preexisting contract with WMDSO to the Columbia Ridge Landfill in Arlington, Oregon, where the solid waste is disposed.<sup>14</sup>

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Port Townsend Paper on behalf of DAT. Murrey's Disposal's Exhibit 3.20 at 5, Response to Data Request No. 12.

<sup>11</sup> Declaration of Eric Evans at 2-3, ¶¶ 4-6, 10; Declaration of Justin Wheeler at 2, ¶ 5; Murrey's Disposal's Exhibit 3.1 at 24, Response to Data Request No. 93. Puget Sound and Pacific Railroad (Puget Sound and Pacific RR) has authority from the STB and provides rail switching services at the Olympic View Transfer Station and NMF's facility. Declaration of Eric Evans at 1-2, ¶¶ 3, 5.

<sup>12</sup> Declaration of Eric Evans at 2, ¶ 8; Murrey's Disposal's Exhibit 3.1 at 22, Response to Data Request No. 86.

<sup>13</sup> Declaration of Eric Evans at 1-3, ¶¶ 3-4, 9; Murrey's Disposal's Exhibit 3.1 at 20, Response to Data Request No. 79. DAT has collected solid waste in TOFC/COFC containers from McKinley Paper on behalf of MJ Trucking. Murrey's Disposal's Exhibit 3.19 at 7, Response to Data Request No. 14.

<sup>14</sup> Declaration of Eric Evans at 2-3, ¶¶ 4-6, 9-10; Declaration of Justin Wheeler at 2, ¶¶ 5-6; Murrey's Disposal's Exhibit 3.1 at 21, Response to Data Request No. 80. Puget Sound and Pacific RR has authority from the STB and provides rail switching services at the Olympic View Transfer Station and NMF's facility. Declaration of Eric Evans at 1-2, ¶¶ 3, 5.

- 24 Respondents do not hold authority from the Surface Transportation Board (STB) to operate as rail carriers.<sup>15</sup> Respondents do not offer to provide solid waste collection services to Port Townsend Paper or McKinley Paper jointly with Union Pacific RR.<sup>16</sup>
- 25 These facts establish that Respondents are providing solid waste collection services under Washington law without the required certificate of authority from the Commission. Respondents collect solid waste in the form of OCC Rejects from Port Townsend Paper and McKinley Paper for compensation and transport it via motor vehicle over Washington's public highways for collection and disposal.
- 26 Chapters 70A.205 and 81.77 Revised Code of Washington (RCW) establish the legislative authority for regulating the handling of solid waste, which includes the Commission, the state Department of Ecology, and county and city governments. The Legislature defines "solid waste handling" very broadly as "the management, storage, collection, transportation, treatment, utilization, processing, and final disposal of solid wastes, including the recovery and recycling of materials from solid wastes, the recovery of energy resources from solid wastes or the conversion of the energy in solid wastes to more useful forms or combinations thereof."<sup>17</sup>
- 27 Specifically with respect to the Commission's responsibilities, the Legislature requires:
- The commission shall supervise and regulate every solid waste collection company in this state,
  - (1) By fixing and altering its rates, charges, classifications, rules and regulations;
  - (2) By regulating the accounts, service, and safety of operations;
  - (3) By requiring the filing of annual and other reports and data;
  - (4) By supervising and regulating such persons or companies in all other matters affecting the relationship between them and the public which they serve;
  - (5) By requiring compliance with local solid waste management plans and related implementation ordinances;

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<sup>15</sup> Respondents' Response to Motion at 9, n. 9, stating "Respondents **do not** claim they are rail carriers or should be treated as rail carriers." (bold and underline included in original).

<sup>16</sup> Murrey's Disposal's Exhibit 3.1 at 12-15, Responses to Data Request Nos. 70, 71, 72, 73.

<sup>17</sup> RCW 70A.205.015(23).

