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BEFORE THE
WASHINGTON 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,

DOCKET TG-220215

v.
JAMMIE'S ENVIRONMENTAL, INC.,
Respondent.

JAMMIE'S ENVIRONMENTAL, INC.'S
RESPONSE TO BASIN DISPOSAL,
INC.'S MOTION FOR PARTIAL
DISMISSAL

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INTRODUCTION

1. Basin Disposal, Inc. (“BDI”) is playing “gotcha” litigation by trying to dismiss Jammie’s Environmental, Inc.’s (“Jammie’s”) Application when there are significant, glaring questions about BDI’s service to Packaging Corporation of America (“PCA”). Indeed, after months of discovery and where all three parties have filed prefiled direct and response testimonies and exhibits on the merits of the case, BDI has filed a motion to dismiss Jammie’s Application following a procedural process never seen before.

2. BDI has decided, notwithstanding the only rule governing motions to dismiss, WAC 480-07-380(1), that BDI can file a motion to dismiss *28 days after* the parties filed direct testimony based on the unfounded premise that Jammie’s case-in-chief completed on that date. BDI’s process is not found anywhere in rule or Commission precedent. Meanwhile, BDI’s Motion to Dismiss would withhold evidence from the Commission filed by Jammie’s and PCA relating to BDI’s unsatisfactory service to PCA, PCA’s subsequent termination of BDI as its hauler of OCC Rejects, and Jammie’s fitness and support by PCA to provide the OCC Rejects service to PCA. BDI’s Motion to Dismiss should be denied on several independent bases:

3. First, BDI’s Motion to Dismiss violates the procedural rules for filing an untimely motion to dismiss under WAC 480-07-380(1).

4. Second, the Commission is charged with investigating and making factual determinations on the factors listed in RCW 81.77.040, but this provision cannot be read in

1 isolation of the Commission’s implementing regulations found in Chapter 480-70 WAC, and
2
3 specifically WAC 480-70-091. These regulations prescribe the requirements for applying for
4
5 a solid waste certificate of public convenience and necessity under RCW 81.77.040, and
6
7 along with the Commission’s application form itself, determine the specific requirements
8
9 that the Commission has determined will support this factual finding. Jammie’s followed
10
11 these rules when submitting its Application and BDI does not contend otherwise.
12
13

14 5. Third, Jammie’s Application and the testimony and exhibits filed in this case
15
16 present sufficient evidence relating to Jammie’s financial fitness and the economic
17
18 feasibility of Jammie’s OCC Rejects service to PCA. If the Commission desires additional
19
20 information, the proper remedy is to allow Jammie’s the opportunity to provide that
21
22 information until the close of Jammie’s case-in-chief at the hearing.
23
24

25 6. Fourth, a statement from a shipper is not required by RCW 81.77.040 or
26
27 Chapter 480-70 WAC. Regardless, given the extensive evidence filed by PCA on October
28
29 14, 2022, and independent evidence submitted by Jammie’s and BDI, there can be no
30
31 dispute over PCA’s need or desire for Jammie’s to provide the OCC Rejects service to PCA.
32
33

34 7. Finally, there is no “irreconcilable conflict” between Jammie’s proposal to
35
36 haul OCC Rejects and the definition of Municipal Solid Waste. BDI’s reading of Jammie’s
37
38 Application and the Commission’s Docket Notice is forced at best, as both are clear about
39
40 the waste stream at issue: OCC Rejects.
41
42

43 8. BDI’s last-ditch effort to alter the hearing so it can present evidence on its
44
45 Complaint but foreclosing Jammie’s from presenting evidence supporting its Application
46
47

1 regarding of BDI's unsatisfactory service, PCA's concerns, and Jammie's fitness should be
2 denied. Jammie's is entitled to a hearing where it can present its case to the Commission.
3
4

5 COUNTERSTATEMENT OF FACTS

6
7
8 9. On February 15, 2022, Kathryn McPherson from Commission Staff emailed
9
10 Jammie Scott, President of Jammie's, and attached the Commission's form solid waste
11 certificate application and other resources for Ms. Scott to use to prepare an application to
12 the Commission.¹ This email was attached as Exh. JDS-15 but the attachments were not
13 included. The attachments are enclosed as Exhibit A to the Scott Declaration.
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18
19 10. Jammie's filed prefiled direct testimony in this case on September 16, 2022.
20
21 In that testimony, Jammie's provided an email from Kurt Thorne of PCA dated November 1,
22 2021, to Charlie Dietrich at BDI, informing Mr. Dietrich that PCA intends to use Jammie's,
23 not BDI, for the OCC Rejects service.² Mr. Thorne provided testimony in this case on behalf
24 of PCA on October 14, 2022.
25
26
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28
29

30 11. Jammie's testimony also included proposals and an example purchase order
31 from Jammie's to PCA to provide the OCC Rejects service.³
32
33

34 12. BDI filed prefiled direct testimony on September 16. In that testimony, BDI
35 attached numerous purchase orders and invoices from Jammie's to PCA.⁴
36
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43 _____
44 ¹ Declaration of Jammie Scott in Support of Jammie's Environmental, Inc.'s Response to
45 Basin Disposal, Inc.'s Motion for Partial Dismissal ("Scott Declaration"), ¶ 2.

46 ² Exh. JDS-11.

47 ³ Exh. OJS-2; Exh. OJS-3; Exh. JDS-10.

⁴ Exh. CD-6; Exh. CD-7.

