

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

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| 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 (<i>Consolidated</i>) |
| BASIN DISPOSAL, INC., Complainant, v. JAMMIE’S ENVIRONMENTAL, INC., Respondent. | DOCKET TG-220215 (<i>Consolidated</i>) ORDER 05 GRANTING LEAVE TO REPLY; DENYING MOTION FOR PARTIAL DISMISSAL; DENYING MOTION TO STRIKE |

BACKGROUND

- 1 On March 29, 2022, Basin Disposal, Inc., (Basin) filed with the Washington Utilities and Transportation Commission (Commission) a formal complaint (Complaint) against Jammie’s Environmental, Inc., (Jammie’s) in Docket TG-220215 requesting the Commission find that Jammie’s violated Revised Code of Washington (RCW) 81.77.040 by engaging in the collection and transportation of solid waste without first obtaining certificated authority from the Commission required to conduct such operations.
- 2 On April 1, 2022, Jammie’s filed with the Commission an application for authority to operate as a solid waste collection company in Washington (Application) in Docket TG-220243, and on April 6, 2022, the Commission issued a notice of pending application, allowing affected parties 30 days to protest the Application.
- 3 On April 20, 2022, Basin filed a protest to the Application. On April 25, 2022, the Washington Refuse and Recycling Association (WRRRA) petitioned to intervene in Docket TG-220243. On May 18, 2022, the Packaging Corporation of America (PCA) filed a petition to intervene.

- 4 On May 24, 2022, the Commission convened a prehearing conference in both dockets before Administrative Law Judge Michael Howard.
- 5 On June 8, 2022, the Commission entered Order 01, Consolidating Dockets; Granting Petitions to Intervene; Prehearing Conference Order; Notice of Hearing (Order 01). The Commission consolidated Docket TG-220243, the Application proceeding, and Docket TG-220215, the Complaint proceeding. The Commission noticed an evidentiary hearing for November 15, 2022, at 9:30 a.m., and granted the petitions to intervene filed by WRRRA and PCA.
- 6 On October 14, 2022, Basin filed a Motion for Partial Dismissal under WAC 480-70-091(2) (Motion for Partial Dismissal). Basin argues that the Commission should dismiss or otherwise deny Jammie’s Application on the existing record, without the need for a hearing, and that the Commission should allow only Basin’s Complaint to proceed.
- 7 Basin argues that Jammie’s failed to support its Application with evidence required by statute, Commission rule, and Commission precedent. Specifically, Basin argues that Jammie’s did not provide evidence of the present service or cost thereof, and that Jammie’s did not present evidence of sentiment in the community to be served regarding the necessity of such service. Basin submits that the Commission has required testimony from shippers to support an application in the past.
- 8 Finally, Basin argues that Jammie’s Application is internally inconsistent. Basin explains that the Application excludes all municipal solid waste, but the waste at issue in this proceeding—old corrugated cardboard/container (OCC) Rejects—undeniably falls under the definition of municipal solid waste. Jammie’s raises concern that an incomplete application does not provide sufficient notice and that it should, consequently, be denied.
- 9 On October 21, 2022, Basin filed a Motion to Strike Portions of Prefiled Testimony of Jammie Scott, Brian Wilhelm, Kurt Thorne, and Skyler Rachford (Motion to Strike). Basin argues that the aforementioned witnesses provide response testimony that should properly have been filed as direct testimony. Basin notes that on August 5, 2022, the Commission issued an Errata to Order 01 (Errata) that amended the procedural schedule to make clear that both Jammie’s and Basin were required to file their direct case on September 16, 2022. However, Basin maintains that Jammie’s did not support its direct case with required evidence, such as the testimony of a shipper, and that the testimony of the PCA witnesses may not be considered in determining whether Jammie’s met its burden of persuasion and its burden of production with respect to its Application. Basin’s objections to specific portions of Scott’s, Wilhelm’s, Thorne’s, and Rachford’s testimony are discussed in greater detail below.

