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BEFORE THE WASHINGTON STATE

UTILITIES AND TRANSPORTATION COMMISSION

In re Application TG-081725 of)	DOCKET TG-081725
)	
)	Volume III
NORTHWEST INDUSTRIAL)	Pages 29-108
SERVICES, LLC, d/b/a AMERICAN)	
ON SITE SERVICES)	
)	
)	
For a Certificate of Public Convenience))	
and Necessity to Operate Motor)	
Vehicles in Furnishing Solid Waste)	
Collection Service)	
_____)	

A hearing in the above matter was held on April 16, 2009, at 9:00 a.m., at the Office of Administrative Hearings, 221 N. Wall Street, 5th Floor Conference Room, Spokane, Washington, before Administrative Law Judge ADAM TOREM.

The parties were present as follows:

NORTHWEST INDUSTRIAL SERVICES, LLC, by PAUL J. ALLISON, 11315 E. 4th Avenue, Spokane Valley, Washington 99206-9417; telephone, (509) 755-7000.

ROBERT L. NICHOLS d/b/a B & N SANITARY SERVICE, by JAMES K. SELLS, Law Offices of Ryan Sells Uptegraft, PSC, 9657 Levin Road N.W., Suite 240, Silverdale, Washington 98383; telephone, (360) 307-8860

COMMISSION STAFF, by MICHAEL A. FASSIO, Assistant Attorney General, 1400 S. Evergreen Park Dr. S.W., Olympia, Washington 98504-0128; telephone, (360) 664-1192

Raymond H. Groth, CSR
Court Reporter

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7 FOR APPLICANT:

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9 DAVID ALVARADO

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11 by Mr. Allison 51 78 83

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13 by Mr. Sells 67 80

14 by Mr. Fassio 69

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17 CHARLES KRESS

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19 by Mr. Allison 85

20 by Mr. Fassio 90

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EXHIBITS

2

3

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EXHIBIT NUMBERS:

ID'D

REV'D

6

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1 9/15/08 one-page e-mail from Cathy

53

57

9

Kern to Mr. Alvarado re: Solid Waste

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Tariffs and B & N drop box service

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2 Two-page e-mail from Penny Ingram

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to Mr. Alvarado re: Solid Waster

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Tariffs and B & N drop box service

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1 P R O C E E D I N G S

2 JUDGE TOREM: Good morning. It is
3 Thursday, April the 16th, 2009, I'm Adam Torem, the
4 Administrative Law Judge from the Utilities and
5 Transportation Commission. We're in Spokane, Washington,
6 at the Office of Administrative Hearings in the large
7 conference room on the 5th floor building, here, the
8 docket we're going to have a hearing in today is
9 TG-081725. This is the application of Northwest
10 Industrial Services, LLC, they do business as American On
11 Site Services.

12 Again, this is an application for Solid
13 Waste Collection Services. We have, just before going on
14 the record this morning, I've reviewed with the attorneys
15 the witness lists and the exhibits that they submitted
16 back in January, are what we're going forward on today.

17 We're going to briefly go around the
18 room, the court reporter already has all of the
19 attorneys' information, and have each attorney just state
20 your name, and who you're representing, and that will be
21 sufficient for today's appearances.

22 MR. ALLISON: Paul Allison, representing
23 Northwest Industrial Services, LLC.

24 MR. SELLS: James Sells, representing
25 Protestant, B & N.

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1 MR. FASSIO: Michael Fassio, representing
2 Commission Staff.

3 JUDGE TOREM: All right. And an e-mail
4 was sent to all of you yesterday with a reminder of our
5 start time, and our assumptions of what we're going to do
6 today. I wanted to give everybody an opportunity to make
7 a short opening statement. After we do that we can go
8 ahead and call witnesses. And, Mr. Allison, you'll be
9 calling your witnesses first. And I understand we'll see
10 about the calling of an adverse witness, and, perhaps, an
11 objection from Mr. Sells about that. And I'll rule on
12 that in due course.

13 Once we're done with your case in chief,
14 then the Protestant will call his witnesses. And I
15 understand, Mr. Fassio, Commission Staff, still has no
16 witnesses, but is here to represent the Commission's
17 interest, and cross-examine as necessary.

18 MR. FASSIO: That's correct.

19 JUDGE TOREM: At the end of the case
20 today, what I want to do is make sure we set a date
21 that's appropriate for the submission of post hearing
22 briefs. And I think it's easier for me to get something
23 in writing on a case like this rather than a closing
24 argument today. If you would like to get the transcript,
25 it should be prepared and submitted with the Commission

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1 by May 1st. That's about two weeks from now. So, as
2 you're thinking about what date for a post hearing brief,
3 if you're going to be needing the transcript, or wanting
4 to cite to it, and avoid paying the costs of an expedited
5 transcript, I'd say May 1st is the first day you'll have
6 it in hand, having talked with Mr. Groth before the
7 hearing about that. So, factor that in, and I'll let the
8 attorneys get together at one of our breaks during the
9 course of the hearing, and, perhaps, agree on a date on
10 or after May 1st for submitting post hearing briefs.
11 Those are the only procedural matters that I had.
12 Counsel, anything else that you want to deal with before
13 opening statements?

14 MR. SELLS: No.

15 MR. ALLISON: No.

16 MR. FASSIO: No.

17 JUDGE TOREM: All right. Seeing none,
18 then, Mr. Allison, why don't you tell me a short -- what
19 you intend to do today.

20 MR. ALLISON: Yes. As already noted, my
21 name is Paul Allison, and I do represent Northwest
22 Industrial Services, LLC. Northwest has applied for a
23 Certificate of Convenience & Necessity to provide drop
24 box services in the -- the north half of Pend Oreille
25 County. Our evidence will show that there is a need for

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1 those services. Up until just a few days ago there had
2 been no tariff filed for those services, but we
3 understand that B & N had provided such services, and
4 charged for them without having a tariff on file.

5 We note from the annual reports that are
6 filed by B & N that it has sustained substantial losses
7 year after year, and, based on those reports, it appears
8 that it is not a viable operation for B & N, and that it
9 would not be possible to anticipate that B & N would be
10 able to continue operating at such substantial losses
11 over the years. Northwest Industrial Services has
12 equipment that is appropriate to provide the services,
13 and it has the experience and the personnel capable of
14 doing that. And it actually operates the transfer
15 stations in that area, and is familiar with the County,
16 and acquainted with the County procedures, and is held in
17 high regard by the County for its services. And, on that
18 basis, I conclude that Northwest should be granted a
19 certificate to engage in drop box services in North Pend
20 Oreille County.

21 MR. TOREM: All right. Thank you, sir.

22 MR. ALLISON: For the Protestor?

23 MR. SELLS: Thank you. Your Honor,
24 please, I was on the road yesterday, I didn't get the
25 e-mail, and I'm not smart enough to use the new device in

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1 my office, to allow me to read e-mails in the car. But
2 let me just point, Your Honor, to 8177-040, which we're
3 all familiar with, which is the Public Convenience &
4 Necessity statute. In order for Your Honor to grant this
5 application several things have to be shown here in this
6 hearing room.

7 Number, one, we have to show that there
8 is community sentiment -- and that's a quote from the
9 statute -- that the service is not being provided.
10 Service must be shown to be insufficient by the
11 certificated hauler, and not to the satisfaction of the
12 Commission, in order for the Commission to grant a second
13 G-Certificate over the top of the existing certificate.
14 I think, if we listen very closely here today, unless
15 there's some witnesses I don't know about, there's not a
16 single witness from the community, a customer, a shipper,
17 as we used to call them, there's no shipper witnesses.
18 There's nobody that's going to appear and say, "I called
19 up Bob Nichols, and he said he couldn't make the haul for
20 me."

21 I think we can also ask, Your Honor, to
22 take notice of the fact that there's no community
23 complaints on file with the Commission against B & N
24 garbage. So, it seems to us that it is very difficult,
25 if not impossible, to show that the service is not being

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1 provided to the satisfaction of the Commission, when
2 there's nobody saying that, other than the people who
3 would may gain by (inaudible). And there's no complaints
4 from the community. I think the testimony will show that
5 this is just good old fashion cream skimming, "Give me
6 the lucrative commercial accounts, and I'll let you go
7 out in your garbage truck, out in the wilds of Pend
8 Oreille County and pick up customers a mile apart." It's
9 cream skimming. And, if the testimony is as we expect it
10 to be, we're going to offer a Motion To Dismiss at the
11 end of the Applicant's case. Unless there's something
12 new, it should be granted.

13 JUDGE TOREM: And the Commission?

14 MR. FASSIO: Thank you, Your Honor. I'll
15 keep mine short. The Staff is not taking a position on
16 this case, and is presenting no witnesses in support of
17 either the position of the Applicant or the Protestant
18 with regards to grant or denial of the application. As
19 is typical in these contested cases, the Staff's purpose
20 here, as you've stated earlier, is to assist the
21 Commission in obtaining an adequate record to reach a
22 decision, and to support that by Order, so -- through any
23 cross-examination that might be necessary.

24 Mr. Sells has already set forth the
25 statute, 8177-040 that sets forth the standards for

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1 granting of a solid waste certificate. I've also come
2 prepared today with some citations of a case --
3 Commission case precedent and law, which I can present at
4 the conclusion, if it would be beneficial to the
5 Commission in reaching its decision, cases that have
6 interpreted 8177-040. I can provide those when we've
7 concluded.

8 JUDGE TOREM: I think it would be helpful
9 if you provide them to the attorneys, as well, to make
10 sure they're versed in what the Commission is going to
11 cite to. That way they can cite to them, or distinguish
12 them as necessary in any post hearing briefs, if we get
13 to that point.

14 MR. FASSIO: I will make sure we can -- I
15 will state those for the record.

16 JUDGE TOREM: All right. And given
17 Mr. Sells' indication of his plans for a Motion, if you
18 have copies of those to discuss when the Motion is made,
19 or otherwise, if you'll offer up your thoughts on the
20 Motion at that time, that would be helpful, as well, as I
21 may be forced to make a ruling on the record today, as it
22 will stand at the end of the case in chief, as opposed to
23 having an opportunity for those briefs.

24 So, we will cross each of those bridges
25 as we get to it, but appreciate counsel setting the scene

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1 for us this morning, and I think we'll call the first
2 witness. Is that going to be Mr. Alvarado?

