

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

In re Application TG-081725 of)	DOCKET TG-081725
)	
NORTHWEST INDUSTRIAL)	
SERVICES, LLC, d/b/a AMERICAN)	ORDER 03
ON SITE SERVICES)	
)	
For a Certificate of Public Convenience)	INITIAL ORDER GRANTING
and Necessity to Operate Motor)	MOTION TO DISMISS;
Vehicles in Furnishing Solid Waste)	DISMISSING APPLICATION
Collection Service)	
.....)	

Synopsis. This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. This Order recommends granting a motion to dismiss the application of Northwest Industrial Services, LLC, for a solid waste collection certificate because the applicant failed to present testimony demonstrating community sentiment regarding the necessity for the proposed service and whether the existing carrier is providing service to the satisfaction of the Commission, required elements to grant the application.

INTRODUCTION

- 1 **Nature of Proceeding.** Docket TG-081725 involves an application by Northwest Industrial Services, LLC, d/b/a American On Site Services (Applicant or American On Site), for a solid waste collection, or garbage, certificate to provide solid waste collection service consisting of construction, demolition, industrial manufacturing waste, and recycling material in portions of Pend Oreille County, Washington. Robert L. Nichols, d/b/a B & N Sanitary Service (Protestant or B&N), protested the application.

- 2 On April 16, 2009, Administrative Law Judge Adam E. Torem heard the matter upon due and proper notice to all interested parties in Spokane, Washington. The Applicant failed to offer testimony from any potential customers in the community to be served or to otherwise establish any evidence of need for additional service. Therefore, Protestant B&N moved to dismiss the application. The Staff of the

Washington Utilities and Transportation Commission (Commission Staff) supported the motion.

3 **Appearances.** Paul J. Allison, Attorney at Law, Spokane, Washington, represents American On Site, Spokane, Washington. James K. Sells, Ryan Sells Uptegraft, Inc., P.S., Silverdale, Washington, represents B&N. Michael Fassio, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff).¹

4 **Initial Order:** The presiding administrative law judge proposes to grant B&N's motion and to dismiss American On Site's application for failure to demonstrate the minimum prerequisites set out by statute. In accordance with Commission rules, re-filing of the application would be prohibited for a period of six (6) months.

DISCUSSION

5 On September 22, 2008, American On Site filed its application with the Commission for a certificate of public convenience and necessity to operate motor vehicles in furnishing certain solid waste collection service in the northern portion of Pend Oreille County, Washington. On October 22, 2008, following publication of notice of the application in the Commission's weekly Docket, B&N filed a protest to the application.

6 On November 13, 2008, the Commission served a *Notice of Prehearing Conference* that set out the issues in the proceeding, scheduled a conference for December 3, 2008, and included an Appendix A explaining in detail what a solid waste applicant must present at hearing. As now relevant to this matter, Appendix A stated that "the Applicant will need to present testimony and documents establishing that there is a public need for the service proposed by the applicant." Appendix A further advised that "need for new service must be established by the testimony of members of the public who actually require the service. The Commission does *not* accept statements of an applicant that the authority is needed. The applicant *must* support its application

¹ In formal proceedings, such as this, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including regulatory staff. *RCW 34.05.455*.

with independent witnesses knowledgeable about the need for service in the territory in which the applicant seeks authority.” (emphasis added)

7 At hearing, the Applicant presented only two witnesses.² The Applicant called Dave Alvarado, American On Site’s manager, and Charles Kress, a retired employee of Pend Oreille County. Mr. Alvarado testified regarding American On Site’s current operations, the company’s rationale for seeking a solid waste collection certificate in order to offer commercial “drop box” service, and that several potential customers had expressed to him the need for a drop box service. Mr. Kress testified about his previous responsibilities as Facilities Coordinator for the county, confirmed that he would not be a potential customer of American On Site, and also noted that he had never heard anything negative about B&N’s existing service in north Pend Oreille County.

8 **Motion to Dismiss.** Upon completion of the Applicant’s case-in-chief, Protestant moved to dismiss the application for failure to meet the requisite burden of proof set out in Revised Code of Washington (RCW) 81.77.040. Specifically, B&N argued that American On Site failed to produce any evidence showing community sentiment of a need for the proposed drop box service. B&N also contended that there was no evidence it was not already providing service to the satisfaction of the Commission.

9 The Applicant opposed the motion, acknowledging that it had failed to produce testimony from prospective customers. American On Site argued that the hearsay evidence offered by Mr. Alvarado should be sufficient to support the application, particularly when the incumbent provider, B&N, had not filed a tariff with the Commission to provide drop box services in north Pend Oreille County.

10 Commission Staff joined in the Protestant’s motion, citing not only to the language contained in Appendix A of the *Notice of Prehearing Conference* but also to a plethora of Commission decisions that expressly require live testimony from independent witnesses in order to prove a community’s need for a new service.

11 **Commission Decision.** As noted in Order 02, *Order Quashing Data Requests and Declining to Invoke Discovery Rules*, parties to a proceeding before the Commission

² Applicant attempted to call Mr. Robert Nichols, a principal of Protestant B&N Sanitary Services, as an adverse witness. Protestant objected, citing to the Applicant’s failure to list Mr. Nichols on its witness list and also to Civil Rule 43(f). The presiding ALJ sustained the objection and prevented the Applicant from calling Mr. Nichols as one of its own witnesses, allowing instead an opportunity for cross-examination after Mr. Nichols’ testimony.

are obliged to adhere to and ensure their familiarity with the Commission's rules and orders. As demonstrated here, knowledge of the governing statutes is also a required element for any party intending to successfully present its case to the Commission.