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LEGAL STANDARD

13. There is one rule that addresses motions to dismiss filed before the Commission: WAC 480-07-380(1), which provides that the Commission will consider the motion using “the standards applicable to a motion made under CR 12(b)(6) and 12(c) of the Washington Superior court’s civil rules in ruling on a motion made under this subsection.”⁵ Such a motion must be brought “no later than the time the responsive pleading is due, or within twenty days after the pleading is served, whichever time is less, unless the party shows good cause for delay.”⁶

14. Washington courts grant a motion to dismiss under CR 12(b)(6) and CR 12(c) “only if it appears beyond doubt that the [nonmoving party] cannot prove any set of facts, consistent with the [pleading], justifying recovery.”⁷ A motion to dismiss “should be granted ‘sparingly and with care’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to

⁵ WAC 480-07-380(1)(a). A CR 12(b)(6) motion is a motion to dismiss for failure to state a claim upon which relief can be granted while a CR 12(c) motion is one for judgment on the pleadings. “[A]lthough generally raised at different times,” the two motions “generally raise identical issues.” *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712 (1987); *see also Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634, 128 P.3d 627 (2006) (citing *Suleiman* for this proposition).

⁶ WAC 480-07-380(1)(b).

⁷ *Hipple v. McFaddin*, 161 Wn. App. 550, 556, 255 P.3d 730 (2011) (motion to dismiss under CR 12(b)(6)); *see also Davidson v. Glenny*, 14 Wn. App. 2d 370, 375, 470 P.3d 549 (2020) (motion for judgment on the pleadings).

1 relief.”⁸ “For the purposes of this analysis, a plaintiff’s allegations are presumed to be true
2
3 and a court may consider hypothetical facts not included in the record.”⁹
4

5
6 15. “Because the legal standard is whether any state of facts supporting a valid
7
8 claim can be conceived, there can be no prejudice or unfairness to a defendant if a court
9
10 considers specific allegations of the plaintiff to aid in the evaluation of the legal sufficiency
11
12 of plaintiffs claim.”¹⁰
13

14 ARGUMENT

15
16
17 16. There are several independent reasons why BDI’s Motion to Dismiss should
18
19 be denied. First, BDI has violated the Commission’s procedural rules for filing a motion to
20
21 dismiss and instead just asks the Commission to “liberally” allow its motion. The
22
23 Commission should decline BDI’s request. Second, RCW 81.77.040 cannot be read in
24
25 isolation of the Commission’s implementing regulations found in Chapter 480-70 WAC, and
26
27 specifically WAC 480-70-091. These regulations prescribe the requirements for applying for
28
29 a solid waste certificate of public convenience and necessity under RCW 81.77.040 which
30
31 Jammie’s adhered to. Third, the evidence BDI asserts is missing under RCW 81.77.040
32
33 relating to the economic feasibility of Jammie’s proposed service to PCA is adequately set
34
35 forth in the Application or in the testimony and exhibits filed in this case. Fourth, a
36
37 statement from a shipper is not required by RCW 81.77.040 or Chapter 480-70 WAC.
38
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44 _____
45 ⁸ *Holiday Resort Cmty. Ass 'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 218, 135 P.3d
46 499 (2006) (quoting *Tenore v. AT&T Wireless Svcs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)).

⁹ *Hipple*, 161 Wn. App. at 557.

¹⁰ *Halvorson*, 89 Wn.2d at 675.

1 Regardless, given the extensive evidence filed by PCA on October 14, 2022, and
2
3 independent evidence submitted by Jammie's and BDI, there can be no dispute over PCA's
4
5 need or desire for Jammie's to provide the OCC Rejects service to PCA. Finally, BDI's
6
7 suggestion that Jammie's has somehow excluded OCC Rejects from its Application because
8
9 the definition of Municipal Solid Waste arguably includes OCC Rejects cannot be supported
10
11 by a reasonable reading of the Application.
12
13

14
15 *17.* BDI's Motion should be denied, and Jammie's Application should proceed to
16
17 hearing. To the extent the Commission identifies any defects in the Application or seeks
18
19 additional information, Jammie's should be permitted to supplement the Application.
20

21 **A. The Procedural Rules Do Not Permit BDI's Motion to Dismiss**
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23
24 *18.* BDI admits it has no right or authority to file its Motion to Dismiss but asks
25
26 the Commission in a footnote to overlook the rules and allow its Motion anyway.¹¹ The
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28 Commission should decline BDI's request, however, because BDI provides no justification
29
30 or good cause for why it was unable or unwilling to follow the procedural rules. Granting
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32 BDI's Motion to Dismiss would also prejudice Jammie's by prematurely foreclosing
33
34 Jammie's right to present its evidentiary case at hearing.
35
36

37
38 *19.* BDI claims its Motion to Dismiss was filed under to WAC 480-07-375(4)
39
40 and WAC 480-70-091(2)(c),¹² but neither rule allows for BDI's dispositive motion at this
41
42
43
44

45 ¹¹ Mot. at note 1 (noting that the deadline has expired for motions filed under WAC 480-07-
46 380(1)(a) and WAC 480-07-091(2)(c) does not provide for a motion to dismiss).

47 ¹² Mot. at 1.