(6) By requiring certificate holders under chapter 81.77 RCW to use rate structures and billing systems consistent with the solid waste management priorities set forth under RCW 70A.205.005 and the minimum levels of solid waste collection and recycling services pursuant to local comprehensive solid waste management plans.<sup>18</sup>

28 A “solid waste collection company” is “every person or his or her lessees, receivers, or trustees, owning, controlling, operating, or managing vehicles used in the business of transporting solid waste for collection or disposal, or both, for compensation . . . over any public highway in this state as a ‘common carrier’ or as a ‘contract carrier.’”<sup>19</sup> No one may operate as a solid waste collection company without a certificate from the Commission granting authority to begin service in a specified territory.<sup>20</sup>

29 The Commission has promulgated rules in Chapter 480-70 WAC to implement this authority, the purpose of which is:

[T]o administer and enforce Chapter 81.77 RCW by establishing standards for: Public safety; Fair practices; Just and reasonable charges; Nondiscriminatory application of rates; Adequate and dependable service; Consumer protection; and Compliance with statutes, rules, and commission orders.<sup>21</sup>

30 The Commission’s rules define a “solid waste collection company” as “every common carrier, including a contract carrier, who provides solid waste collection service,” and “solid waste collection” as “collecting solid waste from residential or commercial

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<sup>18</sup> RCW 81.77.030.

<sup>19</sup> RCW 81.77.010(9). A “common carrier” for these purposes is “any person who collects and transports solid waste for disposal by motor vehicle for compensation, whether over regular or irregular routes, or by regular or irregular schedules.” RCW 81.77.030(1).

<sup>20</sup> RCW 81.77.040; WAC 480-07-101. A company may be granted authority by the Commission to operate even in a territory already served by a certificate holder, but 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. RCW 81.77.040.

<sup>21</sup> WAC 480-70-001.

customers and transporting the solid waste, using a motor vehicle, for collection and/or disposal over the highways of the state of Washington for compensation.”<sup>22</sup>

31 The Commission has also included in its rules the determination that neither the Interstate Commerce Act nor the Federal Aviation Administration Authorization Act (FAAAA) exempt solid waste collection companies operating in Washington from Commission regulation.<sup>23</sup>

32 Respondents have consistently characterized the service they are providing as TOFC/COFC intermodal transportation that is preempted from Commission regulation by the Interstate Commerce Commission Termination Act (ICCTA), which authorizes the STB to regulate transportation by rail carriers.<sup>24</sup> Respondents’ argument centers on the TOFC/COFC containers in which the solid waste is collected and transported in this instance. Respondents argue that their “continuous transportation of intermodal containerized solid waste from motor carrier to railroad, unloaded only at the final destination, is . . . like all such continuous intermodal movement of cargo including a rail leg . . . part of rail transportation exclusively regulated by the STB.”<sup>25</sup>

33 We disagree. Respondents’ service consists of more than the TOFC/COFC intermodal transportation because it involves the inherently local concerns of entering upon a customer’s property to collect and remove solid waste and then transporting that waste over Washington’s public highways by motor vehicle. Regardless of the container in which the solid waste is initially placed, or the fact that it may at some point be moved via rail, its collection remains intrinsically local in nature and falls outside of the STB’s jurisdiction.<sup>26</sup> None of the federal statutes, rules, or agency decisions on which the

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<sup>22</sup> WAC 480-70-041.

<sup>23</sup> WAC 480-70-006(5).

<sup>24</sup> 49 U.S.C. § 10501. To show that the Commission is preempted, Respondents must demonstrate that their operations constitute transportation by a rail carrier under the ICCTA. Respondents fail to meet this burden as none are rail carriers and their operations are not at the direction of a rail carrier, offered jointly with a rail carrier, and are not related to transportation by a rail carrier. Additionally, the case law has long established that the STB does not regulate the transportation by motor vehicle of solid waste, as explained *infra* at Paragraphs 33-35 and associated notes.

<sup>25</sup> Respondents’ Motion at 19, ¶ 57.

<sup>26</sup> 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

Respondents rely state or otherwise support the conclusion that federal jurisdiction over TOFC/COFC intermodal transportation extends to the entirety of the solid waste collection service of which intermodal transport may be only a part. In other words, the jurisdiction of Congress and the STB over TOFC/COFC intermodal transportation does not extend so far as to preempt state regulation of solid waste collection.

34 The federal law on which the Respondents rely at most reflects the STB's assertion of jurisdiction over the combination of rail and motor carrier transportation when *rail carriers* provide, arrange, or jointly partner with a motor carrier to provide that transport.<sup>27</sup> Here, none of the Respondents are rail carriers and none of the services provided are offered at the direction of a rail carrier or jointly with a rail carrier.<sup>28</sup> Even then, neither Congress nor the STB has extended federal authority over solid waste handling by rail carriers to the extent Respondents assert.<sup>29</sup> To the contrary, Congress exempted solid waste rail transfer facilities from STB jurisdiction, thus preserving states' ability to regulate such facilities in the same manner as non-rail solid waste management facilities.<sup>30</sup> This illustrates Congress's respect for state authority over solid waste handling, including the rail transfer facilities that are used as part of rail transportation, as well as the collection, disposal, and other handling of solid waste before and after it is transported.

