

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In re Application No. GA-789000 of ) DOCKET NO. TG-000584  
)  
TRASH HUSTLERS, L.L.C. )  
) POST-HEARING BRIEF OF TRASH  
For a Certificate of Public Convenience ) HUSTLERS L.L.C.  
and Necessity to Operate Motor Vehicles )  
in Furnishing Solid Waste Collection )  
Services. )

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**I. INTRODUCTION**

On April 12, 2000, Trash Hustlers L.L.C. (“Trash Hustlers”) filed an application with the Washington Utilities and Transportation Commission (“Commission”) for a Certificate of Public Convenience and Necessity. Trash Hustlers proposes to provide service within Yakima County for the collection and disposal of solid waste, excluding chemicals, hazardous, biohazardous or biomedical waste. This service would be provided on-call basis, and would exclude drop box and containerized pick-up service and would exclude the use of vehicles with a gross vehicle weight in excess of 23,000 pounds. Included within its application, was Trash Hustler’s proposed Tariff No. 1. Subsequent to its application, protests were filed on behalf of the Washington Refuse & Recycling Association, Yakima Waste Systems, Inc., and Country Garbage Service. A telephonic prehearing conference was conducted on August 8, 2000. A hearing was conducted before Administrative Law Judge Ann Rendahl in Yakima, Washington on August 17, 2000 and August 18, 2000. Testimony supporting the application of Trash Hustlers was received from Mr. Tony

DiTommaso, Mr. Bud Owens, Mr. Michael Nash, Mr. John Puccinelli, Mr. Lynn Buchanan, and Mr. Ron Boster. Testimony in opposition to application was received from Ms. Nancy Fortier, Mr. Steven Wheatley, Mr. Scott Robertson, and Mr. Cecil Bronkhorst.

Although Trash Hustlers filed an application with reference to the Yakima County, it is willing to accept a certificate that excludes those municipalities where the Commission does not have jurisdiction to issue such a certificate. It is not seeking the revocation of the certificate of any other solid waste carrier. With the respect to the service area presently served by Country Garbage Service in the southern region of Yakima County, Trash Hustlers concedes that the record does not disclose a burgeoning demand for the type of services that are proposed to be provided under the application. The bulk of the evidence presented concerned the service area currently occupied by Yakima Waste Systems, Inc.

## **II. THE COMMISSION MUST WEIGH THE PUBLIC INTEREST IN DETERMINING WHETHER SERVICE IS SATISFACTORY**

RCW § 81.77.040 provides in part,

[W]hen an applicant requests a certificate to operate in a territory already served by certificate holder under this chapter, the commission may, after hearing, issue the certificate only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the Commission.

Trash Hustlers contends there is more than sufficient evidence for the Commission to determine that Yakima Waste Systems has not performed the type of service proposed by Trash Hustlers in a satisfactory manner, and the Commission's dissatisfaction could be remedied by competition from Trash Hustlers. Clearly the applicant and the protestants are at odds with respect to the major factual issues in this proceeding. Notwithstanding this factual dispute, there should be no disagreement that the Commission's findings in this matter must be made with respect to the public interest. The "satisfaction" standard of RCW 81.77.040 must be interpreted in the light of the public interest being served. Stated differently, the Commission's concern must be assuring

adequate service to the public, not merely protecting a monopoly or market position of an incumbent solid waste collection company. See Superior Refuse Removal, Inc. vs. WUTC, 81 Wn. App. 43, 913 P.2d 818 (1996). When the Commission evaluates the quality of existing service, it follows logically that the Commission may consider whether service would be enhanced by competition.

The type of service which Trash Hustlers proposes to deliver is of a limited nature and does not include regularly scheduled service or containerized service. In this respect, the applicant's activities may compete, in theory, only with a very narrow segment of the market available to presently certificated solid collection companies. The Commission is not precluded from granting multiple certificates to carriers within the same service area. See Yakima Valley Disposal, Inc. Order M.V. No. 140746, Hearing No. P-72643 (1990).