3 MR. ALLISON: I want to call Mr. Nichols
4 as ad adverse witness.

5 JUDGE TOREM: All right.

6 MR. SELLS: We object to that, Your
7 Honor. Two bases. And I wish I could cite Your Honor to
8 the -- it's either a civil rule, or a statute, but, as I
9 recall, if an opposing party is going to call a principal
10 of the other party as a witness at trial, there has to be
11 notice served of that, and I think it's two weeks before
12 trial, at noon, and, if necessary, I can look it up.

13 And, secondly, he's not listed as a
14 witness for the Applicant. I would have prepared him
15 differently had I anticipated -- maybe I should have, but
16 I didn't -- had I anticipated that he would be providing
17 direct testimony before my opportunity to call him for
18 direct. He will certainly testify in our case, and be
19 available for cross-examination.

20 JUDGE TOREM: Mr. Allison, can you
21 explain the basis or what rule you're relying on to call
22 him?

23 MR. ALLISON: No. I can't refer to a
24 rule. I can only tell you it may be -- there may be a
25 new rule which Mr. Sells alludes to. I am not familiar

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1 with such a rule. In civil practice I have never heard
2 of an objection of that sort being made, and I have,
3 frankly, never heard of the requirement of giving notice
4 of intent to call an adverse party as an adverse witness.
5 I've seen it done many, many times, always without
6 objection, and my -- so, my intent to call Mr. Nichols
7 was simply based on my trial experience, having never had
8 any problem with doing that. If there's a rule that says
9 I can't do it, then I couldn't fault the Court for -- can
10 I call you the Court? Or, what do I call you, sir?

11 JUDGE TOREM: You have many choices, I
12 suppose.

13 MR. ALLISON: Well, I mean, at this
14 point. Maybe after you rule --

15 JUDGE TOREM: Before I make a ruling, or
16 after?

17 MR. ALLISON: There might be something
18 different. Right.

19 JUDGE TOREM: Right. Well, what I would
20 suggest, Mr. Allison, is that there is a library here
21 that maybe I could take a look at the civil rules, or
22 Mr. Sells could, if we have the current civil rules
23 available here, or in the building. We could take a
24 look. And, Mr. Sells, since you believe it might be a
25 court rule, if we can confirm that. But, certainly, the

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1 Procedure Act, don't appear to offer any guidance.
2 Mr. Sells, you were not able to find a statute, but,
3 apparently, a Washington Superior Court Civil Rule,
4 CR 43(f)(1), which I've reviewed, and Mr. Allison has had
5 a chance to review, but we haven't shared it with
6 Mr. Fassio. Do you want to summarize that quickly for
7 us?

8 MR. SELLS: Well, I think the purpose of
9 the rule is that -- to allow -- is not to allow a
10 surprise of calling a principal of an adverse party as a
11 witness. It requires that side to give notice of doing
12 so before -- beforehand, so you know that your client is
13 going to be the first witness called. And even if that
14 rule didn't exist, once, again, Mr. Nichols is not listed
15 on the Applicant's witness list, and that's the reason
16 for the list, is so we can get them ready to face
17 whatever is coming.

18 JUDGE TOREM: Right. I understand that.
19 And as I read the rule, it was requiring two different
20 kinds of notice, one for depositions, and one for being
21 called as a witness at trial. So, I read it as two
22 different requirements. Mr. Allison, do you want to
23 respond, having read the rule?

24 MR. ALLISON: Yes. I read it as being a
25 notice to compel attendance. Because in civil practice,

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1 anything, Mr. Fassio, you wanted to add, having heard the
2 other counsel's arguments?

3 MR. FASSIO: Just that the Staff's not
4 going to take a position on this, but I do echo
5 Mr. Sells, and that this proceeding we did have the
6 opportunity for all witness -- for all parties to provide
7 witness lists in advance, which would be an opportunity
8 to provide notice of intent to call many witnesses to the
9 other party.

10 I'm not sure how exactly this would play
11 into it, but there are discovery rules, 480-07400, that
12 describe the 480-07402, that say subpoenas are available
13 as a means of discovery, perhaps, that could be a method
14 by which you could subpoena a witness of an adverse party
15 to appear at a hearing. I just present that as an
16 alternative for which this would have been available, but
17 that was not used in this case.

18 MR. ALLISON: Might I?

19 JUDGE TOREM: Mr. Allison, go ahead.

20 MR. ALLISON: Yes. He's not my witness,
21 but he's adverse. And in a civil practice, in my
22 experience, that doesn't make him my witness for me to
23 call him as adverse. In civil practice, if I make him my
24 witness, then I may be bound by some of the things that
25 he says. But he is an adverse party, and I don't see

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1 anything in that rule, or in the traditional practice --
2 civil practice that precludes me from calling him.

3 JUDGE TOREM: Mr. Sells, anything else?

4 MR. SELLS: Why don't we have
5 cross-examination, here.

6 MR. ALLISON: Cross-examination -- excuse
7 me, Your Honor. Cross-examination is, typically, limited
8 to those things that are raised on direct, and it's very
9 possible that some of the things I wanted to ask him
10 about will not be raised on direct. And, so, calling him
11 as an adverse witness is the appropriate way to get those
12 on the record.

13 JUDGE TOREM: All right. I'm going to
14 sustain Mr. Sells' objection for two reasons. One, we,
15 as Mr. Fassio cites, had a procedural schedule that was
16 established prior to your entering the case, Mr. Allison,
17 and this was a deadline of January 30th, by which your
18 client, Mr. Alvarado, when he was representing Northwest
19 Industrial, pro se, submitted a witness and exhibit list,
20 four exhibits, one of which was the contact information
21 for Mr. Kress, who I anticipate will speak to us, your
22 witness, by phone today.

23 We had another conference, and rewrote
24 these back on February the 12th. We had a status
25 conference, and we said that if anyone wanted to

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1 supplement their witness and exhibit lists, they would be
2 due by March 27th. And I had, last week, in preparing
3 for this case today, started to look and make sure what
4 had come in new. And, other than a typographical
5 correction to one of Mr. Sells' exhibits, nothing new has
6 been filed since we continued the case over from February
7 till this month. So, there's been two solid months in
8 which you could have made known to the Court, and to all
9 the parties, of your intent to call the witnesses. And
10 it's Commission practice and custom that we give advance
11 notice of who's going to be called.

12 Now, while the Civil Rules are not
13 binding on me, they are guidance. They're not,
14 necessarily, persuasive guidance, but I think it's
15 informational, here, the spirit of what they're asking
16 for, is that you could have called any of the witnesses,
17 the principals of B & N Sanitary Service, had you listed
18 them and made them your own witnesses. And, in fact, the
19 order that was issued, Order 2 in this case, mid March,
20 that quashed some data requests that you submitted, cited
21 to the rule that Mr. Fassio did, that we were not
22 invoking discovery under the Commission's process at your
23 request, but instead were recommending that subpoenas
24 were always available. And I'm looking at Paragraph 8 of
25 that Order, which quotes the entire rule that Mr. Fassio

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1 referenced.

2 So, a Subpoena would have been available
3 to contact any witnesses you thought would not appear,
4 and the notice would have been given.

5 So, while I understand your desire to
6 call Mr. Nichols today, the procedural steps to guarantee
7 your ability to do so were readily available to you and
8 not used. And, today, because of the way this hearing is
9 set up, and I had thought through this prior to Mr. Sells
10 saying as much in his opening, the Applicant does carry
11 the burden, and the statute is very clear about that to
12 prove these points. And, so, it's upon -- it's upon the
13 Applicant, the expectation they'll provide the necessary
14 witnesses to do so. And if Mr. Nichols is a necessary
15 witness, there have been two opportunities given, one to
16 Mr. Alvarado, and now a second to you, to provide that
17 list. And I do think, if there were no prejudice, and
18 there were no objection, then we would go forward.

19 Mr. Sells is entitled to make an
20 objection, and state the reasons he believes it's
21 prejudicial to his client to be called as a witness,
22 unexpectedly, in this capacity. And it's also my
23 understanding that his intention of the case, here, is if
24 he does not need to put his witnesses on today, any of
25 them, based on a motion that may or may not be

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1 successful, he need not subject them to adverse
2 cross-examination in advance. He's prepared them the way
3 he has suggested, "I could testify today," and he's
4 listed them and provided exhibits, as well, that may be
5 sponsored by those witnesses at the appropriate time.
6 But the appropriate time will be in his case and chief as
7 a protestant, and your witnesses will be, apparently,
8 Mr. Alvarado and Mr. Kress.

9 So, there will not be any calling in
10 advance during your case in chief of any of Mr. Sells'
11 witnesses. So, again, the objection, for that long
12 explanation, is sustained.

13 MR. ALLISON: I'm not, specifically,
14 familiar with UTC practice to know if an exception is
15 necessary, but I do take exception to Your Honor's
16 ruling. You correctly pointed out that I could not be
17 assured he could be here. I could not be assured I would
18 have an opportunity to question him. One might well say
19 that I took that risk that he would not be here, but he
20 is here, and he has been listed as a witness in this
21 proceeding. I am not aware of any rule which says that
22 if one side has listed a witness, the other side has to
23 list the same witness, because he's already established
24 as a witness. And, on that basis, I take exception to
25 Your Honor's ruling.

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1 JUDGE TOREM: I understand. If there's a
2 need for an appeal, certainly you --

3 MR. ALLISON: Oh, yeah. You've given me
4 some grounds, and I appreciate that.

5 JUDGE TOREM: Yes. All right. The
6 record will be clear in the transcript. I won't be
7 issuing any other further written ruling, but the
8 transcript will be available.

9 MR. ALLISON: Certainly. Sure.

10 JUDGE TOREM: Let me state that the
11 witness lists that I've seen in the past -- just to
12 answer the concern -- the administrative practice, and
13 I'm sure in Superior Court, as well, my familiarity,
14 Mr. Allison, is that they'd, typically, say, "and all the
15 witnesses listed by the other party, or other parties,"
16 They'd reserve the right to call them.