- 10 On October 24, 2022, Jammie's filed a Response to Basin's Motion for Partial Dismissal. Jammie's argues that Basin's Motion for Partial Dismissal is untimely and that it should not be permitted under the Commission's rules. Regarding the merits of Basin's arguments, Jammie's contends that Basin incorrectly reads the factors in RCW 81.77.040 in isolation as if they were legal elements for a prima facie case, and that Basin overlooks the Commission's rules and forms implementing this statute. Jammie's submits that it has completed required forms in connection with its Application and provided all required information; that the Commission has allowed companies to amend their applications; and that the Commission has not always required a statement from a shipper to support an application.
- 11 Jammie's also disputes Basin's interpretation of its Application. As Jammie's explains, the Application clearly identifies the primary commodity to be hauled as "processed OCC reject waste" and "processed and rejected corrugated cardboard waste." Jammie's argues that its Application does not present any internal inconsistency, and even if it does, Jammie's argues that denying the Application would not be the correct remedy.
- 12 On October 28, 2022, Jammie's filed a Response to Basin's Motion to Strike. Jammie's argues that its response testimony is directly responsive to Basin's direct testimony, particularly the statements made by Basin witness Charlie Dietrich, and that it is directly relevant to the issues in this consolidated proceeding. Jammie's argues that its responsive testimony did not violate Basin's due process rights and that the parties negotiated and agreed to the procedural schedule in this case.
- 13 That same day, October 28, 2022, PCA filed a Response to Basin's Motion to Strike. PCA raises similar concerns as Jammie's, observing that Basin and the other parties agreed to the procedural schedule in this case. PCA argues that it filed its responsive testimony in accordance with the agreed-upon procedural schedule and that Basin now seeks to silence PCA as the only customer participating in this proceeding.
- 14 On October 31, 2022, Basin filed a Motion for Leave to File a Reply in Support of its Motion for Partial Dismissal (Motion for Leave to File a Reply). Basin argues that Jammie's raises unanticipated arguments, misunderstands applicable solid waste policies, and makes certain misleading statements. Basin attaches its proposed Reply (Reply), and the specific arguments raised by this Reply are addressed below.

DISCUSSION

- 15 The Commission grants Basin's Motion for Leave to Reply. The Commission denies Basin's Motion for Partial Dismissal and its Motion to Strike. We discuss Basin's specific arguments and Jammie's responses below.

A. Basin's Motion for Leave to Reply

16 We grant Basin's Motion for Leave to Reply. WAC 480-07-370(5)(a) authorizes a reply
only upon a showing of good cause. Given the various issues raised by Jammie's
response to Basin's Motion for Partial Dismissal, particularly the issues around the
timeliness of a motion to dismiss and the concept of Jammie's case-in-chief, we agree
that there is good cause and accept Basin's Reply

B. Basin's Motion for Partial Dismissal

17 We find that Basin's Motion for Partial Dismissal should be denied.

18 First, we agree that this motion is untimely. WAC 480-07-380(1)(b) provides that a
motion to dismiss must be filed no later than the responsive pleading is due, or within 20
days of service of the pleading at issue, whichever is less, unless the movant shows good
cause for the delay.

19 Basin's Motion for Partial Dismissal is concerned with Jammie's Application, which was
filed on April 1, 2022. Because Basin argues that the Application fails to state a claim
upon which relief may be granted, Basin was required to file this motion by April 21,
2022.

20 Basin suggests, however, that the Application was not complete until Jammie's
completed its case-in-chief with the filing of its direct testimony on September 16, 2022.
Even if we agree with this proposition, a motion to dismiss would be due 20 days later,
on October 6, 2022. Basin's Motion for Partial Dismissal would thus still be untimely.

21 Although Basin requests that we construe its motion liberally, we decline to grant an
exception to the deadlines for motions to dismiss as set forth in WAC 480-07-380. This is
an adversarial proceeding where the parties are represented by counsel, and the deadlines
for a motion to dismiss are set forth and known in advance to all parties. Basin has not
demonstrated good cause that would justify departing from Commission rules.

22 In making this determination, we have considered the arguments raised by Basin's Reply,
but we find them unpersuasive. For example, Basin cites to Civil Rule 41(b)(3) for
persuasive authority, which provides that after a plaintiff in an action tried by court
without a jury has completed presenting evidence, the defendant may move for dismissal
on the grounds that the plaintiff has not demonstrated a right to relief. This civil rule
supports the proposition that a party may move to dismiss after the opposing party has
completed its presentation of the evidence, but it does not answer the question of when,
precisely, a party completes its presentation of the evidence in an administrative
proceeding with prefiled, written testimony.