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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.

*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>27</sup> Respondents' Motion at 5-9, ¶¶ 27-35 citing *e.g. Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), *aff'd sub nom. Am. Trucking Ass'n v. ICC*, 656 F.2d 1115 (5th Cir. 1981); *ICC v. Texas*, 479 U.S. 450 (1987); *Cent. States Motor Freight Bureau Inc. v. ICC*, 924 F.2d 1099 (1991); *Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers)*, 3 I.C.C.2d 869 (1987); *Am. Trucking Ass'n v. Atchison, T. & S. F. R. Co.*, 387 U.S. 397 (1967); *Improvement of TOFC/COFC Regulations (Pickup and Delivery)*, 6 I.C.C.2d 208 (1989). See also *infra* n. 31 and accompanying text.

<sup>28</sup> *Supra* n. 15 and accompanying text; n. 16 and accompanying text.

<sup>29</sup> See *infra* n. 27; n. 31 and accompanying text.

<sup>30</sup> 49 U.S.C. § 10501(c)(2)(B).

35 Respondents do not point to any language in the ICCTA or any other law, legislative history, or regulation demonstrating or even suggesting, that Congress or the STB intended to preempt traditional state regulation of solid waste collection. To the contrary, Congress, federal courts, and the STB have historically preserved traditional state regulation of solid waste collection.<sup>31</sup> The most reasonable interpretation of federal law is, therefore, that Congress never granted the STB jurisdiction over solid waste transfer facilities, the solid waste collection service as a whole, and neither has the STB ever asserted such jurisdiction.

36 Additionally, Respondents argue that they relied upon advice provided by Commission Staff in 2011, which indicated that the operations raised as issues in this case were not regulated by the Commission.<sup>32</sup> We have consistently rejected such arguments. Commission Staff's opinions on the applicability of statutes and rules are their opinions alone, which Commission Staff stated explicitly in its 2011 advice.<sup>33</sup> "The Commission through its rules and final orders interprets the statutes the legislature has enacted for the Commission to implement and enforce."<sup>34</sup> Here, the Commission has jurisdiction over the solid waste collection services conducted by Respondents. Respondents' misunderstanding of the law and Commission jurisdiction does not absolve the Respondents of their culpability for operating contrary to Commission regulation.<sup>35</sup>

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<sup>31</sup> See *AGG Enter. v. Wash. Cty.*, 281 F.3d at 1328-29 (explaining the intrinsically local nature of solid waste collection, states' historic regulation, and 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); *Kleenwell Biohazard Waste and Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391; *Joray Trucking Corp. Common Carrier Application*, 99 M.C.C. 109 (Jun. 29, 1965); *Long Island Nuclear Serv. Corp., Common Carrier Application*, 110 M.C.C. 395 (Sep. 9, 1969); *Transp. of "Waste" Prod. for Reuse and Recycling*, 114 M.C.C. 92, 103-08 (1971); *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); *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004).

<sup>32</sup> Respondents' Motion at 3, ¶ 16; Declaration of Eric Evans at 2, ¶ 7.

<sup>33</sup> See *In re Proper Carrier Classification of, and Complaint for Penalties Against Ghostruck Inc.*, Docket TV-161308, Order 05, Denying Petition for Administrative Review, 5, 11, ¶¶ 14, 30 (Jun. 1, 2017); Declaration of Jessica L. Goldman, Exhibit No. 1 at 2.

<sup>34</sup> *Id.* at 11, ¶ 30; see also *id.* at 5, ¶¶ 14-15.

<sup>35</sup> In *Ghostruck*, the Commission reasoned that Staff's contribution to a company's misunderstanding of the law through interactions and discussions *may* be a mitigating factor in reducing (but not eliminating) the penalty amount assessed to the company. See *id.* at 5-6, ¶¶ 16-

37 Murrey's Disposal argues that Respondents are motor carriers, not rail carriers, and that

the STB's jurisdiction varies based upon the mode of transportation involved, and its authority over motor carriers is actually set forth in 49 U.S.C. Section 13501. Starting with the ICC's decision in *Joray Trucking Corp. v. Common Carrier Application* construing its jurisdiction over motor carriers, the ICC and its successor, the STB, consistently ruled that federal law does not confer jurisdiction over the collection and transportation of solid waste hauled for disposal."<sup>36</sup>