Moreover, the Commission clearly has recognized that in applying the statutory standard it can recognize the differences in market and in operation between community universal solid waste collection and specialized operations. In Medical Resource Cycling, Inc. Order M.V.P.G. No. 1707, Hearing No. GA-76820 (1994). The Commission noted:

As the initial order notes, the Commission has recognized the differences in market and in operation between community universal solid waste collection, on the one hand, and specialized operations such as collection of hazardous and biohazardous waste on the other. Because of the differences of the services, the biohazardous waste collection service is evaluated differently when looking at performance to the Commission's satisfaction and at the requirement of the public convenience and necessity.

In this case, the Commission should also recognize the difference in market and in operation between community universal solid waste collection performed on a regularly scheduled basis, and the on-call "clean-up" service proposed by Trash Hustlers. The type of service proposed to be delivered by Trash Hustlers is supplementary to the containerized and regularly scheduled curbside service regularly supplied by large carriers. It is a specialty service not requiring the use of equipment for container or curbside service. It is a labor intensive, low capital service intended to

be responsive to the special clean-up needs of requesting customers. If Trash Hustlers were permitted to provide this service, there would be no threat at all to the regularly scheduled and containerized or curbside service provided by other carriers. Therefore, the Commission should weigh the standard of “satisfaction” differently when evaluating the application of Trash Hustlers, as opposed to an applicant for a scheduled community wide certificate. The Commission can and should determine that the public interest will be enhanced by competition for the type of service Trash Hustlers desires to provides. Therefore the service of existing certificated solid waste carriers who have a near “monopoly” for this type of service should be found unsatisfactory.

In this connection, it is important to keep in mind that RCW § 81.77.040 does not require that the Commission find that all services provided by an existing weight carrier service are “unsatisfactory”, before it issues a certificate to a competing solid waste transporter for one type of service. Nor does the statute require that an existing solid waste carrier be found negligent, or culpable under some standard of civil or criminal law.

This application should also be evaluated by the Commission in light of recent cases calling into question arrangements which have the effect of granting exclusive franchises to waste haulers. For instance, in Huish Detergents, Inc. vs. Warren County, Kentucky, et al., \_\_\_\_\_ F.3d \_\_\_\_\_, 2000 Fed. App. 0182 P., No. 98-5566 (6 Cir., May 31, 2000) the United States Court of Appeals for the 6<sup>th</sup> Circuit held that a county ordinance may unconstitutionally interfere with interstate commerce if its incorporates a waste collection arrangements whereby local residence are obligated to purchase services directly from an exclusive provider. It is apparent from this case and the cases cited therein, that the courts increasingly regard with disfavor statutory arrangements which result in a state or county government using its regulatory power to protect on exclusive right of a party to collect and/or process solid waste. In light of these devolvments, the Commission should exercise restraint

and only utilize the “satisfaction” standard to restrict competition only when it clearly appears that public interest is served by such a restriction.

**III. THE COMMISSION SHOULD FIND THAT YAKIMA WASTE SYSTEMS, INC. HAS NOT DELIVERED THE TYPE OF SERVICE PROPOSED BY TRASH HUSTLERS IN A SATISFACTORY MANNER.**

Prior to the application filed by Trash Hustler, LLC, Yakima Waste Systems, either did not provide the kind of on-call labor intensive service proposed by Applicant, or if did so, it was infrequent or occasional. Mr. Ron Boster testified on this point. Mr. Boster was employed by Yakima Waste Systems, Inc. between 16 and 17 years and was familiar with the operations of Yakima Waste Systems until September or October of 1999. (T.233 L5-L19) Prior to his employment with Yakima Waste Systems, Mr. Boster was associated with the business of transporting solid waste for a period of 18 to 23 years. (T.232 L2-L18) Mr. Boster testified to a general familiarity with the operations of his former employer and general awareness of what his fellow employees were doing. (T.239 L6-13) As far as he knew Yakima Waste Systems never provided the type of service that Trash Hustlers proposes to provide. (T.244, L18 to T.246, L4) Although counsel for Yakima Waste Systems attempting to impeach Mr. Boster’s memory by reference to a cleanup involving a collapsed building at Selah, Washington, (which, incidentally, is not the type of service for which Trash Hustlers seeks certificate authority) Mr. Boster testified that this was, “more or less an exception to the rule, because it was the only time in his knowledge, that they had that much damage and that they had to have it out in a very short period of time.” (T.251 L-21 to T. 252 L-1)

