

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE WASHINGTON STATE UTILITIES
AND TRANSPORTATION COMMISSION

In the Matter of the Application of
JAMMIE’S ENVIRONMENTAL, INC.
For Authority to Operate as a Solid Waste
Collection Company in Washington

DOCKET TG-220243

BASIN DISPOSAL, INC.

Complainant,

v.

JAMMIE’S ENVIRONMENTAL, INC.

Respondent.

DOCKET TG-220215

BASIN DISPOSAL, INC.’S MOTION TO
STRIKE PORTIONS OF PREFILED
TESTIMONY OF JAMMIE SCOTT,
BRIAN WILHELM, KURT THORNE,
AND SKYLER RACHFORD

1. Basin Disposal, Inc. (“Basin Disposal” “BDI”) files this Motion to Strike under WAC 480-07-375(1)(d) for an order striking portions of the prefiled testimony of Jammie Scott, Exhibit JDS-17T, Brian Wilhem, Exhibit BW1T, Kurt Thorne, Exhibit KT-1T, and Skyler Rachford, Exhibit No. 01T [sic]. The testimony at issue in this motion is submitted on behalf of Packaging Corporation of America (“PCA”) and Jammie’s Environmental, Inc. (“Jammie’s” or “JEF”) and expressly states its purpose is to support Jammie’s certificate application. Although the witnesses at issue collectively also respond to BDI’s testimony in support of its

1 complaint against JEI for providing solid waste collection service in violation of RCW
2 81.77.040, the new or additional testimony in support of Jammie’s application should have
3 been supplied as direct testimony pursuant to the Commission’s procedural schedule in Order
4 01, as revised by the Errata to Order 01, issued on August 5, 2022. This motion is also
5 submitted in connection with BDI’s Motion for Partial Dismissal. If the Motion to Dismiss
6 addressing deficiencies in Jammie’s direct case is granted, the Commission’s order would also
7 render the untimely and out-of-sequence testimony at issue here moot.

8 **I. INTRODUCTION**

9 2. As addressed in greater detail below, Jammie’s and Packaging Corporation of America
10 (“PCA”) attempted to violate BDI’s procedural due process rights by filing significant
11 evidence in support of JEI’s application for a certificate to provide solid waste collection in the
12 testimonial response phase. These mutual efforts appear orchestrated to preclude BDI from
13 defending its existing certificate rights by circumventing any form of substantive evidentiary
14 response by BDI. However, due to the ongoing infringement of BDI’s certificate rights by JEI,
15 any further delay in adjudicating BDI’s formal complaint against Jammie’s will continue to
16 cause it irreparable harm. Thus, the appropriate remedy is to strike all of the identified out-of-
17 sequence testimony, which was expressly offered to support JEI’s application.

18 **II. STATEMENT OF FACTS**

19 3. On March 29, 2022, BDI filed a formal complaint against JEI in Docket TG-220215,
20 asserting that Jammie’s was providing solid waste collection service to PCA at a facility in
21 unincorporated Walla Walla County near Wallula, Washington by its regular transportation of
22 solid waste for disposal over the public roadways for compensation.

23 4. On April 1, 2022, in Docket TG-220243, JEI filed an application for authority to
24 provide solid waste collection service as a Class C carrier, subject to certain certificate
25 restrictions, for the territory defined as PCA’s facilities near Wallula, Washington.

1 5. On April 20, 2022, BDI filed a protest to JEI’s application.