1 time. As BDI correctly points out, WAC 480-07-091(2)(c) does not provide for a motion to
2
3 dismiss at all; instead, it lists several actions the Commission may take when it evaluates an
4
5 application for a certificate of public convenience and necessity.
6

7
8 20. If, on the other hand, BDI's Motion to Dismiss is filed pursuant to the only
9
10 Commission rule that does authorize such a motion, WAC 480-07-380(1), then BDI's
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12 Motion to Dismiss is untimely because under WAC 480-07-380(1)(b), a motion to dismiss
13
14 must be filed no later than the time a responsive pleading is due, or within twenty days after
15
16 the pleading is served, whichever is less, unless the party shows good cause for delay.¹³
17
18 Jammie's filed its Application on April 1, 2022, and the Commission provided notice of
19
20 such filing on April 6, 2022. Accordingly, if BDI contends that Jammie's Application
21
22 omitted necessary information and should therefore be dismissed, then BDI's Motion was
23
24 due no later than April 26, 2022. BDI has not attempted to show good cause for its delay.
25
26 Instead, BDI acknowledges the missed deadline and to avoid the rule, attempts to combine
27
28 several Commission rules, WAC 480-70-091(2)(c), WAC 480-07-380(1), and WAC 480-
29
30 07-395(4), to argue that a motion to dismiss is timely if filed any time after an applicant files
31
32 its response testimony. BDI provides no support for this procedure.
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40
41 ¹³ BDI tries to avoid the time requirement for filing a motion to dismiss under WAC 480-07-
42 380(1)(b) by suggesting it is not filing a motion under WAC 480-07-380(1)(a). Mot. at note 1. This
43 is misleading. First, even if BDI did not file its motion under WAC 480-07-380(1)(a), the time
44 requirement for filing a motion under WAC 480-07-380(1)(b) applies to all motions to dismiss.
45 Second, BDI's Motion is fundamentally a CR 12(b)(6) or 12(c) motion because it is contending that
46 Jammie's has failed to present required elements of its Application, so the twenty day time period
47 would apply.

1 21. BDI’s position that it should be allowed to file a motion to dismiss at this
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3 point in the proceeding hinges on BDI’s unsupported assumption that Jammie’s right to
4
5 present evidence supporting its Application ended when it filed direct testimony on
6
7 September 16, 2022. “As a protested application, BDI anticipated that JEI would be
8
9 permitted until its direct case to supply evidence in compliance with the statutory and
10
11 regulatory standards applicable to solid waste applications.”¹⁴ BDI’s anticipations are not
12
13 rule or law. There is no basis for BDI to assume that Jammie’s right to supply or present
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15 evidence ended with the filing of its prefiled direct testimony. BDI presents no explanation
16
17 or authority for its assumption, and BDI misrepresents Order 01 multiple times as setting
18
19 September 16, 2022, as the deadline for filing Jammie’s “case-in-chief.”¹⁵ The Prehearing
20
21 Conference Order established the procedural schedule for this consolidated proceeding but
22
23 did not establish that date as a deadline for presenting Jammie’s case-in-chief.
24
25
26
27

28 22. This is because a party does not conclude its case-in-chief upon the filing of
29
30 its direct testimony, it is concluded following presentation at hearing. *AT&T*
31
32 *Communications of the Northwest, Inc. v. U S West Communications, Inc.*¹⁶ demonstrates
33
34 the proper process for filing a motion to dismiss and that a party’s case-in-chief concludes
35
36 after a hearing. In that case, respondent U S West timely moved for dismissal in its answer
37
38 to AT&T’s complaint. The Commission denied it, and “At the conclusion of AT&T’s case
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43

44 ¹⁴ Mot. at 5.

45 ¹⁵ Mot. at 4, 5.

46 ¹⁶ *AT&T Commc'ns of NW., Inc. v. U S W. Commc'ns, Inc.*, UT-991292, Tenth Supp. Order
47 at ¶ 13 (May 18, 2000).

1 in chief at the subsequent hearing, U S WEST renewed its motion to dismiss.”¹⁷ Another
2 case illustrates even more clearly the Applicant’s right to put on its case-in-chief at hearing.
3
4 In *In Re Application P-75994 of Allen Dale Frank*, the Commission was faced with
5
6 applicant’s past illegal behavior, an inaccurate application, a “ludicrous” argument regarding
7
8 the public interest in the applicant’s service, and “flagrant, continued disregard for
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10 Commission laws and rules,” yet the Commission nonetheless recognized the applicant’s
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12 right to present evidence at hearing that may correct the record, fill in gaps, and assuage the
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14 Commission’s concerns.¹⁸ In that case, the Commission expressly acknowledged that the
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16 applicant could supplement its application through testimony at the hearing. “Gaps in the
17
18 financial statement were filled in by the applicant's testimony at hearing.”¹⁹
19
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24 23. Finally, Jammie’s would be prejudiced if BDI’s Motion to Dismiss is
25
26 granted, but BDI will not be prejudiced if it is denied because a hearing is still required for
27
28 BDI’s Complaint proceeding. There will be a hearing either way. Granting BDI’s Motion to
29
30 Dismiss will prejudice Jammie’s because it will inequitably deny Jammie’s the right to
31
32 present witness testimony and other evidence supporting its Application.
33
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40 ¹⁷ *Id.* at ¶ 15.

41 ¹⁸ *In Re Application P-75994 of Allen Dale Frank d/b/a Econ. Delivery for Permit to*
42 *Operate As A Common Carrier.*, Order M.V. No. 146257, Hearing No. P-75994, 1993 WL
43 13811905, at *1 (Mar. 12, 1993). (“If an applicant has operated in violation of the law in the past, a
44 finding of fitness may nonetheless be made if the applicant gives credible assurances of future
45 compliance and there are objective manifestations of intent to comply which give credence to his
46 testimony.”) (internal citations omitted).