If Mr. Boster, an employee of Yakima Waste Systems was unaware that his employer provided the type of service that Trash Hustlers proposes, then it comes as no surprise that businessmen operating in and around Yakima County also were similarly unaware. Mr. Bud Owens testified that he had been in business in the Yakima County area for 51 years (T.155, L-1.) He has had properties in the vicinity of Selah, City of Yakima, Yakima County and Union Gap. He testified that he had a need for the sort of services that Trash Hustlers would provide an average of 5 to 6 times per month. (T.172 L-5 to L14). Notwithstanding the fact that Mr. Owens has spent his life in the Yakima Valley, he was unaware that Yakima Waste Systems routinely provided this sort of on-call labor intensive service proposed by Trash Hustlers. (T.176, L-2 to L-8). Only in the last couple of weeks before the hearing had anyone from Yakima Waste Systems contacted Mr. Owens' business to ascertain if they wanted them to haul (T.184 L-6 to L-14).

Similar to Mr. Owens, Mr. Michael Nash testified that as far as he knew Yakima Waste Systems did not provide the same type of service that Trash Hustlers intends to provide (T.195 L-19 to L-22). Like Mr. Owens, Mr. Nash has resided in the community for a substantial time and has never observed representatives of Yakima Waste or Superior any other hauling company physically loading into a dumpster or other container. Mr. Buchanan, who has been in business in Yakima since 1950, testified that no waste carrier had made it known that they could provide service other than bin type or container type service. (T.220 L-21 to T.222 L-9). Mr. Nash consulted local advertising in order to have trash hauled off his rental properties. However, the name of Yakima Waste Systems did not appear in the advertising, and no one ever approached him and made him aware of the fact that Yakima Waste Systems was willing to provide this sort of service until very recently. (T.192 to T.194).

Not surprisingly, employee/witnesses for Yakima Waste Systems, Inc. have vigorously asserted their employers willingness and eagerness to provide the type of service proposed by Trash

Hustlers. However, one may infer that it is at best a minor part of their business. Yakima Waste Systems, Inc. itself does not apparently keep track of this type of service. For instance, Mr. Wheatley testified that he has not made any effort to enumerate the type of service being proposed by Trash Hustlers, and he does not know if his employer had (T.309 L-13 to L-25). Mr. Wheatley ventured an estimate that the special on-call services he personally would have performed could have numbered into the hundreds (T.296 L-22, T.297 L-3). Mr. Robertson made similar representations. However, their testimony is not easily reconciled with that of Mr. Boster. If providing this type of service reflected a general company practice involving other company employees, Mr. Boster would surely have had a some knowledge of such service.

Notwithstanding Mr. Wheatley's testimony that special on-call services that he had performed could have numbered into the hundreds, he could not remember any specific time in which he was asked to gather yard waste (T.299 L-1 to L-14), and the last time he could remember being dispatched to go onto somebody's premises to physically gather debris or garbage and remove it was in May or June, two or three months before the hearing. (T.299 L-10 to L-19).

Mr. Robertson's memory of specific haul projects of the type proposed to be served by Trash Hustlers is also fairly thin, Mr. Robertson referred to a file containing forms that reported special calls. However, stated that this file did not contain all the requests for unscheduled or on-call service. (T.369 L-17 to L-24). In fact, Mr. Robertson testified that Exhibit 19, "Special Haul Request", only originated in the last year. (T.366 L-12 to L-20).