- 23 Second, even if Basin’s Motion for Partial Dismissal was construed as motion for summary determination or was otherwise found to be timely, we find that it should be denied and that these consolidated matters should proceed to hearing.
- 24 Pursuant to RCW 81.77.040, a company must not provide solid waste collection services without obtaining a certificate of convenience and necessity from the Commission. When a company seeks to operate in a territory already served by a certificate holder, the Commission may issue a certificate to the applicant, after notice and a hearing, “only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission or if the existing solid waste collection company does not object.”¹
- 25 When considering any application for a certificate of convenience and necessity, The Commission must apply the following factors:
- Issuance of the certificate of necessity must be determined on, but not limited to, the following factors: The present service and the cost thereof for the contemplated area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal, set out in affidavit or declaration; a statement of the assets on hand of the person, firm, association, or corporation that will be expended on the purported plant for solid waste collection and disposal, set out in an affidavit or declaration; a statement of prior experience, if any, in such field by the petitioner, set out in affidavit or declaration; and sentiment in the community contemplated to be served as to the necessity for such a service.²
- 26 The Commission has implemented this statute in a specific manner. Pursuant to WAC 480-70-091(1), a company must submit its application on the forms prescribed by the Commission. The Commission “may reject or dismiss an application if it includes false, misleading, or incomplete information.”³
- 27 Although Basin argues that Jammie’s Application and its direct testimony failed to include information required by RCW 81.77.040, we disagree and decline to dismiss Jammie’s Application.

¹ RCW 81.77.040.

² *Id.*

³ WAC 480-70-091(2)(c).

- 28 As an initial matter, we do not agree with Basin’s assertion that Jammie’s failed to address the fourth statutory factor—sentiment in the community to be served—in its direct testimony. Jammie’s direct testimony included emails from PCA, the shipper in this proceeding, describing its concerns with Basin’s service.⁴ The parties agreed to a procedural schedule that provided for the filing of response testimony by this same shipper, PCA, later in the proceeding. This case is not comparable to other proceedings where the applicant itself made claims about the needs of the community to be served.⁵
- 29 Even if Jammie’s Application did not address the first statutory factor—the estimated costs of providing service—in detail, we do not agree that dismissal is an appropriate remedy. As Jammie’s observes, the Commission has considered applications for solid waste carrier certificates based on all the evidence of record, including testimony and evidence provided at an evidentiary hearing.⁶ Jammie’s has further opportunities to provide additional detail in support of its Application, and it would be departing from Commission practice to dismiss the Application at this juncture.
- 30 Furthermore, Basin and WRRRA have had an opportunity to conduct discovery since Order 01 was entered on June 8, 2022. It is not persuasive for Basin to suggest that Jammie’s is conducting trial by surprise under these circumstances.
- 31 We have considered Basin’s argument, raised in its Reply, that orders entered prior to 1994 do not reflect the Commission’s current procedural rules. Basin argues that under the current procedural rules, the applicant in a protested case may not supplement its application after the filing of its direct testimony. As a general matter, this argument appears inconsistent with WAC 480-70-091(2)(c). If a company could not supplement its application with required evidence, it is reasonable to infer that the rule would *require* dismissing an incomplete application. Furthermore, this argument appears inconsistent with the Commission’s decisions since the procedural rules were amended. In *In the Matter of the Application of Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington*, the Commission affirmed an initial order that considered declarations regarding the applicant’s financial fitness that were provided

⁴ E.g., Scott, Exh. JDS-1T at 16:9-17:3.

⁵ Cf. *In re Safco Safe Transportation.*, Order M.V. No. 143916, App.P-73623, (Oct. 1991).

⁶ See *In Re Application GA-896 of Superior Refuse Removal Corp. for A Certificate to Operate Motor Vehicles in Furnishing Solid Waste Collection Serv.*, Order M. V. G. No. 1566, 1992 WL 12789820 (July 24, 1992); *In Re Application E-19113 of Circle M Constr. Co., Inc. for Extension of Auth. Under CC-30713.*, Order M. V. No. 133031, 1985 WL 1203598 (Nov. 3, 1985).

months into the case's schedule.⁷ This undermines Basin's arguments that Jammie's is strictly limited to its "case-in-chief," which concludes with the filing of direct testimony.

32 We also reject Basin's argument that Jammie's Application should be dismissed because it contained internal inconsistencies. Jammie's Application specifically sought authority for a specialized "class C" certificate to haul solid waste from PCA's facility in Walulla, Washington. The Application states that the "[primary commodity to be hauled: processed OCC reject waste . . .]"⁸ The Application also states, "The purpose of this application is to request authority to manage and transport Processed OCC reject waste from the Packaging Corporation of America located at 31831 S Hwy 12 in Walulla, WA 99363."⁹ We do not agree with Basin's claims that this Application provided insufficient notice to potential intervenors or that it should otherwise be dismissed.