47 ¹⁹ *Id.*

1 **B. BDI Misapplies the “Factors” Set Forth in RCW 81.77.040 and Overlooks the**
2 **Implementing Regulations in WAC 480-70-091**

3
4 24. BDI’s motion also fails because it incorrectly reads the “factors” in RCW
5
6 81.77.040 in isolation as legal elements for a prima facie solid waste certificate.
7
8
9 RCW 81.77.040 sets forth the basis for the Commission to investigate and render factual
10
11 findings as to the public’s need for a given certificate.²⁰ The failure to provide evidence to
12
13 support a factor *could* be determinative as a matter of fact depending on the case.²¹ But to
14
15

16
17
18 ²⁰ See, e.g., *Stericycle of Washington Inc. v. Washington Utilities & Transp. Comm'n*, 190
19 Wash. App. 74, 84, 359 P.3d 894 (2015) (“When deciding whether to issue a PCN certificate to a
20 biomedical waste company, the Commission must first analyze five factors under RCW
21 81.77.040.”); *In Re Application TG-081725 of NW. Indus. Servs., LLC, d/b/a Am. on Site Servs. for A*
22 *Certificate of Pub. Convenience & Necessity to Operate Motor Vehicles in Furnishing Solid Waste*
23 *Collection Serv.*, Order No. 03, 2009 WL 1116601, at *2 (Apr. 23, 2009) (“RCW 81.77.040 sets out
24 the factors upon which the Commission makes its determinations to issue a solid waste certificate of
25 necessity.”); *In Re Application GA-75154 of Ryder Distribution Res., Inc., for A Certificate of Pub.*
26 *Convenience & Necessity to Operate Motor Vehicles in Furnishing Garbage &/or Refuse Collection*
27 *Serv.. in Re Application GA-77539 of Stencycle of Washington, Inc., for A Certificate of Pub.*
28 *Convenience & Necessity to Operate Motor Vehicles in Furnishing Garbage &/or Refuse Collection*
29 *Serv.*, Order M. V. G. No. 1761, 1995 WL 18090850 (Aug. 9, 1995) (“The Commission is directed
30 by [RCW 81.77.040] to consider the following factors”); *In the Matter of Determining the Proper*
31 *Carrier Classification of: Enoch Rowland, d/b/a Kleenwell Biohazard & Gen. Ecology Consultants,*
32 *Docket TG-920304*, 1993 WL 13811942 (Jan. 25, 1993) (“[RCW 81.77.040] specifies some of the
33 factors upon which a Commission determination to issue a certificate must be based”); *In Re*
34 *Application Ga-896 of Superior Refuse Removal Corp. for A Certificate of Pub. Convenience &*
35 *Necessity to Operate Motor Vehicles in Furnishing Solid Waste Collection Serv.*, Order M. V. G. No.
36 1660, 1993 WL 13811937, at *1 (Sept. 28, 1993) (“one of several factors listed in RCW 81.77.040
37 that the Commission considers in making its public convenience and necessity determination”);
38 *Application of R.S.T. Disposal Co., Inc., d/b/a Tri-Star Disposal to Provide Garbage & Refuse*
39 *Collection in the City of Kent. Application of Seattle Disposal Co., d/b/a Rabanco Companies, to*
40 *Provide Garbage & Refuse Collection in the City of Kent.*, Order M. V. G. No. 1402, 1989 WL
41 1785222 (July 28, 1989) (“[the applicant] will be judged upon the factors identified in RCW
42 81.77.040”).
43

44 ²¹ See, e.g., *In Re Application P-76085 of Brian C. McCulloch, d/b/a Parallax Moving Sys.,*
45 *for Permit to Operate As A Common Carrier.*, Order M. V. G. No. 146379, 1993 WL 13811908
46 (Apr. 15, 1993) (emphasis added) (“An applicant which fails to provide sufficient information
47 regarding its financial condition may be found to have failed to demonstrate its fitness to conduct

1 suggest that any one factor is always dispositive as a matter of law is not supported by the
2
3 statute, Commission practice, or in any case cited by BDI.
4

5 25. BDI ignores that the Commission has adopted rules “implementing
6
7 RCW 81.77.040” that prescribe the requirements for a solid waste certificate application.²²
8

9
10 The current iteration of these regulations was adopted after the 1989 case on which BDI
11
12 relies. WAC 480-70-091(1) requires an applicant to “submit its application for certificated
13
14 authority on forms provided by the commission.”²³ The Commission’s form, in turn,
15
16 requires the applicant to provide the items listed in WAC 480-70-091(3):
17

18
19 (a) A complete description of the proposed service and the line,
20 route, or service territory using boundaries such as streets, avenues,
21 roads, highways, townships, ranges, city limits, county boundaries,
22 or other geographic descriptions;
23

24
25 (b) A map of the proposed line, route, or service territory that
26 meets the standards described in WAC 480-70-056;
27

28
29 (c) If contract carrier authority is requested, a copy of each contract
30 under which service will be performed;
31

32
33 (d) A statement of the applicant's assets and liabilities;
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37 operations. . . . The Commission Staff shall not publish another application from this applicant in the
38 docket unless the balance sheet portion of the application is complete.”).

39 ²² *In Re Application TG-091259 of W. Waste & Recycling, Inc. for an Extension of*
40 *Certificate No. G-251 for A Certificate of Pub. Convenience & Necessity to Operate Motor Vehicles*
41 *in Furnishing Solid Waste Collection Service; In Re Application TG-091019 of Murreys Disposal*
42 *Co., Inc., d/b/a Olympic Disposal for an Extension of Certificate No. G-9 for A Certificate of Pub.*
43 *Convenience & Necessity to Operate Motor Vehicles in Furnishing Solid Waste, Order 03, 2010 WL*
44 *2863609, at *3 (July 15, 2010) (“The Commission’s rules implementing RCW 81.77.040 are found*
45 *in Chapter 480-70 of the Washington Administrative Code (WAC). WAC 480-70-091(3) provides*
46 *that a certificate application must include at least the following eight items.”).*
47

²³ WAC 480-70-091(1).