2 6. Then, on May 18, 2022, PCA filed a petition to intervene.¹ There, through its counsel,
3 PCA argued in favor of its intervenor status, representing that “PCA’s participation as an
4 intervenor in this action will not unreasonably broaden the issues, burden the record, or delay
5 the proceeding.”² PCA also made clear that its “position in this action is expected to be in
6 support of the [sic] Jammies.”³

7 7. The Commission held a prehearing conference (“PHC”) on May 24, 2022. At the PHC,
8 on its own motion, the Commission consolidated dockets TG-22-0245 and TG-220215 for
9 hearing. The Commission also established a procedural schedule in Order 01, originally issued
10 on June 8, 2022. The original procedural schedule require “Applicant Direct Testimony and
11 Exhibits” to be filed by September 16, 2022 and “Response Testimony from Protestants and
12 Intervenors” on October 14, 2022.⁴

13 8. Following the issuance of Order 01, counsel for JEI approached counsel for BDI to
14 seek clarification as to whether Order 01 should require BDI to submit direct evidence in
15 support of its Complaint on September 16, 2022. This was concerning because if BDI was not
16 required to submit its case-in-chief on September 16, 2022, JEI would not be permitted due
17 process through an opportunity to respond. BDI shared JEI’s concerns and readily agreed; the
18 parties should both be required to make their case-in-chief in the first round of testimony and
19 then be provided an opportunity to respond to the other’s direct. Thus, by agreement of the JEI
20 and BDI, counsel for JEI emailed the Administrative Law Judge on July 22, 2022.⁵ There,
21 though its counsel, JEI relayed JEI and BDI’s concern that the procedural schedule require
22

23 _____
24 ¹ The Washington Refuse and Recycling Association also moved to intervene, but because it has not filed
evidence in this proceeding is not at issue in this Motion.

25 ² Petition to Intervene of Packaging Corporation of America, ¶ 11.

³ *Id.* at ¶ 12.

⁴ Order 01, Appendix B, Procedural Schedule.

⁵ Exhibit 1.

1 direct testimony on each of the consolidated proceedings on September 16, 2022 with response
2 testimony in both proceedings due on October 14, 2022.⁶ No party requested that the response
3 phase of testimony be unlimited in scope. Instead, as expressed by JEI's counsel's email, the
4 parties were concerned that due process be afforded through an appropriate opportunity to
5 respond to evidence that should have been included in the direct phase of testimony.

6 9. In response to the July 22, 2022 email from JEI's counsel, on August 5, 2022, the
7 Commission issued an Errata to Order 01, which amended the procedural schedule to make
8 clear that the direct case for the Applicant and Complainant were both due on September 16,
9 2022 and that the responses to these testimonies were due from all parties on October 14, 2022.

10 10. On September 16, 2022, JEI filed its direct case in support of its application, consisting
11 of the prefiled testimonies of Jammie Scott and Owen Scott and supporting exhibits. JEI did
12 not file shipper support testimony at that time to which BDI would have an opportunity to
13 respond. As BDI addressed in its pending Motion for Partial Dismissal and incorporated by
14 reference here, JEI failed to support its case-in-chief with particular evidentiary showings,
15 including requisite testimony of a supporting shipper.⁷

16 11. That same day, BDI filed its direct case in support of its complaint against Jammie's.
17 There BDI supplied all of the evidence upon which it relies in support of its formal complaint
18 against JEI, providing JEI and the intervenors an opportunity to respond.

19 12. On October 14, 2022, JEI and PCA filed prefiled testimony which in part purports to
20 respond to the initial testimony.⁸ However, as addressed below, each witness expressly
21 indicates the intent of their testimony is to present issues on which JEI carried the burden of
22

23 _____
⁶ *Id.*

24 ⁷ See Order M.V.C. 1443, *In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-*
25 *Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection*, App. No. D-2444 (May
1984)(concluding that independent witnesses must support an application through testimony regarding the need
for service).

⁸ Exhibits JDS-17T, KT-1T, BW-1T and Exhibit No. 01T [sic].

1 proof in its application. As a whole, the prefiled testimony of Kurt Thorne, Brian Wilhelm,
2 and Skyler Rachford for PCA address for the first time in this proceeding PCA’s complaints as
3 to how OCC Reject waste was “managed” at PCA’s facility and the various reasons why they
4 believe Basin will not provide service to the Commission’s satisfaction, an articulated factor
5 for evaluation of solid waste certificate applications under RCW 81.77.040, and generally the
6 reasons why Jammie’s application in their view should be granted.