17 MR. ALLISON: That's commonly said.

18 JUDGE TOREM: In this case I recognize
19 that you did not actually submit a witness list since you
20 entered the case, and that Mr. Alvarado, he submitted the
21 exhibit lists, but there's no actual formal listing of
22 witnesses. And it's implied that he would be testifying,
23 and that Mr. Kress, given the other e-mails that are in
24 the record, and his listing of it, that he is a formally
25 listed witness. That's how I've understood the

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1 materials. So, that's the ruling. If there's to be an
2 appeal, the process for doing so will probably be after
3 an Initial Order is published in this case --

4 MR. ALLISON: Certainly.

5 JUDGE TOREM: -- and if the Commissioners
6 decide to reverse me, and have me supplement the record
7 at some point, or alter any other rulings, we'll deal
8 with that later.

9 MR. ALLISON: Certainly.

10 JUDGE TOREM: All right. So, please,
11 your next witness you wish to call?

12 MR. ALLISON: Mr. Alvarado.

13 JUDGE TOREM: All right. Mr. Alvarado,
14 If you'll take the seat to my left. Just come over and
15 remain standing. I'll swear you in.

16 JUDGE TOREM: If you'd raise your right
17 hand. Do you, David Alvarado, solemnly swear or affirm
18 that the testimony you'll give in this proceeding will be
19 the truth?

20 THE WITNESS: Yes.

21 JUDGE TOREM: All right. Thank you. If
22 you'll state and spell your first and last name for the
23 court reporter?

24 THE WITNESS: David Alvarado, D-a-v-i-d,
25 A-l-v-a-r-a-d-o.

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1 JUDGE TOREM: Mr. Allison, your
2 witness.

3 DIRECT EXAMINATION

4

5 BY MR. ALLISON:

6 Q. Yes. Mr. Alvarado, where do you live?

7 A. 4315 North Walnut Street, Spokane,
8 Washington.

9 Q. And who is your employer?

10 A. Northwest Industrial Services, LLC.

11 Q. And what is your position in that company?

12 A. I am part of the managing -- part of the
13 management team that oversees the day-to-day
14 operations.

15 Q. How long have you been with the company?

16 A. Oh, going on eight years, now.

17 Q. What can you tell us as to the need for the
18 drop box services that Northwest has applied for in
19 northern Pend Oreille County?

20 A. You know, as I've always stated from the
21 beginning, I was -- we have -- we operate three transfer
22 stations in Pend Oreille County, and we currently offered
23 the service from transfer station to transfer station. I
24 just got to looking into the -- what was available, as
25 far as drop box services, and I contacted the Commission

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1 to find out if anybody was offering the service, or who
2 was able to offer the service, and I received a reply
3 from the Commission stating that the current --

4 MR. SELLS: Objection, Your Honor. It's
5 hearsay.

6 JUDGE TOREM: Sustained.

7 Q. (BY MR. ALLISON:) Did you get a letter from
8 the Commission?

9 A. I did. And it was part of -- it was part of
10 my -- I think I submitted it as part of my attachments
11 for -- to the WUTC.

12 MR. ALLISON: Your Honor, it's in the
13 record already, the letter which says that no one had
14 authority to do this service. Is it necessary to -- to
15 make that letter an exhibit in this proceeding, as well
16 as being in the --

17 JUDGE TOREM: Are you referring to the
18 exhibits that have been submitted? Or, are you referring
19 to a letter in another docket, or some other case?

20 MR. ALLISON: No. No. No. This case.
21 This case, certainly.

22 Q. Who was the letter from?

23 A. I think it was Cathy Kern.

24 MR. ALLISON: Cathy Kern.

25 JUDGE TOREM: My understanding,

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1 Mr. Allison, in pulling the filing and docket sheets in
2 this matter, and since the docket number of 081725 was
3 opened back on September the 23rd of last year --

4 MR. ALLISON: Uh-huh.

5 JUDGE TOREM: -- unless it's included in
6 the filing itself, the application, then that letter may
7 not be part of the record until it is moved to
8 admissibility as one of your exhibits. But if you can
9 call my attention to it -- I see the filing, and I don't,
10 as I flip through it, see anything attached to it that
11 would include such a letter. And the rest of -- the rest
12 of the documents that I'm seeing are the transcripts or
13 the various notices that we've issued, such as the
14 opportunities to supplement witness lists, and the back
15 and forth briefing that we had regarding discovery, so I
16 don't see anything that would indicate that letter.

17 Now, in fairness, I do see that you have
18 two exhibits that are e-mails from Commission employees.
19 Exhibit Number 1, as proposed, was the one-page e-mail
20 dated September 15th, an e-mail from Cathy Kern to
21 Mr. Alvarado, regarding solid waste tariffs, and B & N's
22 drop box service, or lack, thereof. And Exhibit 2, a
23 two-page e-mail, from Penny Ingram to Mr. Alvarado,
24 regarding, I think, the similar idea, as far as container
25 service. Are those the letters that you're referring to?

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1 THE WITNESS: That's what I was referring
2 to. Yes.

3 Q. (BY MR. ALLISON:) The letter from Cathy
4 Kern?

5 A. Correct.

6 Q. And --

7 A. And from Penny Ingram.

8 JUDGE TOREM: So, I think that there is
9 nothing in the record that I can take notice of. If you
10 want to move the admission of these documents through
11 this witness, that's fine.

12 Q. (BY MR. ALLISON:) Yes. Are they in this
13 package --

14 A. You know, Paul, I didn't see them in that
15 packet, but I think I did submit them.

16 Q. Okay.

17 A. And I apologize, I didn't bring my --

18 JUDGE TOREM: I'm going to hand my copies
19 of what's been proposed as --

20 MR. ALLISON: I appreciate that.

21 JUDGE TOREM: -- your Exhibits Number 1
22 and 2 to Mr. Alvarado. So, if you can review them, and
23 then I'll have him hand them to you so you're familiar
24 with exactly --

25 MR. ALLISON: Certainly.

0055

1 JUDGE TOREM: -- what he's looking at.

2 And we'll make sure that the other counsel, who I believe
3 received a copy back in January, will have those in front
4 of him, as well.

5 THE WITNESS: Here's what I was referring
6 to right here, Paul. Right where my thumb's at, right
7 there.

8 MR. ALLISON: Uh-huh.

9 THE WITNESS: And this was Exhibit --
10 this was also the second one. Those were my
11 correspondences with the UTC.

12 MR. ALLISON: I'll move the admission of
13 Exhibits 1 and 2. Have you seen these, Counsel?

14 MR. SELLS: I have. We have an objection
15 to that, if, Your Honor, please? It's very difficult, if
16 not impossible, to cross-examine an e-mail. This is not
17 a regularly kept business record of the Commission, and
18 it's not on file in this docket. There's nobody here,
19 specifically, either Cathy Kern or Ms. Ingram, to
20 authenticate these e-mails. And for me to ask them what
21 they did to look this stuff up, what kind of questions
22 were asked, without a sponsor, it's nothing but a piece
23 of hearsay that I can't cross-examine.

24 JUDGE TOREM: May I see the documents,
25 Mr. Allison?

0056

1 MR. ALLISON: I submit that it is not
2 hearsay for Mr. Alvarado to testify that this is the
3 communication that he received from the Commission.

4 THE WITNESS: Through the public request
5 system.

6 JUDGE TOREM: Mr. Sells, are you
7 suggesting that Mr. Alvarado can't authenticate these
8 e-mails as having received them?

9 MR. SELLS: Well, he can authenticate
10 them as -- Well, he can testify that he received them,
11 but they're being asked to being placed into evidence as
12 truth of the matters contained, therein. And, therefore,
13 they're hearsay, unless -- and I have the opportunity to
14 cross-examine the sponsor -- the author and the sponsor
15 of the memo itself. He can certainly testify that he got
16 a memo, but he can't say what it says.

17 JUDGE TOREM: Mr. Allison, anything
18 further?

19 MR. ALLISON: Well, they say what they
20 say. This is the communication he got from the
21 Commission. That's the fact. And the only fact that I
22 want to derive from it, for this proceeding, is that
23 Mr. Alvarado received these specific communications from
24 the Commission. And, there they are. And they've been
25 in the record for a long time.

0057

1 JUDGE TOREM: Mr. Fassio, any comment on
2 these objections in offering these into evidence?

3 MR. FASSIO: Well, I do point out that
4 they do appear to come from Commission Staff, and
5 Commission Staff is not here to testify as to the
6 contents of the e-mails, and I certainly cannot testify
7 as to the contents of the e-mails. So, in that sense,
8 the communications are hearsay.

9 However, I do point out that I believe
10 they're also of limited value because they refer to
11 matters that are actually -- it could be matters of
12 public record, and -- in terms of the -- the actual
13 contents of the e-mails are hearsay, in that what they
14 say. And the Applicant did not request that the
15 Commission Staff, Ms. Kern, or Ms. Ingram, appear as
16 witnesses to testify.

17 JUDGE TOREM: Mr. Sells, I'm going to
18 overrule this objection, mainly, because hearsay is
19 admissible in an administrative hearing. So, I will
20 admit what's been marked, now, by me as Exhibit 1, the
21 e-mail from Cathy Kern, from September 15th, 2008. And
22 I'll also admit, as Exhibit 2, the two pages of e-mail
23 correspondence between Ms. Ingram and Mr. Alvarado.

24 With that said, Exhibits 1 and 2 are
25 admitted, the weight I can give to these may be limited

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1 based on the nature of what's said here, and what's
2 verifiable, based on the witnesses available today. But
3 Mr. Alvarado can certainly testify in the realm of his
4 personal knowledge as to what he received, and what he
5 understood these communications to mean. So, I'm going
6 to hand these items back to Mr. Alvarado for the purpose
7 of his testimony, and if his attorney wishes to ask him
8 any additional questions regarding contents of those,
9 that's fine. But, otherwise, as pointed out by
10 Commission Staff's counsel, and, Mr. Sells, by your
11 objections, the authors of those messages are not here to
12 cross-examine or verify what's there, or what may have
13 been background, or what may -- what their intended
14 meaning might be versus what Mr. Alvarado's taken meaning
15 was. Mr. Alvarado can certainly testify as to how he
16 understood the communications.

17 Q. (BY MR. ALLISON:) And you may so testify,
18 Mr. Alvarado, what you understood from those.

19 A. Thank you.

20 JUDGE TOREM: If you ask him a question,
21 that would be great. Because I'd prefer not to have
22 Mr. Alvarado narrate in areas that may be irrelevant.

