

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

In the Matter of Determining the
Proper Carrier Classification of, and
Complaint
for Penalties Against

SEAN SMITH

DOCKET TG-190488

ORDER 02

INITIAL ORDER CLASSIFYING
RESPONDENT AS SOLID WASTE
COLLECTION COMPANY; ORDERING
RESPONDENT TO CEASE AND DESIST;
IMPOSING PENALTIES; DEFAULT
ORDER

BACKGROUND

Synopsis. *This is an Administrative Law Judge's Initial Order that is not effective unless approved or allowed to become effective as described in the notice at the end of this Order. If this Initial Order becomes final, the Washington Utilities and Transportation Commission (Commission) will find Sean Smith (Smith or Company) in default for failing to appear at the hearing. In addition, if this Initial Order becomes final, Smith will be classified as a solid waste collection company, assessed a financial penalty in the amount of \$2,000 for two (2) violations of RCW 81.77.040, and required to cease and desist from operating as a solid waste collection company without first obtaining a certificate from the Commission.*

- 1 **Nature of Proceeding.** The Commission initiated this special proceeding to determine if Mr. Smith has engaged, and continues to engage, in unlawful operations without first obtaining a solid waste collection company certificate.
- 2 **Procedural History.** On October 2, 2019, the Commission entered Order 01, Order Instituting Special Proceeding; Complaint Seeking to Impose Penalties; and Notice of Mandatory Appearance at Hearing, pursuant to RCW 81.04.510, initiating this docket on its own motion. The Complaint alleges that Smith violated RCW 81.77.040 by:
 - (1) offering on at least one occasion to provide solid waste collection service in the state of Washington; and
 - (2) advertising on at least one occasion to provide solid waste collection services within the state of Washington

without having a certificate required for such operations. On the same date, the Commission issued a *Subpoena and Subpoena Duces Tecum For Production of Documents* (Subpoenas) to the Company commanding Smith to appear before the Commission at a special proceeding scheduled to convene at 9:00 a.m. on November 25, 2019, in the Commission's offices at 621 Woodland Square Loop S.E., Lacey, Washington, and to bring the documents specified in the *Subpoenas*.

3 On October 20, 2019, the Commission personally served (via legal messenger) the Complaint and Order Instituting Special Proceeding and Subpoenas on Sean Smith in Post Falls, Idaho.

4 **Hearing.** On November 25, 2019, the hearing convened as scheduled in Lacey, Washington, before Administrative Law Judge Rayne Pearson.

5 RCW 34.05.440(2) allows the presiding officer discretion to enter a "default or other dispositive order" if a party fails to appear at the hearing. Based on Smith's failure to appear or otherwise comply with the Commission's subpoenas, the Administrative Law Judge granted Commission Staff's request to enter a default order and to allow for presentation of its case.

6 Commission Staff presented the testimony of one witness, Kathryn McPherson. Commission Staff provided a brief summary oral argument at the close of the hearing.

7 **Initial Order.** The Commission finds Smith in default pursuant to RCW 34.05.440(2) and WAC 480-07-450(1). The Commission also finds that Smith is unlawfully operating following the cancellation of its solid waste collection company certificate. Further, the Commission orders Smith to pay a \$2,000 penalty for two (2) violations of RCW 81.77.040. Finally, the Commission orders Smith to cease and desist from future unauthorized operations.

8 **Appearances.** Kathryn McPherson, Compliance Investigator, Lacey, Washington, represents Commission Staff.

DISCUSSION AND DECISION

A. Default

9 The Complaint and Order Instituting Special Proceeding includes a notice that any party who fails to attend or participate in the hearing may be held in default in accordance with the terms of RCW 34.05.440 and WAC 480-07-450. RCW 34.05.440(2) provides: "If a party fails to attend or participate in a hearing or other stage of an adjudicative

proceeding ... the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.” WAC 480-07-450(1) provides that that the Commission may find a party in default if the party fails to appear at the time and place set for a hearing.

10 The Subpoena includes language ordering Smith to appear for the hearing and produce specified documents in compliance with subpoena powers granted to the Commission in RCW 34.05.446 and RCW 81.04.510.

11 At the time of the hearing, the Commission had served Smith with the Complaint and Order Instituting Special Proceeding and Subpoenas by personal service upon Sean Smith.

12 **Decision.** Smith was properly and legally served with the Complaint and Order Instituting Special Proceeding and Subpoenas and provided due and proper notice of the November 25, 2019, hearing. Smith did not appear at the hearing and is hereby held in default. Further, Smith did not comply with the Subpoenas; the Company failed to appear and also failed to produce or otherwise provide any of the specified documents.

13 WAC 480-07-450(2) states: “A party who is dismissed from a proceeding or found in default may contest the order of dismissal or default by written motion filed within ten days after service of the order. A dismissed party found in default may request that the order be vacated and, if the order is dispositive of the proceeding, that the proceeding be reopened for further process.” A notice appearing at the end of this order provides instructions for filing such a notice with the Commission.