7 13. Also on October 14, 2022, JEI filed additional prefiled testimony of Jammie Scott,
8 Exhibit JDS-17T. Ms. Scott also offered additional testimony in support of JEI’s application,
9 including multiple new opinions regarding the quality of BDI’s service to PCA as well as
10 BDI’s experience and fitness to provide solid waste collection service to PCA.

11 **III. EXHIBITS**

12 14. This Motion is supported by Exhibit 1, a true and correct copy of the July 22, 2022
13 email from counsel for JEI to the Administrative Law Judge.

14 **IV. ARGUMENT**

15 15. Washington law recognizes that a certificate of public convenience and necessity is
16 property that affords its holder certain rights.⁹ Among them are: (1) the right to be free from
17 interference by persons providing service without authority, as well as the public who would
18 use such unauthorized service;¹⁰ and (2) due process rights to be given notice of any
19 complaints about the nature of the service provided and an opportunity to respond and, if
20 ordered to do so, to provide additional service, before an overlapping certificate may be
21 issued.¹¹ As it pertains to the relief requested, this motion primarily concerns the latter. Basin
22 Disposal holds Certificate G-118, which, among other procedural and substantive legal
23

24 ⁹ See *Davis & Banker v. Nickell*, 126 Wash. 421, 423, 218 P. 198, 200 (1923)(recognizing that a certificate of
25 public convenience and necessity is a franchise affording its holder certain property rights); See also RCW
81.77.0201, which expressly recognizes a certificate issued under RCW 81.77.040 is a property right.

¹⁰ See *Davis v. Clevinger*, 127 Wash. 136, 137, 219 P. 845, 845 (1923).

¹¹ *Kitsap Cnty. Transp. Co. v. Dep't of Pub. Works*, 170 Wash. 396, 404, 16 P.2d 828, 830 (1932).

1 protections, entitles it to due process, including the opportunity to respond to complaints
2 against its service, before an overlapping certificate may be granted because failure to do so
3 would diminish BDI's property rights.¹² Any alternative outcome to BDI's Motion would
4 concern the former because JEI continues to violate state law and interfere with BDI's property
5 rights by its continuing collection and transportation of solid waste from PCA. Additional
6 delay to the adjudication of Basin Disposal's complaint would only exacerbate further harm to
7 BDI.¹³

8 16. In this proceeding, PCA and JEI alike have violated implicit limitations in the
9 Commission's procedural schedule. As noted above, JEI and BDI were both concerned that
10 due process required that the party with the burden of production and persuasion (PCA with
11 respect to its application and BDI with respect to its formal complaint) present the evidence
12 supporting their direct case in the first round of testimony on September 16, 2022. By
13 requiring that the case-in-chief be addressed in the first round of testimony, each party would
14 have an opportunity to respond to the evidence on October 14, 2022.

15 17. As noted, PCA and JEI have fundamentally violated these limitations by addressing
16 topics on which JEI carried both the burden of production and the burden of persuasion in their
17 respective response testimonies filed October 14, 2022, rather than in support of JEI's direct
18 case on September 16, 2022. Specifically, as the applicant, Jammie's carries the burden of
19 production to supply shipper support testimony during its case-in-chief.¹⁴

20 18. BDI anticipates that Jammie's and PCA will now belatedly argue that they were merely
21 responding to Charlie Dietrich, or that PCA was simply complying with the procedural
22

23 ¹² See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)(constitutional
24 procedural due process rights prohibit the state from depriving a citizen of a property right without first providing
25 procedural due process including an opportunity to be heard).

¹³ See *Chelan Transfer Co. v. Foote*, 130 Wash. 511, 228 P. 297, 298 (1924)(reiterating holding that a certificate-
holder is entitled to be free from unlawful interference with its certificate rights).