23 Q. (BY MR. ALLISON:) What did you understand
24 the communication from Cathy Kern to be telling you?

25 A. I had called her, specifically, to ask the

0059

1 question if there was a service provider in northern Pend
2 Oreille County, and her reply to me was that in order for
3 me to get that information I had to go through a process
4 that the Commission had set up, which was -- it was a
5 Public Request Records. So, at that point I went through
6 that process. I received this, because we had talked a
7 little bit, and she said, "It would be best if you just
8 write it down and submit that." So, when I received this
9 information it was pretty clear what my intent was. I
10 was wanting to know if there was anybody who was
11 authorized to provide the roll-off service in that area.
12 And this was her reply.

13 Q. And her reply told you what?

14 A. That -- At the time I was specific that,
15 from my understanding, the only service provider who had
16 a certificate was Bob Nichols, and I had asked her if he
17 had tariffs -- or, you know, was he providing the
18 roll-off service. And she -- Her reply to me was that,
19 "It appears that Robert Nichols, d/b/a B & N Sanitary,
20 HE122 (phonetic) has never had drop box service. I have
21 attached their index pages to support this. I looked in
22 their previous Tariff Number 1, and it also concurs."
23 So, with that information, she pretty-well satisfied what
24 I was looking for to find out if anybody had provided
25 service in that area.

0060

1 Q. Did you make a determination as to whether
2 or not such drop box service was needed or called for in
3 northern Pend Oreille County?

4 A. With that information that I received from
5 the Commission staff, you know -- and I -- my -- the
6 simplicity of the entire -- you know, when it was
7 presented to me, it was just obvious, well, if nobody's
8 ever applied for tariff, or if nobody has ever, you know,
9 is offering that service, that was -- would base my
10 application, that was to me was the need.

11 Q. Mr. Alvarado, I suggest that the fact that
12 no one is offering the service doesn't mean that the
13 service is needed. What did you -- How did you
14 determine, if you did so determine, that the service was
15 needed in north Pend Oreille County?

16 A. Well, along with not having a service
17 provider, I had received calls from different businesses
18 in the area --

19 MR. SELLS: Objection, Your Honor. It's
20 hearsay. It's starting to -- the next words out of his
21 mouth are going to be hearsay.

22 MR. ALLISON: Well, hardly. He's
23 testifying that he received calls. He's not -- He's not
24 testifying to the truth of any matter asserted. He made
25 the investigation as to whether or not there was a need

0061

1 for service, and he received calls. I think that that is
2 evidence of the need for service.

3 JUDGE TOREM: Mr. Sells, anything
4 further?

5 MR. SELLS: Well, the only thing that
6 would be of value to the Commission, here, would be if
7 the people who made the calls are here testifying as to
8 the need. Again, I don't have any objection to the
9 answers that go so far. But, as I say, if it goes any
10 further than that, it's the worst kind of hearsay that is
11 absolutely of no value to the Commission in this
12 hearing.

13 JUDGE TOREM: Mr. Fassio, anything else?

14 MR. FASSIO: No.

15 JUDGE TOREM: Mr. Sells, I'm going to
16 overrule the objection at this point, because he has yet
17 to testify to the hearsay. But I will suggest, based on
18 where the record is being created today, that I
19 understand the weight to be given to hearsay that might
20 come from a witness such as Mr. Alvarado, where the
21 information might better come, as you stated, Mr. Sells,
22 in your opening statement, correctly, from a customer in
23 the community expressing this need directly, and allowing
24 that customer to be cross-examined. So, the weight of
25 Mr. Alvarado's testimony today with regard to the

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1 community need, I'll have to determine.

2 MR. ALLISON: Certainly.

3 JUDGE TOREM: So, I'll allow you,
4 Mr. Alvarado, to testify to that, but, again, there may
5 be a need for another objection on the record as to
6 various pieces of this testimony, and, Mr. Sells, I'll
7 have you make those, and whether I sustain or overrule
8 them will depend on the nature of the testimony.

9 MR. SELLS: Well, I don't intend to
10 stretch this out anymore than it already is, Your Honor,
11 but I -- and I feel that when an objection is necessary
12 I'm going to have to make it. And if it involves the
13 kind of testimony you were just talking about, I am going
14 to continue to make those objections.

15 JUDGE TOREM: And I don't intend to
16 discourage you one bit. I don't mind the procedural
17 calisthenics from this end. Mr. Allison, proceed.

18 MR. ALLISON: And I would not be
19 surprised.

20 Q. From whom did you receive calls that related
21 to drop box service?

22 A. I received from Tech-Cominco, which is a
23 mine up in Ione. And I had -- That one was, in
24 particular, we actually provided service for that --

25 MR. SELLS: Objection, Your Honor.

0063

1 Beyond the scope of the question.

2 Q. (BY MR. ALLISON:) Did you provide service
3 for Tech-Cominco?

4 A. Yes. We did.

5 Q. What service did you provide?

6 A. Recycling service. We had containers there
7 for corrugated cardboard, and for wood loads. And at
8 that point we were providing that service, and they had
9 asked us if, you know, could we do a comprehensive
10 municipal solid waste program for them. And at that
11 point I told them that, you know, my understanding was
12 regulated, so all we could do at that point was provide
13 the recycling service, and they were just -- they liked
14 the idea of one company doing all the work.

15 Q. Anybody else you heard from?

16 A. I did hear some from Pend Oreille County,
17 but not necessarily in that particular -- in
18 Mr. Nichols's service area.

19 Q. From potential customers?

20 A. I did in Pend Oreille County as a whole, but
21 not up in his initial service area. It was pretty much
22 Tech-Cominco was who I was working with in his service
23 area. There are other customers, but they were not in
24 his service area.

25 JUDGE TOREM: Mr. Alvarado, can you spell

0064

1 the name of the company?

2 THE WITNESS: I think it's T-e-c-h, dash,
3 C-o-m-i-n-c-o, Cominco -- Tech-Cominco.

4 JUDGE TOREM: Tech-Cominco?

5 THE WITNESS: Tech-Cominco. Yes.

6 JUDGE TOREM: Thank you.

7 Q. (BY MR. ALLISON:) Does Northwest Industrial
8 Services operate transfer stations in north Pend Oreille
9 County?

10 A. Yes. We do. We have a site in Ione -- in
11 the town of Ione, right outside. We operate those for
12 the Pend Oreille County itself.

13 Q. And have the transfer stations that your
14 company operates received drop boxes with garbage refuse
15 things, the sort of thing that is regulated by UTC?

16 A. No. We've never provided that service up in
17 Pend Oreille County. As a custom with Northwest
18 Industrials Services, we have never gone in there and
19 provided that service -- for garbage service. Because we
20 understand that it is regulated.

21 Q. No. Have you received such containers
22 brought in by anyone else?

23 A. Well, yes. We have. Other than
24 Mr. Nichols? I'm not sure of the question, Paul.

25 Q. Have you received, from anyone at the

0065

1 transfer station, drop boxes containing materials that
2 would be subject to UTC regulation?

3 A. Just Mr. Nichols.

4 Q. Fine. To what extent have you received --
5 has your station --

6 A. Just roll-off services. Roll-off box.

7 Q. To what extent? Just one?

8 A. Oh, no -- Okay. Several. Actually, for the
9 last several years, we have -- you know, he comes in, and
10 he drops off his roll-off boxes, usually at the Deer Park
11 Transfer Station -- at the Valley Road Transfer Station,
12 he's brought in drop boxes full of municipal solid
13 waste.

14 Q. Is that north Pend Oreille County, too?

15 A. Well, he -- If I'm not mistaken, the service
16 area he's bringing it is to -- from that area to the
17 transfer station, because of the fact that in Ione there
18 is no place to drop those loads, so it has to be brought
19 into Deer Valley so we can reload it into one of the
20 trailers.

21 Q. Deer valley, you said?

22 A. Yes. That's right. It's about the middle
23 of Pend Oreille County. Or, southern -- Actually, it's
24 the southern part of Pend Oreille County. It's part of
25 the transfer station system. The way it's set up, we had

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1 to have two satellite locations, one in Ione, and one in
2 Usk. And then in Deer Valley they usually draw in all of
3 the solid waste, and recycles to Deer Valley, but since
4 we don't have the capabilities of the volume, those drop
5 boxes, if they're roll-offs, are usually brought to
6 the main hub where it's reloaded, and that's where
7 Mr. Nichols has brought in several of his boxes over the
8 last years.

9 Q. What facilities does Northwest have to
10 provide drop box service?

11 A. What facilities do we --

12 Q. Yeah. What equipment? How are you set
13 up?

14 A. Oh, we have -- Gosh, we have one, two -- we
15 have three -- actually, we have four roll-off trucks,
16 which are designed for that service. They're
17 manufactured, they have the chain of the -- chain and the
18 cable-type systems. And we probably have in our
19 inventory in excess of 40 roll-off boxes and variation of
20 sizes.

21 Q. And what are the sizes that you have?

22 A. 10, 20, 40s. And we have some large -- the
23 105, or the large chassis and containers that we wanted
24 to incorporate into our service.

25 MR. ALLISON: You may inquire, Counsel.

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1

CROSS-EXAMINATION

2

3 BY MR. SELLS:

4

Q. Mr. Alvarado, my name is Jim Sells, we've

5

met and talked on the phone several times, before

6

Counsel, who was involved. I have a couple questions.

7

Do you, as the company's representative, do you have any

8

intent today to present any testimony from a producer or

9

shipper of solid waste in support of your application?

10

A. I think Charles Kress may. If the question

11

is posed to Mr. Kress, I think he will.

12

Q. Is he a solid waste customer?

13

A. Yes. He is.

14

Q. As a commercial customer?

15

A. As a resident.

16

Q. All right. And so he gets his garbage

17

picked up once a week just like I get mine?

18

A. But he can also request roll-off service.

19

Q. But he doesn't own a business, and he's not

20

going to testify that he needs commercial service for his

21

business, is he?

22

A. He will testify that he can request roll-off

23

service. Yes. He will.