- 1 (e) A proposed tariff;
2
3 (f) A statement of conditions that justify the proposed service;
4
5 (g) An equipment list; and
6
7 (h) A statement of the applicant's transportation or solid waste
8 industry experience, including knowledge of motor carrier driver
9 and equipment safety requirements.
10

11
12 26. Attached as Exhibit A to the Scott Declaration are the forms Commission
13 Staff provided to Ms. Scott to use to apply for a Class C solid waste certificate. Jammie's
14 Application contains all the above information and BDI does not contend otherwise.²⁴ To
15
16
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19
20 date, Commission Staff has not indicated any deficiencies with Jammie's Application.

21 27. The Commission recently approved a Class C solid waste certificate
22 application using those forms.²⁵ In *In the Matter of Determining the Proper Carrier*
23 *Classification of, and Complaint for Penalties Against: International Resource*
24 *Management, Inc., d/b/a/ WasteXpress and d/b/a WasteXpress Hazardous Waste Disposal*
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29
30 ("WasteXpress"), the Commission instituted a special proceeding and a complaint against
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WasteXpress for allegedly hauling solid waste without a certificate of convenience and
necessity in violation of RCW 81.77.040.²⁶ After the complaint was filed and answered,

24 Jammie's did not include a proposed tariff with her Application because Jammie's Application is for contract solid waste authority under WAC 480-70-146. If the Commission determines a tariff is needed, Jammie's can provide one. Jammie's and PCA will execute an amendment to their current contract to meet the requirements of WAC 480-70-146.

25 *In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against: International Resource Management, Inc., d/b/a WasteXpress and d/b/a WasteXpress Hazardous Waste Disposal*, Docket TG-200131, Order 02 (Jan. 8, 2021).

26 *Id.* at ¶ 1.

1 WasteXpress submitted its application for a certificate of public convenience and necessity
2
3 using the Commission’s form application.²⁷ Months later, it amended its application after
4
5 responding to questions from Commission Staff.²⁸ Throughout the proceeding, WasteXpress
6
7 did not provide a separate cost of service analysis or a separate shipper statement. Rather,
8
9 WasteXpress provided the information requested in the Commission’s form application and
10
11 any additional information that the Commission requested. This was in no way fatal to the
12
13 application. In an initial order, the presiding officer referenced the granted application,
14
15 repeating the finding that WasteXpress was “fit, willing, and able to properly provide the
16
17 proposed operations and that the proposed service is necessary and would be of convenience
18
19 to the public.”²⁹ Notably, the Commission granted WasteXpress’s application for a Class C
20
21 certificate without some of the very information that BDI claims is mandatory here, such as
22
23 a shipper statement.
24
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28 28. BDI’s Motion to Dismiss implies that any omission in an application for a
29
30 certificate of public convenience and necessity is fatal to that application.³⁰ This is not true.
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32 WAC 480-70-091(2) itself establishes the Commission’s discretion in reviewing an
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34 application: “The commission may reject or dismiss an application if it includes false,
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42 ²⁷ *Id.*; see WasteXpress Application, Docket TG-200764 (Aug. 28, 2020).

43 ²⁸ See WasteXpress Updated Application, Docket TG-200764 (Nov. 5, 2020).

44 ²⁹ *WasteXpress*, Docket TG-200131, Order 02 at ¶ 9, citing Order 01 in Docket TG-200764.

45 ³⁰ Mot. at ¶ 11 (citing Commission review of “the record”, but incorrectly limiting that to the
46 “application and direct case”. The record in this case is not limited to Jammie’s application and
47 direct testimony.).

1 misleading, or incomplete information.”³¹ As demonstrated in WasteXpress, and other cases,
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3 the Commission routinely allows an applicant to amend³² its application and supplement
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5 evidence to establish its fitness.³³ The Commission may even require such information
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7 following a hearing, in the form of a bench request. The process is simply far more fluid and
8
9 comprehensive than BDI represents.
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12 29. As an example that the Commission may request information from an
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14 applicant at any time prior to rendering a determination on the application, in *In re*
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16 *Application of Brian McCulloch , d/b/a PARALLAX MOVING SYSTEMS, for permit to*
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18 *operate as a COMMON CARRIER*, the Commission evaluated an application for authority
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20 to transport household goods.³⁴ The application required prima facia evidence of financial
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22 ability, including a balance sheet, but the application omitted that information.³⁵ The
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24 applicant was notified “many times” that the Commission required a financial statement, but
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26 the applicant refused to provide the information and refused to answer questions about his
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35 ³¹ WAC 480-70-091(2)(c) (emphasis added).

36 ³² *WasteXpress*, Order 02 at ¶¶ 4-9. *See also, In Re Application P-75994 of Allen Dale Frank*
37 *d/b/a Econ. Delivery for Permit to Operate as a Common Carrier.*, Order M. V. G. No. 146257,
38 1993 WL 13811905, at *1 (Mar. 12, 1993) (“After applicant and two supporting shippers had given
39 testimony, the remaining protestants withdrew their protests, subject to Commission acceptance of
40 an amendment to the application.”).

41 ³³ *Id.* (“Gaps in the financial statement were filled in by the applicant's testimony at
42 hearing.”) (Emphasis added.)

43 ³⁴ *In Re Application P-76085 of Brian C. Mcculloch, d/b/a Parallax Moving Sys., for Permit*
44 *to Operate as a Common Carrier.*, Order M. V. G. No. 146379, 1993 WL 13811908 (Apr. 15, 1993).