¹⁴ Order M.V.C. 1443, *In re Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap
Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection*, App. No. D-2444 (May 1984).

1 schedule's deadline for intervenor response testimony. Those or similar arguments would only
2 demonstrate that the Commission has no reason to consider PCA's testimony with respect to
3 Jammie's application; if they truly respond only to BDI's case-in-chief on its complaint, they
4 cannot be considered in determining whether JEI met its burden of production or persuasion on
5 its application. Yet the procedural schedule's response deadlines do not exist in a vacuum to
6 permit a witness whose testimony is a requisite element of the applicant's case-in-chief to file
7 out of sequence thereby denying the incumbent carrier due process. Had PCA and JEI
8 addressed these topics on September 16, 2022, BDI would have been afforded an opportunity
9 to respond to any complaints or criticisms regarding the service it provided to PCA in its
10 response testimony on October 14, and to correct the numerous inaccurate assertions and
11 misstatements made in those prefiled testimonies. Instead, PCA and JEI's actions appear
12 intended to prevent an effective response to correct the record.

13 19. The Commission has previously concluded "[p]arties who do not comply with
14 procedural requirements and deadlines do so at their own peril... Accordingly, the
15 Commission will act to strike evidence that does not comply with established procedures and
16 unfairly prejudices other parties."¹⁵ Thus, in similar circumstances the Commission's remedy
17 has been to strike testimony that was similarly offered out-of-sequence. For example recently,
18 in *City of Spokane v. Union Pacific Railroad Company*, Dkt. TR-210814 and TR-210809
19 (*consolidated*), Order 02 (May 5, 2022) the Commission struck testimony that was offered in a
20 rebuttal phase but which responded to testimony offered on direct, thus cutting off any
21 opportunity to respond. There, the Commission concluded "[the responding party] should not
22 be permitted to file a second round of Response Testimony in the guise of Rebuttal Testimony,
23 depriving [the moving party] of an opportunity to respond prior to the evidentiary hearing."¹⁶

24
25 ¹⁵ *In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport and Termination*, Sixth Supplemental Order, Dkt. UT-003013, ¶¶ 18-19 (Aug. 2000).

¹⁶ *City of Spokane v. Union Pacific Railroad Company*, Order 02, ¶ 13.

20. Here, PCA and JEI have similarly filed direct testimony in the response phase, depriving BDI of an opportunity to respond. Consequently, BDI requests the Commission strike the following pages and lines:¹⁷

Exhibit BW-1T, Prefiled Response Testimony of Brian Wilhelm:	
Page and line	Basis
Starting on page 4, from “Q. Why did PCA intervene” through the second line of page 5.	This testimony addresses PCA’s support for JEI’s application and whether BDI provided satisfactory service and is not a response to BDI’s prefiled testimony in support of its formal complaint. JEI should have solicited PCA as the shipper to file this testimony in support of JEI’s application during Jammie’s direct testimony because that is a minimum requirement for establishing that an application is in the public interest. By filing instead in the response phase, BDI is deprived of an opportunity to respond to PCA’s testimony addressing whether Basin provided satisfactory service.
Page 6, starting at the first line, “BDI’s Service,” through the end of page 7.	As expressly indicated by the header on the top of page 6, this testimony is intended to address BDI’s service, which is a statutory factor on which the applicant carries the burden of proof. JEI should have solicited and included this testimony in its direct case. PCA’s status as an intervenor does not obviate the requirement that this testimony be offered in the direct phase of testimony.
Page 8, starting from “Q. What is BDI’s typical way of managing...” through the end of page 17.	Again, this testimony expressly provides out-of-sequence support for JEI’s application by addressing statutory satisfactory service standards and does not purport to address the issues raised in Basin’s formal complaint against Jammie’s.
Page 23, starting with “Q. After the visit, what was your understanding...” through the end of page 24.	The first full question and answer on page 23 are impermissible hearsay regarding a purported informal staff opinion and are also irrelevant to whether JEI’s service violates state law. <i>In re Determining the Proper</i>

¹⁷ BDI would also note that PCA failed to comply with form requirements in WAC 480-07-460(2)(c) by failing to include numbered lines on each page to facilitate transcript or exhibit references.