24

Q. At his home?

25

A. Yes.

0068

1 Q. Is that a commercial haul? Or, is that a
2 residential haul?

3 A. I think that -- Are you asking for the
4 service, in general? Or, are we going to differentiate?

5 Q. No, I'm asking for -- I'm sorry. Excuse me.
6 I'm asking for Mr. Kress's home. Mr. Kress calls and
7 says he wants a 10-yard drop box -- or a 5, I guess it
8 would probably be, at his house -- is that a commercial
9 customer, or a residential customer?

10 A. Well, provided he doesn't work out of his
11 house, it would be residential.

12 Q. All right. And you're not -- Your company
13 is not applying for residential solid waste authority,
14 are you?

15 A. Correct.

16 Q. This mine that you talked about, Tech
17 something --

18 A. Tech-Cominco.

19 Q. Okay. That's a mine, is it not?

20 A. Yes, sir.

21 Q. And, at the present time, is it operating?

22 A. No, sir. You know, let me rephrase. I know
23 they were closing, they may -- they're possibly in the
24 process of closing it, and there may be some work being
25 done there, currently.

0069

1 Q. Has this mine -- Does this mine have a
2 history, if you know, of opening and closing depending
3 upon the metals markets?

4 A. That particular company I'm not sure of.
5 No.

6 Q. Are you providing any service there now?

7 A. No. I'm not.

8 Q. Have you ever provided garbage solid waste
9 service to the mine?

10 A. No. I haven't.

11 Q. You've never hauled a roll-off container
12 from the mine, and taken it to a disposal facility?

13 A. Correct. Never.

14 MR. SELLS: Okay. I have no further
15 questions.

16 JUDGE TOREM: Mr. Fassio?

17

18 CROSS-EXAMINATION

19

20 BY MR. FASSIO:

21 Q. Yes, Mr. Alvarado, I have a few questions
22 for you, and some of these relate to your application,
23 just to get somemore information onto the record. About
24 how many employees do you have in your company?

25 A. In the company itself?

0070

1 Q. Yes.

2 A. Probably, it fluctuates. But I would say we
3 average right about 35.

4 Q. And how many drivers?

5 A. Oh, gosh. CDL drivers? Or, just drivers in
6 general?

7 Q. Drivers that would be used for --

8 A. For that particular purpose?

9 Q. -- for the purpose of operations under the
10 certificate, should it be granted?

11 A. Probably 10.

12 Q. And you mentioned in your testimony that you
13 had, I believe you said four roll-off trucks, and your
14 application lists three. I'm wondering if you could
15 clarify?

16 A. We had one that we were -- we had subleased
17 it, and it came back. So, we have four.

18 Q. You have four. And these would be used for
19 demolition and waste, and the other operations --

20 A. Correct. Recycling, hauling. Yes.

21 Q. Do you have a maintenance agreement on the
22 roll-off trucks, or the maintenance schedule?

23 A. Yes. We do. We come under the Department
24 of Transportation Guidelines, so since we do have a
25 common carrier permit, and we do have our Federal Motor

0071

1 Carrier Permit, we have to have those in place. So, yes,
2 we do. We have a mechanic, and we have the yearly annual
3 inspections, and the maintenance schedules.

4 Q. So, you do on-site, in-house --

5 A. Yes. And we also do -- you know, it depends
6 on the extent of the repairs, but it can be in-house, or
7 we take it out.

8 Q. And do you maintain driver records?

9 A. Yes. We do.

10 Q. Can you kind of describe or summarize the
11 records that you maintain?

12 A. Once again, we're under the Department of
13 Transportation Guidelines. As a common carrier permit we
14 have to have -- I have a separate file, we have our
15 mandatory drug testing, we have our -- we have our annual
16 drivers affidavit request forms in there, and we'll have
17 their -- if there's any accidents, or anything like that,
18 things of that nature.

19 Q. And you maintain hours of service logs?

20 A. When it's needed. But, I mean, in-house we
21 have our own policy where we -- if a customer calls,
22 we'll generate a work order. And on that work order it
23 will have the customer's name, the service address, the
24 billing address. So, it will have the type of service
25 requested. And they'll be on the work order itself. It

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1 has a start time, an end time, and it will have mileage,
2 and the state they're going in. So, it's a pretty
3 comprehensive work order. And that -- We just do that
4 just for the -- you know, just for our in-house, but we
5 also do the travel logs when it's necessary.

6 Q. And do you have liability insurance on this
7 truck?

8 A. Yes. We do. Yes.

9 Q. On your Profit and Loss Statement -- I might
10 just refer to that -- you list liability insurance --
11 excuse me a moment. Profit and Loss Statement, page 3,
12 lists liability insurance of about \$34,781, is that
13 inclusive of the insurance on the trucks? Does that
14 include --

15 A. You know, I'm not sure, to be honest with
16 you. As far as -- We just -- I know we have to -- when
17 we insure our vehicles, we do it to meet the state
18 requirements. So, that's all I know as regarding our
19 insurance.

20 Q. And can you clarify that the equipment and
21 containers that you list -- that you've listed in your
22 tariff, do you own both those outright?

23 A. Yes.

24 Q. And I'd like, just for the record, you've
25 described in your application, but can you briefly

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1 describe the service that you're actually applying for
2 today?

3 A. Well, regarding the -- yeah. When I
4 initially applied for the service, you know, the need was
5 based on -- I was under the impression that nobody was
6 offering that service, that was my direction that I
7 received from staff. So, what we wanted to do is, we
8 wanted -- we just thought we would have -- since we're
9 already in that service area, we have a truck going from
10 Ione, to Usk, and to Newport, we're already in that
11 service area. We just felt that if there was a customer
12 that had a need for -- I was pretty specific that we
13 wanted to go after manufacturing industrial waste and
14 construction demolition and land clearing debris, you
15 know, we at no time wanted to impact B & N's current
16 service they're providing, which my impression was
17 residential and front load service.

18 So, that was pretty much what we were
19 going to target, you know, the demo jobs, if there was
20 special waste, maybe some manufacturing sludge process,
21 and things along those lines. And recyclables, also.

22 Q. In your application, page 2, you state, "The
23 commodities or construction demolition, industrial
24 manufacturing waste, recycling material, and all other
25 definitions that fall under the solid waste category."

0074

1 Can you describe what you mean by "all"? Specifically,
2 what you mean by "all other definitions"?

3 A. Pretty much protrusibles. I mean, I was --
4 we were looking at dry goods. And, then, after we got to
5 thinking about it, we just figured, well, you know, it
6 was going to be kind of an agreement within ourselves
7 that we would try to go after the dry materials, but,
8 just for the sake of the application, I couldn't be
9 specific, so I -- when I said that, that was to include
10 all protrusibles, also. And whatever else falls
11 underneath the definition of MSW.

12 Q. In the Commission rules -- or, the
13 Commission statues on that -- and so as -- so, your
14 understanding is as they're applied (phonetic) in
15 RCW 8177 --

16 A. Correct.

17 Q. -- in terms of solid waste?

18 A. Correct.

19 Q. And I believe that also refers to
20 RCW 7095-030 by reference. So, is that your
21 understanding of what you meant by that?

22 A. Like I said, when I filled that out I
23 understood that the term MSW, according to the statute,
24 it's a pretty broad definition, and everything, including
25 the kitchen sink, falls underneath that. So, when I

0075

1 initially started that process I was kind of targeting a
2 certain type of a waste I was going to go after. And for
3 the sake of just -- you know, like I -- I just put down
4 anything else, referring to the statute, let's say it was
5 just -- I guess I could have just went ahead and just
6 made it the MSW, but I chose not to do it that way, and I
7 just wanted to put that in there. If that answers your
8 question?

9 Q. And I'd like to clarify. In that same
10 description you described -- you actually put the words
11 "recycling material" as a commodity in your tariff, what
12 do you understand that term to be?

13 A. Well, it's not -- For one thing, it's not
14 regulated, but I just put that in there, also.

15 Q. Okay. So, this is -- So, it's your
16 understanding -- So, it would be true that, essentially,
17 if the certificate were to be granted, that probably
18 should be removed from your tariff, would you agree?

19 A. Correct. Correct. The recycles. Yes.

20 Q. Okay.

21 A. I guess what I was trying to show is the
22 least impact we were going to have in that market. So,
23 we were just being specific for commodities.

24 Q. And you've already testified, and you state
25 in your -- actually, you state in your application that

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1 we've also received calls from area businesses needing
2 container service, can you tell us why you've not -- why
3 any of these -- why you've not presented any of these
4 areas witnesses --

5 A. You know, I take blame for that. You know,
6 I -- like I said, I -- I mean, I didn't -- I could have.
7 And if I would have been better prepared, and if I would
8 have been a little bit more familiar with the process, at
9 the initial I chose not to take counsel, on counsel's
10 advice, so I ended up -- I didn't see the need. I didn't
11 know I was -- I wasn't out to prove anything, I was just
12 under the impression, hey, if -- you know, if you go
13 to -- you know, if you go to a hamburger stand, there's
14 not -- nobody's offering you a Coke, well, obviously,
15 it's nice to have a Coke with your hamburger, and that
16 was just my mentality. It's just -- I thought there is
17 no need for me to go out there and try to find witnesses
18 to say that we need the service, it wasn't being offered.
19 And I just assumed everywhere else you go that service is
20 offered. So, that was my basis for just not going after
21 witnesses. In retrospect, as I look back, now, I would
22 have, and I could have, but I didn't.

23 Q. And can you clarify that -- Did you receive
24 a notice of the prehearing conference? And you did make
25 an appearance at the prehearing. Did you receive a

0077

1 notice of the prehearing conference that was initially
2 sent out by the Commission on -- in November 2008?

3 A. You know, I'm sure I -- if it was sent, I'm
4 sure I received it. I don't have -- I didn't memorize
5 that, but I'm sure I did.

6 Q. And do you recall if there was an appendix
7 to that notice that was attached that described the types
8 of information that would need to be presented at the
9 hearing?

10 A. I did read that. Yes. And I just --
11 unfortunately, I didn't think it was -- once again, that
12 was -- I just was going under the obvious, nobody was
13 providing -- nobody was providing the service, and the
14 need was there, and I -- I didn't -- I thought that would
15 have been adequate. I did not solicit more witnesses.