45 ³⁵ *Id.* (“An applicant must be able to clearly define its assets and liabilities and present a
46 balance sheet or other relevant information.” “The applicant admitted that he did not complete or
47 provide a complete financial statement.”).

1 company's assets and liabilities, citing confidentiality, competition, and other concerns.³⁶
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3 The Commission held at least two hearings, at which the presiding officer inquired into the
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5 applicant's refusal to produce the requested information.³⁷ Then, only after the applicant had
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7 multiple opportunities to provide the requested material, "Protestants moved to dismiss this
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9 application after all applicant's financial information had been presented," and the motion
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11 was granted after oral argument.³⁸
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15 30. Even more cases contradict BDI's "strict liability" approach. In *In Re*
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17 *Application GA-896 of Superior Refuse Removal Corp. for A Certificate to Operate Motor*
18
19 *Vehicles in Furnishing Solid Waste Collection Serv.*³⁹ the Commission held twenty days of
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21 hearings to consider an application for a solid waste certificate of public convenience and
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23 necessity, showing that the Commission's decision is by no means a simple "check the box"
24
25 review. "If the initial order finds that the existing carrier's service does not meet the
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27 Commission's satisfaction, the initial order must then determine whether the application
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29 should be granted, in light of the statutory standards for grants of authority, the
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31 Commission's interpretations of the statute, the legislative preference against overlapping
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33 service territories, and all of the evidence of record."⁴⁰ In even another case, the
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41 ³⁶ *Id.* ("The applicant was notified many times that the Commission's application process
42 requires a financial statement.")

43 ³⁷ *Id.*

44 ³⁸ *Id.* at finding of fact no. 9.

45 ³⁹ *In Re Application GA-896 of Superior Refuse Removal Corp. for A Certificate to Operate*
46 *Motor Vehicles in Furnishing Solid Waste Collection Serv.*, Order M. V. G. No. 1566, 1992 WL
47 12789820 (July 24, 1992)

⁴⁰ *Id.* (emphasis added).

1 Commission affirmed an initial order approving an application that relied solely on oral
2 financial testimony presented at hearing. “The applicant presented evidence of its finances
3 through an operating witness, but had no written financial statement to present at the time of
4 the hearing. One was late-filed, but because of objections the filing was rejected. The
5 proposed order found the applicant financially fit to conduct operations.”⁴¹ In contrast, BDI
6 has not presented one example of the Commission granting the request it seeks.
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14 **C. Contrary to BDI’s Claims, Jammie’s Has Provided All of the Information**
15 **Required by RCW 81.77.040 Necessary for a Class C Application**
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18 31. BDI’s Motion to Dismiss also fails because BDI is wrong that Jammie’s has
19 not provided the information BDI contends is required or the information is not already in
20 the record. At the outset, it should be emphasized that the amount of information an
21 applicant is required to provide depends on the needs and circumstances of the case.⁴² This
22 principle of proportionality is clearly demonstrated in the case BDI cites in its Motion.
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29 **1. Information supporting the financial health of Jammie’s and the**
30 **costs of service the service proposed by Jammie’s is adequately**
31 **described in the Application.**
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34 32. BDI alleges that Jammie’s was required to include with its Application or in
35 its “case in chief” testimony, “The present service and the cost thereof for the contemplated
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42 ⁴¹ *In Re Application E-19113 of Circle M Constr. Co., Inc. for Extension of Auth. Under CC-*
43 *30713.*, Order M. V. No. 133031, 1985 WL 1203598 (Nov. 3, 1985).

44 ⁴² “The proposed order found that applicant had demonstrated a present or future need for
45 applicant's services **as sought in the amended application.**” *In Re Application E-19113 of Circle M*
46 *Constr. Co., Inc. for Extension of Auth. Under CC-30713.*, Order M. V. No. 133031, 1985 WL
47 1203598 (Nov. 3, 1985) (emphasis added).

1 area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid
2 waste collection and disposal, set out in an affidavit or declaration.”⁴³ BDI then states that
3 “[w]hen the record in solid waste application proceedings is devoid of this requisite
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7 showing, the Commission historically denies the application.”⁴⁴ BDI is overstating the law.
8
9 The only case BDI cites for that proposition is a Commission decision from 1989 where the
10 applicant sought a certificate to collect and transport biohazardous waste from waste
11 generators which it would then transport to a biohazardous treatment facility it planned to
12 construct and where it would then transfer the treated wastes to certified haulers for disposal
13 in landfills.⁴⁵ The Commission denied the application, in part,⁴⁶ because it had significant
14 concerns with the applicant’s financial resources for the ambitious endeavor, including
15 concerns that the applicant “is thinly financed. It possesses only \$1500 in assets, possesses
16 no Contracts to provide the services, and intends to construct a facility and purchase
17 transportation equipment through a joint venture, the details of which were not presented of
18 record.”⁴⁷ After a hearing and all evidence had been presented, the Commission found that
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38 ⁴³ Mot. at 5 (quoting RCW 81.77.040).

39 ⁴⁴ Mot. at 6.