	<p><i>Carrier Classification of Ghostruck, Inc.</i>, Dkt. TV-161308, Order 05, ¶ 15 (May 2017).</p> <p>Mr. Wilhelm’s conclusion on p. 23-24 addresses Jammie’s application and does not respond to issues in Basin’s complaint.</p>
--	---

Exhibit KT-1T, Prefiled Response Testimony of Kurt Thorne

Page and line	Basis
Page 3, the words “PCA’s problems with BDI” and page 5, commencing with “Q. As the Mill Manager did you...” through the end of page 10.	Mr. Thorne is not here responding to Charlie Dietrich’s testimony in support of BDI’s complaint. He is offering testimony in support of JEI’s application and critiques of BDI’s service in the response phase, depriving BDI of an opportunity to respond.

Exhibit No. 01T [sic], Prefiled Response Testimony of Skyler Rachford

Page and line	Basis
Page 3, starting with “Q. Why are you testifying?” through page 4, concluding with the last line of the first answer “Jammie’s.”	As described in his answer to the question “why are you testifying,” Mr. Rachford is testifying in support of JEI’s application and to describe “BDI’s performance and ability to handle and dispose of wastes generated from the OCC Plant...” All of Mr. Rachford’s testimony on the topic of whether BDI provides service to the Commission’s satisfaction should have been provided in support of JEI’s direct testimony at a time when BDI would have been provided an opportunity to respond.
Page 12; “The fact that Mr. Dietrich describes in his testimony OCC Rejects as normal municipal waste shows his lack of understanding and overall knowledge of the waste stream.”	Mr. Rachford’s opinion characterizing Charlie Dietrich’s knowledge and experience does not relate to the issues raised in BDI’s complaint or JEI’s defenses; this relates to whether BDI is providing satisfactory service and any such testimony should have been limited to direct testimony rather than response.
Page 13, commencing with “BDI’s Service” through page 17, concluding with the photo of Exhibit SR-09.	This testimony addresses application standards concerning satisfactory service and does not respond in any way to the subject of Basin’s direct testimony.
Page 18, commencing with “Q. After PCA communicated its dissatisfaction...” through	Mr. Rachford is here addressing application standards, is not addressing BDI’s formal

1	page 23, concluding with the last line of the first answer “solutions.”	complaint in any way and is not responding to BDI’s testimony.
2		
3	Page 23, commencing with “Q. Charlie Dietrich testified...” and concluding on the last line of the answer to that question: “point BDI could never catch up.”	This answer purports to address the testimony of Charlie Dietrich, but instead merely uses his testimony to pivot and then address satisfactory service topics that are not responsive to BDI’s testimony in support of its complaint against Jammie’s.
4		
5		
6	Page 23, commencing with “Q. Were there any safety or environmental...” through page 26, concluding with Exh. SR-06.	This testimony addresses application standards under RCW 81.77.040 regarding the incumbent’s satisfactory service rather than issues raised in BDI’s formal complaint and fails to respond to BDI’s direct testimony.
7		
8		
9	Page 27, commencing on the first line with “It is also important to recognize that building a bunker... through page 29, concluding with the last sentence of the first answer: “continue using Jammie’s...”	This testimony addresses satisfactory service and JEI’s application. Although it is initially responsive to Charlie Dietrich’s testimony, it then addresses PCA’s version of events that it should have been discussed in the direct phase of testimony in support of PCA’s position.
10		
11		
12		
13	Page 31, commencing with the first line of the answer to the second question “By July 2021, BDI was still attempting to dispose of the OCC Rejects...” through the sentence “BDI simply could not keep up and their containers were not working.”	This is yet more cumulative testimony addressing satisfactory service and topics in support of JEI’s application. This is not response testimony and could have been offered by Jammie’s in its direct case.
14		
15		
16	Page 33, commencing with the first full question: ‘Q. How did Jammie’s service differ from BDI’s service?’ through the end of page 37.	This is not response testimony and could have been offered by Jammie’s in its direct case rather than at a time when BDI could not respond.
17		
18		
19	Exhibit JDS-17T, Prefiled Response Testimony of Jammie D. Scott	
20	Page and line	Basis
21	1: 15 through 18, commencing with the words “BDI’s refusal...”	Ms. Scott is not addressing issues raised by Basin’s complaint, but is doubling down on her-ill-informed legal opinions regarding whether Basin is provided solid waste collection service to the Commission’s satisfaction. Any testimony on that topic should have been addressed only in JEI’s direct testimony when BDI would have an opportunity to respond to it.
22		
23		
24		
25	2: 19 – 21 (concluding with the words “not	As expressly acknowledged in her testimony,