Formal documentation quantifying Mr. Robertson's claim is absent from the record. Counsel for Yakima Waste System asked Mr. Boster if he had had an occasion to look at Yakima Waste System's "daily log of service requests for service not involving container or drop box". (T.256, L-6 to L-8). However, no evidence was ever submitted indicating that Yakima Waste Systems had a daily log of service requests for service not involving a container or drop box. In fact, according to

Mr. Robertson, the primary record reflecting the delivery of service that Trash Hustlers desires to provide would be the customer's bill. (T.368 L-5 to L-15). But no copy of any bill or summary of bills was ever offered to quantify the actual historical frequency with which this type of service is provided. In short, the testimony of the representatives of Yakima Waste Systems was long on generalities, but short on specifics. Only Yakima Waste Systems would have specifics indicating that the company has satisfactorily performed over a period of time the type of service that Trash Hustlers desires to perform. Absent such information, the Commission should give weight to the testimony of Mr. Boster and the Yakima area businessmen.

#### **IV. TRASH HUSTLERS IS CAPABLE OF PERFORMING THE SERVICES FOR WHICH IT SEEKS A PERMIT**

There is a considerable difference between the intended initial capitalization of Trash Hustlers (\$40,000), and the significantly larger capitalization of Yakima Waste Systems, much of which is devoted to regularly scheduled commercial and residential service. However, there was no significant dispute that Trash Hustlers is capable of performing the type of service for which it is seeking permit authority. The principle member of Trash Hustlers is Mr. Anthony J. DiTommaso. Mr. DiTommaso also owns 75% of DiTommaso Brother's LLC, which presently holds on intrastate common carrier permit. (T.63 L-16 to T.65 L-3.) Mr. DiTommaso has experience in the trash hauling business, since 1949. He was the owner of DiTommaso Brothers Garbage Service, until he sold it for health reasons to the holder of permit G-89, which is now Yakima Waste Systems. (T.26-28). The record evidences that Trash Hustlers is fully capable of providing service for which it is seeking a permit. In fact, it would be an enhancement to the public for Trash Hustlers to receive this permit, because Mr. DiTommaso presently offers service pertaining to recyclable materials under an existing permit, but is not authorized to haul other items disposed of by the public. It would enhance public convenience if Trash Hustlers could dispose of all the solid waste on a customer's



premise. Additionally, witnesses Puccinelli, Buchanan, Owens and Nash all testified they would consider using the service of Trash Hustlers.

## **V. SUMMARY**

Yakima Waste Systems has unsatisfactorily performed the type of services proposed by Trash Hustlers. The record indicates that Yakima Waste Systems either did not provide these services, at least prior to the departure of Mr. Boster from their employment in October, 1999, or provides them sporadically. Businessmen located in the area served by Yakima Waste Systems, sought and obtained services from other carriers, who may or may not have permits. However, notwithstanding the fact that these businessmen had a need for this type of service, and they were seeking somebody to provide it, not until after Trash Hustlers filed their application did these businessmen become aware of the fact that Yakima Waste Systems provided this service. In summary, Yakima Waste Systems has done an unsatisfactory job of making known to the public and available to the public on-call clean-up services.

Trash Hustlers has proved that it is capable of providing this service. Potential customers testified that they would be willing to consider using Trash Hustlers for their needs, and that it would be an enhancement in Yakima County to have competition for this type of service.

Based on the foregoing, and the record in this proceeding, the Commission should grant to Trash Hustlers a permit in accordance with the application.

**RESPECTFULLY SUBMITTED** this 21st, day of September, 2000.

PAINE, HAMBLÉN, COFFIN,  
BROOKE & MILLER LLP

By: \_\_\_\_\_  
R. BLAIR STRONG  
Attorney for Trash Hustlers, LLC

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that, pursuant to WAC 480-09-120(2)(a), I have caused this day to be served the original plus nineteen (19) copies, by FEDEX, of the foregoing **POST-HEARING BRIEF OF TRASH HUSTLERS, LLC** on Carole Washburn, Executive Secretary for the Washington Utilities & Transportation Commission for filing and have served a copy by First Class U.S. Mail postage duly prepaid thereon, upon each person designated on the following service list.

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**DATED** at Spokane, Washington this 21st day of September, 2000.

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