Murrey's Disposal argues that Respondents' operations do not qualify for preemption by virtue of the STB's exclusive jurisdiction over rail carriers granted in 49 U.S.C. Sections 10501 and 10502 because Respondents are not rail carriers or under the control of a rail carrier.<sup>37</sup> Instead, Respondents' "service involves transportation *to* a rail carrier," preemption of which has been rejected.<sup>38</sup> Thus, Murrey's Disposal argues, the Commission cannot be preempted from regulating Respondents' service by virtue of the STB's exclusive jurisdiction to regulate rail carriers.<sup>39</sup> For the reasons explained above, we agree.

38 Accepting Respondents' arguments would have repercussions far beyond the Commission and these consolidated dockets. WMW is a certificated solid waste collection company (albeit without authority to operate in Murrey's Disposal service territory), but the Respondents' preemption argument, if accepted, would preclude the Commission (or any municipality that has contracted for, or engages in, solid waste collection) from regulating *any* company that provides solid waste collection service using TOFC/COFC containers that are eventually moved via rail. The Commission would also be precluded from regulating any aspect of solid waste collection service utilizing TOFC/COFC containers, including the contents or type of the solid waste collected,

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18. Here, no penalty is in dispute, only whether Respondents must hold authority from the Commission to conduct solid waste collection from Port Townsend Paper and McKinley Paper.

<sup>36</sup> Murrey's Disposal's Motion at 14, ¶ 17, citing *Joray Trucking Corp. v. Common Carrier Application*, 99 M.C.C. 109.

<sup>37</sup> Murrey's Disposal's Motion at 15-17, ¶¶ 18-28.

<sup>38</sup> Murrey's Disposal's Motion at 16, ¶ 25 (emphasis in original), citing *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295.

<sup>39</sup> Murrey's Disposal's Motion at 17, ¶ 28.

transported, and disposed, the enforcement of county and city comprehensive solid waste management plans, public safety, and consumer protection. Indeed, none of the provisions of Chapters 70A.205 and 81.77 RCW and Chapter 480-70 WAC would apply to solid waste collection service using TOFC/COFC containers or the companies that provide it. Absent a showing of express Congressional intent to so preempt state authority over solid waste handling, Respondents' argument that the ICCTA preempts all local regulation of solid waste collection services using TOFC/COFC containers must fail.

39 As stated in Order 03, we need not ascribe to Respondents any intent to undermine Washington's authority over solid waste handling. This case presents only the issue of Respondents providing uncertificated solid waste collection services to two large commercial customers located in another solid waste collection company's exclusive service territory. The Legislature has established a process by which the Commission can authorize more than one solid waste collection company to operate in the same service territory.<sup>40</sup> If Respondents seek to serve solid waste collection customers outside of WMW's service territory, they cannot rely on claims of federal preemption of solid waste collection service to circumvent that process.

40 Thus, we determine that there is no genuine issue of material fact and that Murrey's Disposal is entitled to judgment as a matter of law. Respondents are providing solid waste collection services without the required certificate of authority from the Commission and federal law does not preempt the Commission's jurisdiction over the services provided. Accordingly, we order Respondents to immediately cease and desist their provision of solid waste collection services to Port Townsend Paper and McKinley Paper. The remaining events in the procedural schedule in these consolidated dockets are cancelled.

### FINDINGS AND CONCLUSIONS

41 Having discussed above all evidence and matters material to this decision, the Commission now makes the following summary findings of fact and conclusions of law, incorporating by reference pertinent portions of the preceding detailed findings and conclusions:

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<sup>40</sup> RCW 81.77.040.