1 2 3 4	provide satisfactory service to PCA.”) 3: 2 – 5. (commencing with the words “Overall, I reiterate that if the Commission decides...”	this is testimony supporting Jammie’s application; thus, it is not appropriate response testimony regarding the formal complaint. This is additional direct testimony regarding Ms. Scott legal opinions characterizing what evidence supports JEI’s certificate application.
5 6 7	3: 10 – 20.	The testimony again addresses Ms. Scott’s legal opinions regarding what constitutes satisfactory service in support of JEI’s application.
8 9	4: 10 – 16 (commencing with the words “BDI’s seeming...”	This additional opinion testimony once again addresses factors to be considered only in JEI’s application case rather than BDI’s complaint.
10 11 12	7: 12 – 8: 10.	The question and answer here are expressly addressing application standards of satisfactory service rather than BDI’s complaint against JEI.
13 14 15 16 17	10: 10 – 15.	Ms. Scott’s disingenuous speculative statements and conjecture offer no evidentiary value and appear to be nothing more than an attempt to attack BDI at a time when BDI cannot respond through testimony. Her statements do not respond to the testimony of BDI in any way and do not relate to whether JEI’s service is truly incidental under Commission rules.

V. CONCLUSION

21. When PCA sought to intervene in this proceeding it represented that it would not seek to unreasonably broaden the scope of the proceeding, and more importantly it promised that its conduct would not delay the proceeding.¹⁸ PCA’s untimely testimony in support of Jammie’s application should be stricken from the record because there is insufficient time between now and the November 8, 2022 deadline for Cross-Examination Exhibits and Witness Lists for BDI

¹⁸ Petition to Intervene of PCA.

1 to engage in additional discovery of PCA and prepare and file any additional responsive
2 testimony. Both PCA's and JEI's out-of-sequence testimony now threaten to delay the
3 conclusion of the proceedings. Meanwhile, JEI continues to collect and transport solid waste
4 over the public highways for compensation from PCA's facility without a certificate from the
5 Commission in violation of state law, causing both harm to the public and to BDI. Thus, rather
6 than authorizing any additional delay and continued harm to BDI, and tacitly approving
7 procedural tactics which violate BDI's due process rights, the appropriate remedy is to strike
8 PCA's and JEI's untimely testimony and move forward with the hearing on November 15,
9 2022.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 DATED this 21st day of October, 2022.

2
3 /s/ Blair I. Fassburg
4 Blair I. Fassburg, WSBA #41207
5 Dave Wiley, WSBA #08614
6 Attorneys for Protestant/Complainant
7 WILLIAMS, KASTNER & GIBBS PLLC
8 601 Union Street, Suite 4100
9 Seattle, WA 98101-2380
10 Telephone: (206) 628-6600
11 Fax: (206) 628-6611
12 Email: bfassburg@williamskastner.com
13 Email: dwiley@williamskastner.com
14
15
16
17
18
19
20
21
22
23
24
25