40 ⁴⁵ *In the Matter of Application GA-864 of NORTHWEST UNITECH, INC., for a certificate to*
41 *operate motor vehicles in furnishing garbage and/or refuse collection service under contract,*
42 *Hearing No. GA-864, Order M.V.G. No. 1,367 (Jan. 18, 1989).*

43 ⁴⁶ The Commission also found the applicant had not demonstrated any actual need for the
44 service. “The supporting witnesses indicate that their institutions presently have no need for the
45 transportation and treatment of biohazardous wastes and they have no definite present intention to
46 seek transportation at any time in the future.” *Id.*

47 ⁴⁷ *Id.*

1 the applicant had not provided “evidence about the costs of facilities and of providing
2 service and the economic feasibility of the service.”
3
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5 33. BDI’s case does not compare to Jammie’s situation. Unlike BDI’s case,
6 where the applicant sought to start a whole new biohazardous waste processing company
7 Jammie’s is undisputedly an established company that has been operating for over twenty
8 years, already owns the equipment it uses for the service it provides PCA, and is financially
9 sound.⁴⁸ All of this information is set forth in its Application or prefiled direct testimony.
10 Moreover, what Jammie’s charges PCA for its service is clearly laid out in its rate sheet
11 provided with its Application and as evidenced by the Jammie’s invoices and purchase
12 orders with PCA in the record.⁴⁹ The Commission has approved Class C certificate
13 applications on less financial information than what Jammie’s has provided in this case.⁵⁰
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25 34. Further, as in the multiple cases cited above that approved applications based
26 on witness testimony at hearing, Jammie’s will make witnesses available at hearing to
27 address any or all of the supporting evidence. To the extent the Commission would like
28 additional information, Jammie’s is happy to provide it.
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38 ⁴⁸ Scott Declaration, ¶ 4.

39 ⁴⁹ Exh. CD-6; Exh. CD-7; Exh. OJS-2; Exh. OJS-3; Exh. JDS-10.

40 ⁵⁰ In *WasteXpress*, the applicant provided a less detailed listing accounting of its finances
41 than what Jammie’s included in its Application. For example, compared to the separate profit and
42 loss statement and a balance sheet that Jammie’s filed in support of its application (totaling about
43 five pages), WasteXpress, which sought a Class C certificate for a far wider array of hazardous,
44 dangerous, and special wastes for a wide variety of customers, filed a half-page ledger. Similarly,
45 compared to Jammie’s six-page equipment ledger, WasteXpress’s equipment list was again only one
46 half-page. WasteXpress Application, Docket TG-200764 (Aug. 28, 2020).
47

1 35. Regardless, BDI’s Motion to Dismiss on this point fails because this is not a
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3 situation where there is no financial information relating to Jammie’s “economic feasibility”
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5 to provide service to PCA such that a decision could be made as a matter of law. A motion
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7 to dismiss is proper only where a party’s request fails to seek relief that the Commission
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9 may grant or fails to plead undisputed facts that support judgment as a matter of law.⁵¹ That
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11 is not the case here. Rather, the question is whether the information provided by Jammie’s is
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13 sufficient to satisfy the Commission. The financial fitness of the applicant is a factual
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15 question that can only be determined by the Commission.⁵² BDI’s Motion to Dismiss on this
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17 point should be denied.
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21 **2. The independent evidence of PCA’s need and support Jammie’s**
22 **Application is overwhelming.**
23

24 36. BDI next contends that Jammie’s was required to “support its case-in-chief
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26 with prefiled testimony of a shipper witness to be cross-examined at the hearing” and that by
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28 not providing this, its application is incomplete and should be dismissed.⁵³ BDI’s contention
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30 is not found in RCW 81.77.040, in the implementing regulations in Chapter 480-70 RCW,
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32 or in the cases it cites. Indeed, the only rule expressly requiring an applicant to provide a
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37 ⁵¹ WAC 480-07-380(1)(a) or WAC 480-07-380(2)(a), if the Commission liberally interprets
38 a motion to dismiss as a motion for summary determination.
39

40 ⁵² *In the Matter of the Application of Waste Mgmt. of Washington, Inc. d/b/a Wm Healthcare*
41 *Sols. of Washington for an Extension of Certificate G-237 for A Certificate of Pub. Convenience &*
42 *Necessity to Operate Motor Vehicles in Furnishing Solid Waste Collection Serv.*, Order 03, 2012
43 WL 1790165, at *4-5 (May 14, 2012) (“We do not interpret [RCW 81.77.040] to preclude further
44 Commission inquiry into whether an applicant has satisfactorily demonstrated its financial and
45 operational fitness, but at a minimum, the language suggests that such an inquiry may be reserved for
46 the Commission or its Staff.”).
47

⁵³ Mot. at 6-7.

1 supporting statement from a shipper is in an application for a temporary certificate.⁵⁴

2
3 Notably, it is not listed in the list of requirements set forth in WAC 480-70-091 or in the
4
5 Commission's application forms.
6

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8 37. Moreover, none of BDI's cases support its claim that Jammie's was required
9
10 to submit testimony of a shipper. In *In re Application P-73623*, the Commission articulated
11
12 a much broader standard for evaluating need, stating that "[i]n reviewing need, the
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14 Commission does not use a rigid or mechanical test" and found a public need for the service
15
16 based on "longstanding shipping patterns."⁵⁵ Likewise, in *In Re Application D-2444 of*
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18 *Richard E. & Helen N. Asciiie*, the Commission simply required "independent witnesses"⁵⁶
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20 and in *In re Application P-65982 of Glenn Mar, Inc.*, the Commission explained that need
21
22 for a common carrier service is "[c]ustomarily . . . done by producing evidence of one or
23
24 more shippers."⁵⁷ None of these cases stand for the proposition that unless Jammie's
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26 includes the statement of a shipper with its Application, that it should be dismissed as a
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31 matter of law.
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38 ⁵⁴ WAC 480-70-131(3).

39 ⁵⁵ *In Re Application P-73623 of Safco Safe Transp., Inc. for Permit to Operate As A*
40 *Common Carrier.*, Order M. V. No. 143916, 1991 WL 11863723, at *1 (Oct. 9, 1991).