33 Although Basin argues that the Application excludes all municipal solid waste, we agree with Jammie's argument that the phrase "municipal solid waste" follows a parent that modifies the term "special waste."¹⁰ It is not plausible to read the Application as excluding all "municipal solid waste" from the sought-after authority.

34 We have also considered Basin's argument, raised in its Reply, that Jammie's now seeks contract carrier authority and that this warrants dismissing the Application. This is not persuasive. In the Application itself, Jammie's indicated that it was seeking to operate under a contract and indicated the contract would be with Packaging Corporation of America.¹¹ Jammie's reference to a contract in its response does not represent a change in position that requires re-docketing or dismissal.

⁷ See Docket TG-120033, Initial Order, Order 07 ¶¶ 24-27 (February 14, 2013), *affirmed in* Order 10 (July 10, 2013).

⁸ Application at 8.

⁹ *Id.*

¹⁰ *See id.*

¹¹ Application § 4.

35 We therefore find that Basin’s Motion for Partial Dismissal should be denied and
conclude that this consolidated proceeding should proceed to a hearing.

C. Basin’s Motion to Strike

36 We also deny Basin’s Motion to Strike.

37 Basin argues that both Jammie’s and PCA’s response testimony violates implicit
limitations in the procedural schedule for this consolidated proceeding. With respect to
Jammie’s response testimony, Basin argues that portions of this testimony do not address
issues raised by Basin’s formal complaint but instead address matters that should have
been raised in Jammie’s direct testimony.¹²

38 We find this unpersuasive. The Commission consolidated Basin’s formal complaint with
Jammie’s disputed solid waste Application because the two proceedings involve closely
related issues of law and fact.¹³ We have therefore reviewed the portions of Scott’s
testimony at issue in Basin’s motion but find no reason to strike these portions of Scott’s
testimony.

39 For example, Basin argues that the Commission should strike lines 19 to 21 on page 2 of
Scott’s responsive testimony. Scott testifies here, in part, “My response testimony
addresses the points raised above including that from my experience in the industry, Mr.
Dietrich’s testimony demonstrates that BDI did not provide satisfactory service to
PCA.”¹⁴ In the same sentence, Scott responds to earlier testimony from Dietrich and
refers to a key element of Jammie’s case, which is that Basin did not provide service to
the satisfaction of the Commission. It is difficult to see why this testimony should be
struck, or how this prejudices Basin. Basin still has an opportunity to cross-examine
Jammie’s witnesses at the hearing and to provide two rounds of post-hearing briefing.

40 We also deny Basin’s Motion to Strike with respect to PCA’s witnesses. As Jammie’s
observes, the parties to this proceeding agreed to a procedural schedule. After the parties
contacted the presiding officer following the entry of Order 01, the Commission issued an
Errata that clearly describes the two rounds of prefiled testimony. The Errata made clear
that “Applicant Direct Testimony and Exhibits; Complainant’s Direct Testimony and
Exhibits” were due on September 16, 2022. “Cross-Response Testimony from
Protestants, Applicant, and Intervenors” were due on October 14, 2022. Because only the

¹² Basin’s Motion to Strike at 10:19-11:17 (discussing Scott, Exh. JDS-17T).

¹³ See Order 01 ¶ 10.

¹⁴ Scott, Exh. JDS-17T at 2:19-21.

later deadline referred to any testimony from intervenors, PCA should not be faulted for filing response testimony on October 14, 2022. While it may have been possible for this case to proceed differently, the Commission has largely adopted the parties agreed-upon schedule, and it is not persuasive for Basin to now argue that PCA's response testimony, following that same schedule, has violated Basin's due process rights.

41 For these reasons, we deny Basin's Motion to Strike.

42 **THE COMMISSION ORDERS That:**

43 (1) Basin Disposal, Inc.'s Motion for Leave to Reply is GRANTED.

44 (2) Basin Disposal, Inc.'s Motion for Partial Dismissal is DENIED.

45 (3) Basin Disposal, Inc.'s Motion to Strike is DENIED.

DATED at Lacey, Washington, and effective November 2, 2022.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ Michael Howard
MICHAEL HOWARD
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.