16 Q. And if I could go back to your tariff that
17 you -- where you've requested service, and it's item 260,
18 you've stated that you intend to provide a 105-yard
19 container. Can you -- Can you tell us what type of
20 customer would require a container that size?

21 A. A demolition, a commercial -- like,
22 possibly, a renovation of a hospital, or a restaurant, or
23 a person who's wanting to do a large clean-up. That
24 would be an ideal piece of equipment to take, because of
25 the location and the distance. It would benefit the

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1 customer, considerably. We could incorporate three
2 loads, two loads into one.

3 Q. But, again, it's true you haven't provided
4 any witnesses of those types of customers that would
5 testify as to the need of a 105-yard container?

6 A. No.

7 MR. FASSIO: I think that's all the
8 questions I have, Your Honor. Thank you, Mr. Alvarado.

9 THE WITNESS: Thanks.

10 JUDGE TOREM: Mr. Allison?

11

12 REDIRECT EXAMINATION

13

14 BY MR. ALLISON:

15 Q. Mr. Alvarado, are you personally familiar
16 with the existence of any entities in north Pend Oreille
17 County that -- that would be potential users of a
18 105-yard box?

19 A. Yes. I do.

20 Q. Tell me who they are? Who they would be?

21 A. Well, like I mentioned --

22 MR. SELLS: Well, Your Honor, I'm going
23 to object at that point. He can say he's aware of them,
24 but unless they're going to testify, it's -- once again,
25 it's hearsay. I understand it can come in, but it's just

0079

1 going to make this record --

2 MR. ALLISON: I suggest that it is not
3 hearsay. He has a personal awareness of the existence of
4 these entities, and I think he should be allowed to
5 testify.

6 JUDGE TOREM: I'm going to sustain
7 Mr. Sells' objection that it would be hearsay, if they
8 had said they have a need of such thing. If you wish to
9 ask your witness whether he believes there are clients he
10 could solicit, that in his view he believes would have a
11 need, his personal opinion is not hearsay, and he can
12 testify to that.

13 Q. (BY MR. ALLISON:) Very good, Mr. Alvarado.
14 Are there entities in north Pend Oreille County which, in
15 your opinion, based upon your experience in the industry,
16 would have a need for the use of 105-yard containers?

17 A. Yes. I do.

18 Q. And who would they be?

19 A. The hospital going through a renovation
20 process, where they would have a -- request of 30-yard
21 roll-off container for service. Let's say, in that
22 particular case, 30 yards, they would volume out before
23 they would weigh out. Well, that would -- that would
24 be -- you know, every time that 30-yarder was filled they
25 would have to make the trip to get rid of it and return

0080

1 it. Well, with a larger container we could take that one
2 trip, and similar, so a compactor service, we can, you
3 know, make -- turn it into three containers into one
4 trip. So, that would be the benefit to them. It would
5 be a -- I think there would be a savings involved, as far
6 as the transportation of it goes. And, you know, like
7 big demolitions, if there was a house fire in town, the
8 city of Newport, or Ione, a good -- the clean-up process
9 going on Tech-Cominco, once again, the proximity where
10 they're located to the disposal site, it's quite a few
11 miles. So, by taking -- and in taking one load, and
12 turning it into three loads, the customer ends up
13 benefiting from that.

14 MR. ALLISON: I have no further
15 questions.

16 JUDGE TOREM: Any other questions for
17 this witness?

18

19 RE-CROSS-EXAMINATION

20

21 BY MR. SELLS:

22 Q. Well, I guess the obvious, is anybody from
23 the hospital going to testify that they're doing the
24 renovation, and they need your service?

25 MR. ALLISON: That's repetitious. You've

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1 already asked about that, Counsel.

2 JUDGE TOREM: Overruled. You can ask the
3 question.

4 MR. SELLS: I forgot what it was already.

5 JUDGE TOREM: You asked if --

6 Q. (BY MR. SELLS:) Is anyone from the hospital
7 going to testify as to the need for your service?

8 A. If -- If I was to present that to them in
9 the way I just explained --

10 Q. No. No. No. No.

11 A. They can. Yes. They could.

12 Q. No. I didn't ask you if they could, I asked
13 you, are they going to be here today to testify --

14 A. Oh, today? No.

15 Q. All right. Where is the hospital, by the
16 way?

17 A. Outside Newport.

18 Q. Which is in the southern part of the
19 County?

20 A. Correct.

21 Q. As far as you know, they're --

22 A. And Tech-Cominco is in the north side of
23 Pend Oreille County.

24 Q. I'm concerned -- interested about these
25 102-yard containers, are those roll-off boxes?

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1 A. No. They're not.

2 Q. All right. What are they?

3 A. They are -- They're like a shipping
4 container that comes on a chassis.

5 Q. Would that be called an air modal
6 container?

7 A. Yes, sir.

8 Q. So, they're loaded onto a truck, and then
9 loaded onto a train, is that correct?

10 A. Well, they're loaded onto a chassis, and
11 then they're taken off the chassis, and they're put --
12 then they are put on a train.

13 Q. All right. And in looking at your
14 application -- and let me just take a moment. Isn't your
15 application based upon the need for roll-off
16 containers?

17 A. It's the same principle.

18 Q. Well -- No. That wasn't my question. Isn't
19 your application based on the need for roll-off
20 containers?

21 A. Correct. And I --

22 Q. And these -- No. Wait a minute. Let me ask
23 my question. And these containers are in the modal
24 containers, not roll-off containers, correct?

25 A. Yes.

0083

1 MR. SELLS: All right. I have no further
2 questions, Your Honor.

3 JUDGE TOREM: Mr. Fassio, anything else?

4 MR. FASSIO: No.

5 JUDGE TOREM: Mr. Allison, does that
6 raise anything else for this witness?

7 MR. ALLISON: Yes.

8

9 REDIRECT EXAMINATION

10

11 BY MR. ALLISON:

12 Q. With respect to the roll-offs, your
13 application did include 105-yard boxes, did it not?

14 A. Yes.

15 Q. And the 105-yard box is intermodal?

16 A. Yes.

17 MR. ALLISON: Okay. That's fine.

18 Nothing else.

19 JUDGE TOREM: All right. Thank you,
20 Mr. Alvarado. You may return to your seat.

21 THE WITNESS: Thank you.

22 MR. ALLISON: Let's see if we can get
23 Mr. Kress on the line.

24 JUDGE TOREM: All right. Give me one
25 minute to just finish my notes, and we'll call Mr. Kress.

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1 It's 10:15, so let's go off the record for five minutes.
2 It will give you folks a chance to use the rest room, the
3 court reporter to stretch his fingers, and give me a
4 chance to get Mr. Kress on the line. So, I'll try to
5 have him on the line at 10:20.

6 (Short recess).

7 JUDGE TOREM: It's now 10:25, we're back
8 on the record, and I have Mr. Charles Kress on the line
9 at a telephone number that's been provided, in Newport.
10 I've just been explaining to him, for the last three or
11 four minutes, the nature of this proceeding, who's
12 present, which attorneys will ask him questions, and
13 requested that he be aware of the need to not speak when
14 the attorneys are talking, so that the speaker phone
15 doesn't cut him out, and that if there are objections, to
16 wait until I've had a chance to rule on them before he
17 answers. I think we've established he can hear us okay,
18 and that this should work. So, I'm going to ask you,
19 Mr. Kress, in your home, or wherever you are in Newport,
20 I'm going to stand up, here, if you'll do the same and
21 raise your right hand.

22 Do you, Charles Kress, solemnly swear or
23 affirm that all testimony you'll provide in this hearing
24 will be the truth?

25 THE WITNESS: Yes.

0085

1 JUDGE TOREM: All right. Thank you. Can
2 you spell your first and last name for the record?

3 THE WITNESS: The first name, Charles,
4 C-h-a-r-l-e-s. Last name, Kress, K-r-e-s-s.

5 JUDGE TOREM: And can you state your
6 address, please, sir?

7 THE WITNESS: Physical address is 428
8 South Newport Avenue, Newport, Washington.

9 JUDGE TOREM: Is that a business or a
10 home, sir?

11 THE WITNESS: It's a home. And I have a
12 mailing address. Would be P.O. Box 1756, Newport,
13 Washington.

14 JUDGE TOREM: Mr. Allison is now going
15 to ask you the questions, and if you can't hear him for
16 some reason, let me know, I'll turn the phone.

17 THE WITNESS: Okay.

18

19 DIRECT EXAMINATION

20

21 BY MR. ALLISON:

22 Q. Mr. Kress, are you presently employed?

23 A. No.

24 Q. And what was your employment prior to your
25 retirement?

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1 A. I worked for Pend Oreille County.

2 Q. What position did you have with Pend Oreille
3 County at the time of your retirement?

4 A. I was Facilities Coordinator.

5 Q. What does a Facilities Coordinator do?

6 A. I kind of helped out in several different
7 departments, Solid Waste, Parks and Rec, Maintenance,
8 even Building -- Planning Department, actually.

9 Q. How long were you in that position?

10 A. Possibly three years.

11 Q. That would have been from when to when,
12 approximately?

13 A. 2005 to 2008.

14 Q. Mr. Kress, in your position did you have
15 occasion to be familiar with the solid waste hauling in
16 Pend Oreille County?

17 A. Yes.

18 Q. Did you ever receive any calls or requests
19 with regard to providing drop boxes for customers?

20 A. Yes.

21 Q. Could you just go forth on that subject,
22 tell us your recollection of what you did here from
23 customers, or potential customers, or users of drop boxes
24 in Pend Oreille County?

25 MR. SELLS: Objection, Your Honor.

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1 Several reasons.

2 JUDGE TOREM: Hold tight for a second,
3 Mr. Kress. I don't know if you can hear Mr. Sells, but
4 he's making an objection to the question. Go ahead,
5 Mr. Sells.

6 MR. SELLS: First of all, Pend Oreille
7 County is a big place. There are at least three, to my
8 knowledge, G-Certificate holders in Pend Oreille County.
9 This application only concerns the territory of one.

10 Secondly, it's the same old hearsay
11 objection. If he goes to the point of describing what
12 someone else told him, and it's offered for the truth of
13 that -- of that county, then it's, once again, hearsay.