B. Operating Unlawfully as a Solid Waste Collection Company without a Certificate.

14 **Applicable Law.** RCW 81.77.010(7) defines “solid waste collection company” as:

every person or his or her lessees, receivers, or trustees, owning, controlling, operating, or managing vehicles used in the business of transporting solid waste for collection or disposal, or both, for compensation.

15 RCW 70.95.030(23) defines “solid waste handling” as:

the management, storage, collection, transportation, treatment, utilization, processing, and final disposal of solid wastes, including the recovery and recycling of materials from solid wastes, the recovery of energy resources

from solid wastes or the conversion of the energy in solid wastes to more useful forms or combinations thereof.

16 RCW 81.77.040 defines “conduct any operations” as:

Operating for the hauling of solid waste for compensation includes advertising, soliciting, offering, or entering into an agreement to provide that service.

17 WAC 480.70.081 requires a person to have a certificate of public convenience and necessity from the Commission before operating as a solid waste collection company in the state of Washington. Upon proof of unauthorized operations, RCW 81.04.510 authorizes the Commission to order the non-certificated company to cease and desist its activities. Additionally, RCW 81.04.110 authorizes the Commission to file a complaint on its own motion setting forth any act or omission by a company that violates any law, order, or rule of the Commission.

18 RCW 81.04.380 subjects persons who conduct operations as a solid waste collection company in violation of RCW 81.77.040 to a penalty of up to \$1,000 for each violation.

19 In a proceeding initiated under RCW 81.04.510, the responding company has the burden of proving that its alleged operations are not subject to the provisions of RCW 81.77.040.

20 If the Company is found to be operating unlawfully as a solid waste collection company, the Commission is authorized and directed to enter an order requiring the corporation to cease and desist activities subject to regulation under Title 81.

21 The evidence in this matter unquestionably demonstrates that Smith has offered and advertised to engage in the business of a solid waste collection company first obtaining a certificate.

22 Kathryn McPherson, a compliance investigator with the Commission, testified concerning her investigation into Smith’s operations and business practices. Investigator McPherson prepared a declaration summarizing her investigation, with appendices documenting her findings.¹

23 **Decision.** By failing to appear at the hearing held on November 25, 2019, Smith has also failed to meet the burden of proof that the Company’s business operations are not subject to the provisions of RCW 81.77.040. The evidence presented by Commission Staff

¹ See Exhibit 1.

through exhibits and witness testimony establishes that Smith has unlawfully conducted operations as a solid waste collection company without a certificate.

FINDINGS AND CONCLUSIONS

- 24 (1) The Commission is an agency of the state of Washington vested by statute with authority to regulate persons engaged in the business of operating as a solid waste collection company for compensation over public roads in Washington.
- 25 (2) The Commission has jurisdiction over the subject matter of this proceeding and over Smith.
- 26 (3) On at least one occasion, Smith offered to conduct operations without first obtaining a certificate from the Commission, in violation of RCW 81.77.040.
- 27 4) On at least one occasion, Smith advertised to conduct operations prior to obtaining a certificate from the Commission, in violation of RCW 81.77.040.
- 28 (5) Pursuant to RCW 34.05.440(2), Smith is held in default for failing to appear at the November 25, 2019, hearing and for failing to comply with the Subpoenas properly served.
- 29 (6) Smith is classified as a solid waste collection company within the state of Washington, pursuant to RCW 81.77.040 and WAC 480-70.081.
- 30 (7) The Commission is directed by RCW 81.04.510 to order Smith to cease and desist from conducting operations requiring certificate authority unless or until the required authority is obtained from the Commission.

ORDER

THE COMMISSION ORDERS:

- 31 (1) Sean Smith is held in default. Should Sean Smith fail to respond to this Order by filing a written motion within ten (10) days requesting that the order be vacated pursuant to WAC 480-07-450(2), the default in this proceeding shall remain in place.
- 32 (2) Sean Smith is classified as a solid waste collection company within the state of Washington.

- 33 (3) Sean Smith is ordered to immediately cease and desist operations as a solid waste
collection company within the state of Washington.
- 34 (4) Sean Smith is assessed a penalty of \$2,000, due and payable immediately.
- 35 (5) The Commission retains jurisdiction over the subject matter and the parties to this
proceeding to effectuate the terms of this Order.

DATED at Lacey, Washington, and effective November 25, 2019.



RAYNE PEARSON

Administrative Law Judge

NOTICE TO PARTIES

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

WAC 480-07-450(2) states that a party held in default has 10 days after service of a default order to file a written motion requesting the order be vacated and the proceeding reopened for further process. The party held in default must state the grounds relied upon, including its reasons for failing to appear.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Review*. **A party held in default must file a written motion requesting the order be vacated pursuant to WAC 480-07-450(2) within 10 days after service in order to have the Commission consider a Petition for Administrative Review from that party.** WAC 480-07-825(2)(b) identifies what you must include in any Petition as well as other requirements for a Petition. WAC 480-07-825(2)(c) states that any party may file a response to a Petition within 10 days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will give other parties in the proceeding an opportunity to respond to a motion to reopen the record, unless the Commission determines that it can rule on the motion without hearing from the other parties.

WAC 480-07-825(1) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

Any Petition or Response must be electronically filed through the Commission's web portal as required by WAC 480-07-140(5).