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302404

May 25, 2021

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street SW
Washington, DC 20423

ENTERED
Office of Proceedings
May 25, 2021
Part of
Public Record

RE: *Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc. Verified Petition for Declaratory Order*
Finance Docket 36511

Dear Ms. Brown:

Enclosed for filing in the referenced docket is the Washington Utilities and Transportation Commission's Petition for Leave to Intervene. Please contact me if you have any questions.

Sincerely,

/s/ *Jeff Roberson*, WSBA No. 45550
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LJR/emd

Enclosures

cc: All parties of record (by electronic service per agreement by the parties)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No: FD 36511

**WASTE MANAGEMENT OF WASHINGTON, INC. AND WASTE MANAGEMENT
DISPOSAL SERVICES OF OREGON, INC. —
VERIFIED PETITION FOR DECLARATORY ORDER**

**THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION'S PETITION FOR LEAVE TO INTERVENE**

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Transportation Commission

May 25, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No: FD 36511

**WASTE MANAGEMENT OF WASHINGTON, INC. AND WASTE MANAGEMENT
DISPOSAL SERVICES OF OREGON, INC. —
PETITION FOR DECLARATORY ORDER**

I. INTRODUCTION AND RELIEF REQUESTED

The Washington Utilities and Transportation Commission (Commission) respectfully requests that the Board grant it leave to intervene in opposition to the petition for a declaratory order filed by Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc. (collectively the petitioners) in the above referenced docket. The Commission opposes the petition for a declaratory order and has filed a reply to the petition concurrently with this petition for leave to intervene.¹

II. ARGUMENT

The Board allows interested persons to intervene in a matter if doing so will not unduly broaden the issues or delay proceedings. *E.g.*, 49 C.F.R. § 1112.4; 49 C.F.R. § 1113.7. The Commission satisfies the Board’s criteria for intervention, and the Board should grant it leave to intervene.

The Commission has a significant interest in this proceeding’s outcome as the petition amounts to a collateral attack on a conclusion of law made in a Commission order. Specifically,

¹ The Board allows interested persons to file comments in response to a petition for a declaratory order without intervening. *Louisville & Ind. R.R.—Petition for Declaratory Order*, FD 35536, slip op. at 2 n.2 (STB served Feb. 22, 2012). Nevertheless, the Commission seeks leave to participate as a party if the Board does not deny and dismiss the petition for a declaratory order as requested in the Commission’s reply.

the petitioners ask the Board to effectively determine that the Commission incorrectly concluded that the Interstate Commerce Act as amended by the Interstate Commerce Commission Termination Act of 1995 (ICCTA) did not preempt the application of Washington's motor vehicle solid waste collection laws, chapter 81.77 Revised Code of Washington (RCW).

Granting the Commission leave to intervene will not unduly broaden the issues or delay the proceeding because the Commission will address only the issue raised by the petitioners – whether Title 49 U.S.C.'s rail provisions preempt the application of state law to the petitioners' motor vehicle solid waste collection service.

A. The Commission has a significant interest in defending the correctness of its preemption determination in this proceeding

The Commission is an agency of the State of Washington tasked with regulating common carriers and utilities. RCW 80.01.010, RCW80.01.040(2), (3); RCW 81.01.010. Washington defines solid waste collection companies as common carriers subject to the Commission's regulation. RCW 81.04.010(11).

The Commission possesses quasi-judicial powers to enable it to adjudicate administrative complaints. RCW 81.04.110. In consolidated Commission Dockets UG-200650 and UG-200651, a certificated solid waste collection company alleged in a complaint that the petitioners were providing solid waste collection service in its territory without authority. Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc. Verified Petition for Declaratory Order (Petition), Appendix (Appendix) at 1-2. The petitioners defended against that allegation by noting that they arrange a motor vehicle service that uses intermodal containers and claiming that the ICCTA's rail preemption provision, 49 U.S.C. § 10501(b), preempted state law as applied to that service. Appendix at 2. Notably, the petitioners did not request that the Commission stay the proceeding while they sought a declaratory order from the Board. *See id.* at

1-3. The Commission resolved the complaint and rejected the petitioners' ICCTA preemption defense, concluding that Title 49 did not preempt the application of chapter 81.77 RCW to the petitioners' motor vehicle solid waste collection and transport service. *Id.* at 8-12.

The petitioners now seek the declaratory order from the Board that they chose not to seek before. In doing so, they claim that the outcome of this proceeding will “determine the outcome of the ongoing dispute” between the petitioners and the solid waste company that complained to the Commission. Petition at 9. To that end, they have appealed the Commission's order and asked the court sitting in review to stay that proceeding pending the Board's disposition of their petition.² *Id.* at 8 n.1. The petitioners apparently plan to use a favorable declaratory order, should they obtain one, to further their claim of error before Washington's courts.

The Commission thus has a strong interest in the outcome of this matter. The Commission is a necessary party in the petitioners' state court appeal, RCW 34.05.542(2), and to fully defend itself in that forum it requires leave to intervene and participate as a party before the Board if the Board institutes a declaratory proceeding. As such, the Commission seeks leave to appear to defend the correctness of its determination that the ICCTA does not preempt application of chapter 81.77 RCW to petitioners' services at issue in the proceeding. This defense may have significant consequences for its ability to carry out the regulatory duties assigned to it by the Washington legislature. *Cf. Int'l Brotherhood of Teamsters, Local 2875 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021) (an agency's interpretation of the scope of a preemption provision receives Chevron deference).

² The Commission intends to oppose petitioner's motion for a stay in state court.

B. The Commission's participation will not broaden the issues

The Commission's participation will not broaden the issues raised in this proceeding. The Commission will address only the single issue presented by the petitioners. Specifically, the Commission will present argument as to whether the Board's exclusive jurisdiction over transportation by rail carrier preempts Washington laws regulating the service they provide, which involves arranging the collection and transportation of solid waste by motor carriers operating independently of a rail carrier.

C. The Commission's participation will not delay the proceedings

The Commission's participation will not unduly delay these proceedings. The Commission has timely filed its reply comments under 49 C.F.R. § 1104.13. And, as the petitioners have acknowledged what the Commission believes to be the facts necessary to dispose of the petition, the Commission has no plans to engage in discovery.

III. CONCLUSION

The Board should grant the Commission leave to intervene so that it may defend its determination that the Board's exclusive jurisdiction over transportation by rail carrier does not preempt the application of Washington's solid waste collection laws to the service described in the petition for a declaratory order.

Respectfully Submitted,

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Counsel for the Washington Utilities and
Transportation Commission

CERTIFICATE OF SERVICE

I certify that I have this day served copies of the foregoing Petition for Intervention upon all parties of record in this proceeding by email as agreed to by the parties.

/s/ Elizabeth M. DeMarco
(signature)

May 25, 2021
(date)

(49 U.S.C. 721, 5 U.S.C. 553)

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