- 12 RCW 81.77.040 sets out the factors upon which the Commission makes its determinations to issue a solid waste certificate of necessity. The statute expressly includes a requirement for a showing of "sentiment in the community contemplated to be served as to the necessity for such a service." In addition, this statute also requires that where an existing solid waste company provides service in the same area in which an applicant seeks to serve objects to the application, the applicant must show that the incumbent "will not provide service to the satisfaction of the commission."
- 13 American On Site failed to call any witness competent to testify with regard to community sentiment regarding the need for the company to provide the requested service in north Pend Oreille County. As made clear by the Commission in previous cases, an applicant's own testimony in this regard is self-interested and cannot, by itself, support the statute's requirement for evidence of community sentiment.³ Therefore, Mr. Alvarado's testimony regarding what prospective customers may have told him cannot be considered for purposes of meeting American On Site's burden to demonstrate a community in need of another solid waste hauler. The Commission must hear directly from prospective customers and those witnesses must testify at the hearing, under oath, and subject to cross-examination.
- 14 Further, American On Site failed to call any witness or present any evidence to indicate that B&N is not providing adequate and satisfactory service. To the contrary,

³ See Initial Order Dismissing Application, Docket TG-020856, *In re Application No. GA-079086 of J & M Disposal, Inc.* (May 2003), at ¶ 18 ("Self-serving testimony by an applicant regarding others' need for its service will not support a protested application for authority. Cross-examination could not adequately explore the details of the generators' need or the sufficiency of existing service, or even its truth. Fundamental fairness requires that the person supporting the application appear in person to describe his or her experiences."), citing Order M.V.C. No. 2270, *In re Alice Modig and Michael Peterson d/b/a ALI's*, App. No. D-78826, *Initial Order Granting Motion to Deny Application* (January 2000); Order M.V.C. No. 2279, *In re Alice Modig and Michael Peterson d/b/a ALI's, Commission Decision and Order Affirming and Adopting Initial Order* (April 2000); Order M.V.C. No. 2210, *In re Alexandr Milman and Walter Kazak d/b/a Checker Express*, App. No. D-78596, *Initial Order Dismissing Application* (July 1997); Order M.V.C. No. 2217, *In re Alexandr Milman and Walter Kazak d/b/a Checker Express*, App. No. D-78596, *Commission Decision and Order Affirming Initial Order Dismissing Application* (August 1997); see also First Supplemental Order, *Commission Decision and Order Affirming Initial Order*, Docket TG-020856, *In re Application No. GA-079086 of J & M Disposal, Inc.* (June 2003).

Mr. Kress, a retired employee of Pend Oreille County with knowledge of the solid waste haulers in that jurisdiction, stated his belief that the Protestant was doing “a fine job” in providing solid waste service. The Applicant simply did not present a case on this statutorily required element.

- 15 American On Site’s failure to present statutorily required testimony required on two key factors precludes the Commission’s favorable consideration of its application. The Applicant’s failure to meet the burden of proof mandates that Protestant’s motion be granted.

FINDINGS OF FACT

- 16 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

- 17 (1) On September 22, 2008, American On Site filed its application for a certificate of public convenience and necessity to operate motor vehicles in furnishing certain solid waste collection service in the northern portion of Pend Oreille County, Washington.
- 18 (2) On October 22, 2008, B&N timely filed a protest to American On Site’s application.
- 19 (3) Applicant failed to present independent testimony that the public convenience and necessity require the service described in its application.
- 20 (4) Applicant failed to show that the existing service provided by Protestant in the territory encompassed by the application fails to satisfy present or foreseeable demand for such service or otherwise to show that such service is not or will not be provided to the Commission’s satisfaction.
- 21 (5) Protestant moved to dismiss the application because of the absence of any supporting witnesses and Commission Staff joined in the motion.

CONCLUSIONS OF LAW

- 22 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:
- 23 (1) The Washington Utilities and Transportation Commission has jurisdiction under RCW 81.77 over the subject matter of and the parties to this proceeding.
- 24 (2) Protestant's motion to dismiss American On Site's application should be granted based upon the absence of testimony from independent witnesses who are required by RCW 81.77.040 in order to establish the need for the service.
- 25 (3) It is not in the public interest or required by the public convenience and necessity under RCW 81.77.040 to grant the Applicant authority to operate motor vehicles in furnishing solid waste collection services as described in its application.

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ORDER

26 THE COMMISSION ORDERS THAT:

27 (1) Protestant B & N Sanitary Services' Motion to Dismiss is GRANTED.

28 (2) The Application filed by Northwest Industrial Services, LLC, d/b/a American
On Site Services, in Docket TG-081725 on September 22, 2008, is
DISMISSED.

29 (3) In accordance with WAC 480-70-126, Northwest Industrial Services, LLC,
d/b/a American On Site Services, may not re-file an application for service
similar to that described in this application for a period of six (6) months from
the date of the final order denying the application.

DATED at Olympia, Washington, and effective April 23, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

NOTICE TO THE PARTIES

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

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

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

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

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and six (6) copies of any Petition or Answer must be filed by mail delivery to:

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