- 42 (1) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates, rules, regulations, practices, accounts, securities, transfers of property, and affiliated interests of public service companies, including solid waste collection companies.
- 43 (2) Murrey's Disposal is a solid waste collection company subject to Commission jurisdiction with a service territory including Clallam County and unincorporated Jefferson County.
- 44 (3) WMW is a solid waste collection company subject to Commission jurisdiction, but whose service territory does not include Clallam County or unincorporated Jefferson County.
- 45 (4) MJ Trucking and DAT are common carriers subject to Commission jurisdiction, but do not have authority from the Commission to operate as solid waste collection companies.
- 46 (5) WMDSO owns and operates the Columbia Ridge Landfill in Arlington, Oregon, and does not have authority from the Commission to operate as a solid waste collection company in Washington state.
- 47 (5) Port Townsend Paper is a paper mill located in Port Townsend, Jefferson County, and is former customer of Murrey's Disposal.
- 48 (6) McKinley Paper is a paper mill located in Port Angeles, Clallam County whose prior owner and operator was a customer of Murrey's Disposal.
- 49 (7) On July 15, 2020, Murrey's Disposal filed complaints in these dockets against the Respondents, alleging that Respondents were operating as solid waste collection companies in Murrey's Disposal's service territory without a certificate of public convenience and necessity by providing solid waste collection services to Port Townsend Paper and McKinley Paper.
- 50 (8) On March 16, 2021, the Parties filed with the Commission motions for summary determination, supported by declarations and exhibits.
- 51 (9) On April 7, 2021, the Parties filed responses to the motions for summary determination. Respondents also filed additional declarations.

- 52 (10) WMDSO contracts with Port Townsend Paper and McKinley Paper to collect solid waste in the form of OCC Rejects.
- 53 (11) WMDSO contracts with DAT to collect the solid waste from Port Townsend Paper in TOFC/COFC containers and deliver the solid waste over Washington's public highways via motor vehicle to Olympic View Transfer Station or a facility owned and operated by NMF in Mason County near Belfair, Washington.
- 54 (12) WMDSO contracts with MJ Trucking to collect the solid waste from McKinley Paper in TOFC/COFC containers and deliver the solid waste over Washington's public highways via motor vehicle to Olympic View Transfer Station, a facility owned and operated by NMF in Mason County near Belfair, Washington, or the Argo Yard, Union Pacific RR's facility, in Seattle, Washington.
- 55 (13) The Olympic View Transfer Station is operated by WMW under contract with Kitsap County.
- 56 (14) WMDSO has a preexisting contract with Union Pacific RR to transport via railroad solid waste in TOFC/COFC containers to the Columbia Ridge Landfill in Arlington, Oregon.
- 57 (15) After the solid waste in TOFC/COFC containers from Port Townsend Paper and McKinley Paper arrives at the Olympic View Transfer Station, NMF's facility, or the Argo Yard, it is subsequently loaded onto rail cars and transported by Union Pacific RR according to Union Pacific RR's preexisting contract with WMDSO.
- 58 (16) Respondents do not hold authority from the STB to operate as rail carriers.
- 59 (17) Respondents do not offer the provided solid waste collection services to Port Townsend Paper or McKinley Paper at the direction of or jointly with Union Pacific RR.
- 60 (18) Respondents are providing solid waste collection service to Port Townsend Paper and McKinley Paper in Murrey's Disposal's service territory without a statutorily required certificate of public convenience and necessity from the Commission.

- 61 (19) The Legislature has established a process in statute by which the Commission can authorize more than one solid waste collection company to operate in the same service territory.<sup>41</sup>
- 62 (20) The Commission is not preempted by federal law from regulating the operations of the Respondents at issue in these consolidated proceedings.
- 63 (21) There is no genuine issue of material fact and Murrey's Disposal is entitled to judgment as a matter of law.
- 64 (22) The Commission should deny Respondents' motion for summary determination and grant Murrey's Disposal's motion for summary determination and order Respondents to cease and desist.
- 65 (23) The Commission should cancel the remaining procedural schedule in these consolidated dockets.

### ORDER

#### THE COMMISSION ORDERS THAT

- 66 (1) Respondents' Motion for Summary Determination is DENIED and Murrey's Disposal's, Co., Inc., Motion for Summary Determination is GRANTED.
- 67 (2) Respondents are ordered to immediately cease and desist solid waste collection services provided to Port Townsend Paper Company and McKinley Paper Company.
- 68 (3) The remaining events in the procedural schedule are cancelled.

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<sup>41</sup> RCW 81.77.040.

- 69 (4) The Commission retains jurisdiction over the terms of this Order.

DATED at Lacey, Washington, and effective May 3, 2021.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chair

ANN E. RENDAHL, Commissioner

JAY M. BALASBAS, Commissioner

N/A

January 24, 2023 - 9:51 AM

### Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 101,529-1  
**Appellate Court Case Title:** Waste Management of Washington Inc., et al. v. Washington Utilities  
**Superior Court Case Number:** 21-2-00870-8

#### The following documents have been uploaded:

- 1015291\_Answer\_Reply\_20230124095110SC972584\_7770.pdf  
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