41 ⁵⁶ *In Re Application D-2444 of Richard E. & Helen N. Asciiie, Bremerton-Kitsap Airporter,*
42 *Inc., d/b/a Bremerton-Kitsap Airporter, Kitsap-Seatac Airporter, Inc., the Sound Connection, for*
43 *Extension of Certificate of Pub. Convenience & Necessity No. 903 to Operate Motor Vehicles in*
44 *Furnishing Passenger & Express Serv. Between Points Hereinafter Listed.*, Order M. V. No. 1443,
45 1984 WL 1020494 (May 11, 1984).

46 ⁵⁷ *In Re Application P-65982 of Glenn Mar, Inc. for Auth. to Operate As A Common*
47 *Carrier.*, Order M. V. No. 126429, 1982 WL 992937 (Nov. 16, 1982).

1 38. Instead, the independent evidence currently in the record resolves any
2
3 credible question as to the “sentiment in the community contemplated to be served as to the
4
5 necessity for such a service.”⁵⁸ That PCA supports Jammie’s Application is undisputed.
6
7 PCA intervened in the proceeding where it described the services Jammie’s provides PCA
8
9 and indicated support for Jammie’s in the proceeding.⁵⁹ Jammie’s prefiled direct testimony
10
11 contains independent evidence demonstrating PCA’s desire that Jammie’s continue
12
13 providing the OCC Rejects service over BDI,⁶⁰ as does BDI’s prefiled direct testimony.⁶¹
14
15 And finally, PCA filed response testimony from three PCA employees all testifying as to
16
17 PCA’s significant difficulties in working with BDI and its strong desire that Jammie’s be
18
19 permitted to provide the OCC Rejects service for PCA.⁶² Incredibly, BDI has moved to
20
21 strike portions of that testimony in an effort to silence PCA’s support of Jammie’s.⁶³
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25 39. To the extent the Commission requires independent testimony from the
26
27 shipper regarding the proposed service, PCA has provided that in abundance, and BDI and
28
29 the Commission will have the opportunity to cross-examine PCA’s witnesses at the hearing.
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31 BDI’s Motion on this ground should be denied.
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41 ⁵⁸ RCW 81.77.040.

42 ⁵⁹ Docket TG-220243, PCA Pet. to Intervene, ¶¶ 8-12 (May 18, 2022); Docket TG-220215,
43 PCA Pet. to Intervene, ¶¶ 8-12 (May 18, 2022).

44 ⁶⁰ Exh. JDS-10; Exh. JDS-11.

45 ⁶¹ Exh. CD-6; Exh. CD-7.

46 ⁶² Exh. BW-1T; Exh. SR-1T; Exh. KT-1T.

47 ⁶³ BDI Motion to Strike (Oct. 21, 2022).

1 **3. Jammie’s Application is clear—and no party disputes—what**
2 **waste Jammie’s is seeking permission to haul.**

3
4 40. Last, BDI claims that “there is an internal conflict” between Jammie’s
5
6 Application and the Commission’s Docket Notice.⁶⁴ BDI is searching for problems. First,
7
8 Jammie’s Application and the Commission’s Docket Notice clearly describe the waste
9
10 Jammie’s seeks to haul for PCA despite BDI’s pained re-reading. The “primary commodity
11
12 to be hauled” is listed in both Jammie’s Application and the Commission’s Docket Notice as
13
14 “processed OCC reject waste” and “processed and rejected corrugated cardboard waste,”
15
16 respectively.
17

18
19 41. Second, BDI’s proposed reading of Jammie’s Application and the
20
21 Commission’s Docket Notice is not the correct grammatical reading of either text. Jammie’s
22
23 Application first lists the “primary commodity” to be hauled (OCC Rejects) and then lists
24
25 other commodities that may be hauled on occasion, which includes “...and other solid waste
26
27 that is not hazardous, dangerous or special, exception ... municipal solid waste.” Thus, the
28
29 “exception” modifies the “other solid waste” that may be handled on occasion, not the
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31 “primary commodity” to be hauled. Similar language is mirrored in the Commission’s
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33 Docket Notice.
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37 42. Third, even if the language is unclear (the fact that all parties to this case
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39 clearly understand that PCA’s OCC Rejects are the waste at issue suggests otherwise) the
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⁶⁴ Mot. at 7.

1 cases BDI cites do not support the proposition that denial of the Application is the
2
3 appropriate remedy.⁶⁵
4

5 CONCLUSION

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7 43. BDI's Motion to Dismiss should be denied and the matter should proceed to
8
9 hearing. BDI has failed to demonstrate that Jammie's Application should be dismissed as a
10
11 matter of law. Jammie's Application demonstrates Jammie's financial fitness and the
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13 economic viability of its services to PCA, there is substantial independent evidence in the
14
15 record regarding the sentiment of the only customer impacted by the Application, PCA, and
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17 there is no confusion regarding the waste Jammie's seeks permission to haul. To the extent
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19 the Commission desires additional information from Jammie's about its Application,
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21 Jammie's can provide.
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43 ⁶⁵ In BDI's case Order M.V.G. No. 1451, *In the Matter of Application Ga-8 68 of Sure-Way*
44 *Incineration, Inc., for A Certificate of Pub. Convenience & Necessity to Operate Motor Vehicles in*
45 *Furnishing Garbage & for Refuse Collection Serv.*, (Nov. 30, 1990), the Commission determined
46 there was a defect in the publication notice but that republication is the proper remedy, not denial of
47 the application. In that case, the application was denied on other grounds.

1 RESPECTFULLY SUBMITTED this 24th day of October, 2022.
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