14 JUDGE TOREM: So, the two bases for the
15 objections, again?

16 MR. SELLS: Overbroad, and hearsay.

17 JUDGE TOREM: Mr. Allison?

18 Q. (BY MR. ALLISON:) Mr. Kress, the area we're
19 particularly concerned with is, substantially, the north
20 half of Pend Oreille County, so please limit your remarks
21 to calls or inquiries you received from entities in the
22 north half of Pend Oreille County.

23 A. Okay. Anytime that people would call and
24 want to know about information concerning trash pick-up,
25 or garbage pick-up, we would provide them with the option

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1 of going to the transfer station, or we would give them
2 the number of B & N Sanitation in the North County, if
3 that's the area that they were calling from.

4 Q. Did you receive any calls with respect to
5 drop box service?

6 A. Well, we would get calls from everybody.
7 Specifically, I couldn't tell you who had asked for drop
8 boxes, or who asked for garbage.

9 Q. Without identifying -- without -- or,
10 recalling who, specifically -- who, particularly, asked
11 for drop box services, did you get calls that requested
12 drop box service?

13 A. Yes.

14 Q. Did you -- Did you have occasion, based on
15 information that came to you in your position with Pend
16 Oreille County, to become familiar with the quality of
17 service that was provided by B & N Sanitation?

18 A. Yes.

19 Q. And what -- What information did you receive
20 in that regard?

21 A. Generally, what little contact I have with
22 anybody personally, is that they did a fine job picking
23 up the garbage.

24 Q. What about drop box service?

25 A. I really -- I never heard any complaints

0089

1 about drop boxes. Are we talking -- I'm not sure I
2 understand what you mean by drop box, I guess.

3 Q. Well, larger containers, like 10-, 20-, 30-,
4 40-yard containers?

5 A. No. I never heard anything negative about
6 that.

7 Q. Okay. What was -- What, if anything, did
8 you hear or observe on the subject of Northwest
9 Industrial Services and their performance?

10 A. They were eager to set up recycling
11 containers, which wasn't being done in the County, so
12 that we could recycle large items. And I thought that
13 was a good idea, and I still think it's a good idea,
14 rather than just dumping everything as garbage.

15 Q. Did B & N just dump everything as garbage?

16 A. Yes.

17 Q. Even though it was, substantially, recycling
18 materials?

19 A. Yes.

20 MR. ALLISON: I have no further
21 questions.

22 JUDGE TOREM: Mr. Sells, do you have any
23 questions.

24 MR. SELLS: I have no questions, Your
25 Honor.

0090

1 JUDGE TOREM: Mr. Fassio, do you have any
2 questions for Mr. Kress?

3 MR. FASSIO: Yes. Mr. Kress, a few
4 questions, please.

5 JUDGE TOREM: Mr. Fassio, it might be
6 helpful if you could come up closer to the phone.

7 MR. FASSIO: Sure. Certainly. Just a
8 moment.

9

10 CROSS-EXAMINATION

11

12 BY MR. FASSIO:

13 Q. Can you hear me, Mr. Kress?

14 A. Yes. I can.

15 Q. Okay. Thank you. You stated that you were
16 the Facilities Coordinator in Pend Oreille County until
17 2008?

18 A. Yes. And, before 2005, I might add, I was
19 the Recycling and Solid Waste Coordinator for the County,
20 specifically, working at the Deer Valley Transfer
21 Station.

22 Q. Are you --

23 A. Go ahead.

24 Q. Are you currently employed by the County in
25 the solid waste area?

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1 A. No. I'm not.

2 Q. So, just to clarify, you're not here today
3 testifying on behalf of the County?

4 A. That's correct, sir.

5 Q. All right. You're testifying on your own
6 behalf?

7 A. Yes.

8 Q. Are you familiar with the application of
9 Northwest Industrial and the service that they have
10 requested, and the certificate that they have
11 requested?

12 A. Yes. I believe so.

13 Q. You've read that?

14 JUDGE TOREM: I didn't hear the answer.
15 Have you read their application?

16 THE WITNESS: I don't think I read their
17 actual application.

18 JUDGE TOREM: Have you seen it?

19 THE WITNESS: No. I don't think I
20 have.

21 JUDGE TOREM: Okay.

22 Q. (BY MR. FASSIO:) Would you -- Would you,
23 yourself, be a potential customer of Northwest Industrial
24 Services' solid waste if their certificate was granted?

25 A. No. I wouldn't be. I'd just take my own

0092

1 garbage to the transfer station. And -- Oh, never
2 mind.

3 Q. So, you would -- So, you have -- Have you
4 ever -- well, let me rephrase that. So, to clarify, you
5 would not be a potential customer, yourself?

6 A. No. I would not.

7 Q. Okay. Let me -- I want to ask you a couple
8 of questions about B & N Sanitary Service. Do you have
9 an experience, as a customer, of B & N Sanitary
10 Service?

11 A. No. I do not.

12 Q. Have you -- Have you personally complained
13 about B & N Sanitary Service to any entities?

14 A. No. I have not.

15 Q. In your capacity as an official in Pend
16 Oreille County, have you personally received complaints
17 about B & N Sanitary Service?

18 A. No.

19 MR. FASSIO: I believe that's all the
20 questions I have. Thank you.

21 THE WITNESS: You're welcome.

22 JUDGE TOREM: Mr. Allison, anything
23 further?

24 MR. ALLISON: No. Nothing further.

25 JUDGE TOREM: And, Mr. Sells, anything

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1 further?

2 MR. SELLS: No. Your Honor.

3 JUDGE TOREM: Okay. Thank you,
4 Mr. Kress. I don't think the attorneys have any other
5 questions for you. I appreciate your being available
6 this morning. And unless you have any questions for me,
7 then we're going to hang up the phone at this end.

8 THE WITNESS: No, sir. Other than --
9 I'm free to go, then?

10 JUDGE TOREM: You are. Thank you very
11 much.

12 THE WITNESS: Thank you, sir.

13 JUDGE TOREM: All right. Bye-bye.

14 All right. Mr. Allison, do you have any other witnesses?

15 MR. ALLISON: No. I do not.

16 JUDGE TOREM: Do you have any other
17 evidence you want to submit?

18 MR. ALLISON: No. I have nothing. No.
19 Nothing further.

20 JUDGE TOREM: Okay. So, at this time,
21 then, it's my understanding, to be clear, that Northwest
22 Industrial is resting its case.

23 MR. ALLISON: Yes.

24 THE COURT: All right. At this time,
25 Mr. Sells, Protestant can make its case.

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1 MR. SELLS: Well, we have a Motion to
2 offer, if Your Honor, please, and probably anticipated,
3 and that's a Motion To Dismiss the application at this
4 point after the Applicant has rested, which I understand
5 he has done. The burden of proof in an application case
6 is upon the Applicant, and that burden of proof is to
7 show, to the satisfaction of the Commission, that the
8 current certificate holder is not providing, or will not
9 provide service to the satisfaction of the Commission in
10 this Public Convenience & Necessity. There must be a
11 showing of sentiment in the community reflecting that
12 burden of proof. In other words, that, A), the current
13 G-Certificate holder is not providing service, and, B),
14 the Applicant is, in fact, fit to provide the service.

15 Now, in this case, thus far, post
16 Applicant's resting, we have not heard one single bit of
17 testimony regarding the lack of service being provided by
18 the existing G-Certificate holder, Mr. Nichols. Not one.
19 The only testimony we have regarding his service comes
20 from Mr. Kress, who we just hung up on, and I quote,
21 here, "He's doing a fine job picking up the garbage in
22 his G-Certificated area." Well, we think so, too, and
23 we're happy to have Mr. Kress say that. But without a
24 shipper/customer witness there can be absolutely no
25 showing of need, first, and, secondly, showing of

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1 inability of the existing G-Certificate holder to provide
2 this service. And there's reams and reams of case law
3 that I'm not going to bore Your Honor with, I've got --
4 like Counsel, here, I've got a three-ring binder with a
5 bunch of them that I'm sure Your Honor is familiar with
6 them as I. There's an affirmative burden to go forward
7 here, and there is absolutely nothing, nothing that's
8 been prevented here this morning to even approach meeting
9 that burden. It should be dismissed at this point.

10 JUDGE TOREM: Thank you. Mr. Allison,
11 did you want to respond to the Motion?

12 MR. ALLISON: Yes. We have a situation
13 here where -- where B & N was, apparently, providing drop
14 box services without having filed a tariff, and doing it
15 for an extended period of time, and it was my intention
16 to bring that out with Mr. Nichols as a witness. We have
17 a situation where Mr. Nichols, B & N, has been operating
18 at a dramatic loss for a period of years over the last
19 five --

20 MR. SELLS: Objection, Your Honor.
21 There's no testimony.

22 MR. ALLISON: Then I'll make an Offer of
23 Proof.

24 MR. TOREM: Well, Mr. Allison, the Motion
25 is regarding the burden of proof that you had that's been

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1 stated in the second and third paragraph of the statute
2 8177-040. And while I understand your concerns, perhaps,
3 with Mr. Nichols' operations, the statute for an
4 application has only one of those as potential areas of
5 inquiry that the current company is not providing service
6 to the satisfaction of the Commission. The Commission
7 has already determined the fitness of B & N Sanitary to
8 provide this. If they choose to provide it at an
9 operating loss once they already have their certificate,
10 that's not before me today, and I'm not quite sure how it
11 would come back before me, unless they were not providing
12 service to the satisfaction of the community.

13 So, I prefer if you would respond to the
14 nature of the Motion, which is challenging whether you've
15 met your burden of proof as required by statute.

16 MR. ALLISON: I believe that the burden
17 of proof would have been satisfied if I had been allowed
18 to call Mr. Nichols and examine him as an adverse
19 witness, which was my intention, and which I think the
20 rules allow. And, obviously, there has not been a
21 customer here, but Mr. Alvarado testified, and we
22 recognize there was some hearsay, he testified that there
23 were people who did call him for that service, indicating
24 that the service was not being adequately provided. And,
25 as your Honor has properly pointed out, hearsay is

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1 admissible on a discretionary basis with you, as the
2 Judge, and there was evidence to the effect that -- that
3 the B & N service was not adequate and sufficient,
4 because that's why they called Northwest to provide
5 service.

6 JUDGE TOREM: Mr. Fassio?

7 MR. FASSIO: Thank you. Staff at this
8 time is prepared to join the Motion of Protestant. And I
9 would echo the arguments of Mr. Sells, the statute is
10 fairly clear, 8177-040 requires not only that the
11 Applicant has the burden of proof to establish a Public
12 Convenience & Necessity, but also in the case of a
13 protested application, where there is overlapping
14 authority, to show that the existing carrier is not
15 providing service to the satisfaction of the Commission.
16 And I -- For the benefit of Your Honor, and the
17 Commission, I can provide some statutory -- some case
18 authority to support those standards. In particular,
19 they set forth that the need for service has to be
20 presented by testimony of members of the public that
21 would require the service, or who are knowledgeable,
22 particularly, of the need for service required in the
23 community, and that the testimony of the Applicant as
24 to -- is considered to be self-serving and not, in and of
25 itself, is admissible as evidence of need. In this case

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1 self-serving testimony regarding others need will not
2 support the protested application is In Re: Alexander,
3 A-l-e-x-a-n-d-e-r, Milman, M-i-l-m-a-n, and Walter Kazak,
4 K-a-z-a-k, doing business as Checker Express, Order MVC
5 No. 2210, and Order MVC 2217, this is an Initial Order
6 dismissing application of July 1997. And the second
7 would be a Commission decision and Order affirming the
8 Initial Order dismissing the application, August 1997.

9 And, bear with me. One more case.

10 This is In Re: C & C Transfer Company, Inc., Order
11 MV No. 143632, Application No. E74249.

12 JUDGE TOREM: What's the number on the MV
13 Order, again?

14 MR. FASSIO: 143632. Commission decision
15 and Order denying petition for reconsideration, affirming
16 Initial Order July 1991. And, so, that's all I have on
17 the need.

18 Secondly, the second standard for
19 determination, which we believe the Applicant has not
20 met, is that the certificate can only be issued if the
21 solid waste collection company, or companies serving the
22 territory will not provide service to the satisfaction of
23 the Commission. And the case I wish to cite there is
24 In Re: Superior Refuse Removal Corp., Commission decision
25 and Order denying reconsideration, Order MVG No. 1537,

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1 Hearing No. GA849, February 1992. And In Re: Superior
2 Refuse Removal Corporation, Commission decision and Order
3 denying reconsideration, Order MVG No. 1639, Hearing
4 No. G896, June 1993. And that requires live testimony
5 needed to establish that existing carriers will not
6 provide service to the satisfaction of the Commission.
7 It is my understanding some of the cases that I cited
8 earlier also touched upon this requirement. Thank you.

9 JUDGE TOREM: Mr. Sells, is there
10 anything else you want to add to the Motion or argument
11 at this time?

12 MR. SELLS: No, Your Honor. I think it's
13 all been said.

14 JUDGE TOREM: Mr. Allison?

15 MR. ALLISON: Yes, Your Honor. With
16 regard to the 105-yard containers, I think it's clear
17 that from B & N's tariffs. They have not posted with
18 respect to 105, they've not requested a tariff as to
19 105-yard containers, and so that appears to be an open
20 item. And, granted, the only testimony is
21 Mr. Alvarado's, but I submit that the burden should not
22 be so high at that point where the existing holder of the
23 certificate is -- is not undertaken to provide the large
24 105-yard box service, and Northwest has that service
25 available, has the capacity to do it, and I submit that

0101

1 that much of the request by Northwest should be granted,
2 at least.

3 JUDGE TOREM: Bear with me one moment. I
4 want to grab from the shelf the Administrative Procedures
5 Act, so I can more accurately address the hearsay issue.

6 (Short pause in the proceedings.)

7 MR. ALLISON: I believe it gives you
8 quite a bit of latitude.

9 JUDGE TOREM: I understand. There is
10 some latitude, but my days as an Administrative Law Judge
11 for the Office of Administrative Hearings got me familiar
12 with what one could or couldn't do with it, and I want to
13 make sure I'm recalling it correctly.

14 (Short pause in the proceedings.)

15 JUDGE TOREM: Mr. Sells, I'm going to
16 grant your Motion today to dismiss the case. Let me
17 address, first, the hearsay question to be clear as to
18 what's admissible in these matters. Under RCW 3405,
19 Section 452, Sub 1, "Evidence, including hearsay
20 evidence, is admissible, if, in the judgment of the
21 presiding officer, it's the kind of evidence on which
22 reasonably prudent persons are accustomed to rely in the
23 conduct of their affairs." That's the language from the
24 statute. However, it further directs that, "The
25 presiding officer shall exclude evidence that is

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1 excludable on constitutional or statutory grounds, or on
2 the basis of evidentiary privilege recognized in the
3 courts of the state, and the presiding officer may
4 exclude" -- it's a discretionary -- "may exclude evidence
5 that is irrelevant, immaterial or unduly repetitious."
6 That's the statutory language as to what hearsay can do
7 in an administrative proceeding.

8 Even with that, however, RCW 3405,
9 Section 461, regarding the entry of orders, in paragraph
10 4 it directs, "That findings of fact shall be based
11 exclusively on evidence of record in the adjudicative
12 proceeding and on matters that are officially noticed in
13 the proceeding. Findings are to be based on the kind of
14 evidence on which reasonably prudent persons are
15 accustomed to rely in the conduct of their affairs.
16 Findings may be based on such evidence, even if it would
17 be inadmissible in a civil trial." And that's where I
18 understand the reference of the statute to hearsay.

19 It goes on to say, "However, the
20 presiding officer shall not base a finding exclusively on
21 such inadmissible evidence unless the presiding officer
22 determines that doing so would not unduly abridge the
23 party's opportunities to confront witnesses and rebut
24 evidence." And if I choose to base an Order or a finding
25 solely on this inadmissible evidence or hearsay, the

0103

1 statute further directs that the basis for that
2 determination appear in the Order.

3 That's the basis and understanding from
4 which I was making my rulings today as to what I was
5 allowing, or not, and by noting that weight would be
6 given to such items in accordance with what a reasonable
7 person might, customarily, rely upon. However, in
8 combination with the Administrative Procedure Acts,
9 rulings are statutory and bind me and give me limited
10 discretion with hearsay. Mr. Fassio has indicated the
11 precedential decisions of the Utilities & Transportation
12 Commission that set additional requirements based on
13 RCW 8177-040, and in that statute there are five global
14 requirements in all application cases. They require that
15 an issuance of a Certificate of Necessity, as has been
16 requested by Northwest Industrial, be determined on the
17 following factors.

18 This is not a limiting list, but it's, at
19 least, these factors. One, "The present service and
20 costs, thereof, for the contemplated area to be served."
21 "An estimate of the cost of the facilities to be utilized
22 in the plant for solid waste collection and disposal set
23 out in an Affidavit or a Declaration." Third, "A
24 statement of the assets on hand of the person, firm,
25 association or corporation that will be expended on the

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1 purported plant for solid waste collection and disposal
2 set out in an Affidavit or Declaration." Four, "A
3 statement of prior experience, if any, if such -- in such
4 field by the Petitioner, again, set out in an Affidavit
5 or Declaration. And, five, "Sentiment in the community
6 contemplated to be served as to the necessity for such a
7 service."

8 The Commission's decisions indicate that
9 that fifth element has to be fulfilled with actual
10 testimony from the community to be served. And, as
11 Mr. Sells has pointed out, and Mr. Allison, as you, and I
12 think Mr. Alvarado has acknowledged in your arguments and
13 testimony today, that might have been presented, but
14 today it was not. So, that element but itself would make
15 the application as submitted, and the evidence as
16 presented today, deficient under the statute, and require
17 me to sustain Mr. Sells' Motion, and grant it, and
18 dismiss the case.

19 In addition, the statute goes on to say,
20 "When an applicant requests a certificate to operate in a
21 territory already served by a certificate holder under
22 this chapter" -- and in this case Mr. Nichols does hold a
23 G-Certificate to provide service in North Pend Oreille
24 County -- "the Commission may, after notice and an
25 opportunity for a hearing" -- such as we're conducting

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1 today -- "issue a certificate to the Applicant only if
2 the existing solid waste collection company or companies
3 serving the territory will not provide service to the
4 satisfaction of the Commission, or if the existing solid
5 waste company does not object."

6 In this case, Mr. Sells made a timely
7 objection and protest on behalf of his client, which
8 means that we have a sixth element required to be proved,
9 and that would be, again, failure to provide service to
10 the satisfaction of the Commission. There's been no
11 witness today to indicate that any complaints have been
12 filed with the Commission, and while there may have been
13 offers of proof or argument referencing the scope of
14 service provided by Northwest Industrial's potential
15 competitor, B & N Sanitary, no one's indicated that the
16 service that they're providing has not been to the
17 satisfaction of the Commission, or to the customer base.
18 There's no evidence in the record to allow that. And an
19 indirect reference that containers of any size are not on
20 the tariff, or could be offered, would not satisfy that
21 element, even if that had made it into the record.

22 So, because the evidence is not
23 sufficient to carry the Applicant's burden, even with the
24 hearsay in for the limited basis for which it could come
25 in, I must grant the Motion and dismiss the application.

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1 I'll reduce that to writing in the next couple of days or
2 weeks, and at that point, Mr. Allison, it will be an
3 Initial Order dismissing the application.

4 There will be advice to you and your
5 client as to how to appeal that, if you so wish. There
6 certainly is a next level of review. And, in that, if
7 you choose to take up the ruling as to the adverse
8 witness that was made, you certainly can do so at that
9 time, as well. I'm not going to further address that as
10 the basis, because that's not -- there is no evidence in
11 the record. I'm looking at the basis in the statute, but
12 if you think that there's a reason the evidence isn't
13 there, as you've so stated, the transcript will be
14 available in two weeks, and certainly during the time
15 period in which a timely appeal might be made.

16 The time limits are available in our
17 rules in WAC 480-07. And they will also be summarized in
18 a notice at the end of the ruling when it comes out in
19 writing, probably by the end of next week. So, my ruling
20 will be out ahead of the transcript, I expect. So, if
21 you feel that there's a need to extend that period, I
22 encourage you to request an extension of time that could
23 be granted by the Commission for you to file any petition
24 for appeal, or review as necessary. All right?

25 MR. ALLISON: Thank you.

