

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In re Application No. GA-079086 of	)	
	)	DOCKET NO. TG -020856
J & M DISPOSAL, INC.	)	
	)	
For a Certificate of Public	)	INITIAL ORDER DISMISSING
Convenience and Necessity to	)	APPLICATION
Operate Motor Vehicles in	)	
Furnishing Solid Waste Collection	)	
Service	)	
.....	)	

1 **Synopsis:** *This Order proposes to dismiss an application for solid waste authority for failure to present live generator testimony.*

2 **Nature of the Proceeding:** J & M Disposal, Inc. filed this application on June 28, 2002, for authority to operate motor vehicles in furnishing solid waste collection service consisting of construction and demolition debris in King and Pierce counties in the state of Washington.

3 **Procedural history:** Washington Refuse & Recycling Association, University Place Refuse Service, Inc. Rabanco Ltd. & Rabanco Recycling, Inc. d/b/a Rabanco Companies, Tri-County Disposal, Rabanco Connections International, Inc. d/b/a Issaquah Division, Maltby Division, Fiorito Enterprises, Inc. and Rabanco Companies d/b/a Kent-Meridian Disposal Co., Murrey’s Disposal Company, Inc., American Disposal Company, Inc. protested this application. Waste Management of Washington, Inc.’s petition to intervene was granted without objection.

4 Administrative Law Judge Karen M. Caillé heard the matter upon due and proper notice to all interested parties on March 25, 2003 in Olympia, Washington. The applicant failed to offer live testimony of supporting generators to establish the need for additional service, and Protestants, Commission Staff and Waste Management of Washington, Inc. joined in a motion for summary determination and dismissal of the application

5 **Initial Order:** The presiding administrative law judge proposes to grant the motion and to dismiss the application for lack of live testimony of supporting generators to establish the need for additional service.

6 **Appearances:** The following representatives appeared.

**Applicant:** J & M Disposal, Inc.  
Nat Brazill, Co-Owner  
599 Industry Drive, Bldg. 5  
Tukwila, WA 98188

**Protestants:** Washington Refuse & Recycling Association and  
University Place Refuse Service, Inc.  
James Sells  
Attorney at Law  
Ryan Sells Uptegraft, Inc. PS  
9657 Levin Road NW, Suite 240  
Silverdale, WA 98383

Rabanco Ltd. & Rabanco Recycling, Inc. d/b/a  
Rabanco Companies, Tri-County Disposal

Rabanco Connections International, Inc. d/b/a  
Issaquah Division, Maltby Division

Fiorito Enterprises, Inc. and Rabanco Companies  
d/b/a Kent-Meridian Disposal Co.

Murrey's Disposal Company, Inc. and American  
Disposal Company, Inc.

David W. Wiley  
Attorney at Law  
Williams, Kastner & Gibbs  
Two Union Square  
601 Union Street, Suite 4100  
Seattle, WA 98111-3926

**Intervenor:** Waste Management of Washington, Inc.  
Polly L. McNeill  
Summit Law Group, PLLC  
315 Fifth Avenue South, Suite 1000  
Seattle, WA 98104

**Commission Staff:** Lisa Watson  
Assistant Attorney General  
1400 S. Evergreen Park Drive SW  
Olympia, WA 98504-0128

### DISCUSSION

- 7 This is an application for a certificate of public convenience and necessity to operate motor vehicles in furnishing solid waste collection service consisting of construction and demolition debris in King and Pierce Counties in the state of Washington. The application is protested by carriers that already serve the territory.
- 8 A prehearing conference to establish a procedural schedule was originally scheduled for November 13, 2002. Applicant requested a continuance for 60 days due to a medical condition affecting one of the owners. The Commission convened a prehearing conference on February 4, 2003, before Administrative Law Judge Karen Caillé (ALJ). During a discussion about the number of witnesses each of the parties would present, Mr. Nat Brazill, co-owner of Applicant, informed the bench that the three owners would be testifying in support of the application. During a discussion of the issues related to this proceeding, Mr. Brazill stated that his company's position is that "it's a free enterprise. We ought to have the right to participate." (*Tr. 15*)
- 9 The ALJ suggested that Mr. Brazill review Chapter 81.77 RCW and Chapter 480-70 WAC to learn what information the Commission will need to decide whether the application should be granted. (*Tr. 16*) Mr. Brazill stated that he understood the law, asserted that the law protects existing haulers, and expressed that he understood it would be an uphill battle. *Id.* The parties agreed to hold the evidentiary hearing on March 25 and 26, 2003.

10 The ALJ entered a prehearing conference order on February 11, 2003. Appendix B to the order explains the hearing process and the type of information the Commission will need to make a decision on the application. Appendix B states that the Applicant must present testimony that there is a public need for the service proposed by the Applicant, specifically,

- Need for new service must be established by the testimony of members of the public who actually require the service. The Commission does not accept statements of an applicant that the authority is needed. The applicant must support its application with independent witnesses knowledgeable about the need for service in the territory in which the applicant seeks authority.
- If the application is protested, the Commission will not consider written statements of witnesses whom the applicant has not made available for cross examination at hearing; the Commission will generally only consider live testimony.

*Prehearing Conference Order, Appendix B.*

11 Mr. Brazill appeared at the hearing on March 25, 2003, and informed the bench that he would be the only witness to testify on behalf of the Applicant. The ALJ asked Mr. Brazill whether he read Appendix B to the Prehearing Conference Order, and Mr. Brazill affirmed that he did read it. (Tr. 25) The ALJ then asked Mr. Brazill if he intended to proceed without witnesses, and Mr. Brazill confirmed that that was his intention. (Tr. 26)

12 Mr. Brazill read a statement into the record in which he acknowledged his awareness of the statutes, rules, and procedures related to obtaining a certificate of public convenience and necessity to operate motor vehicles in furnishing solid waste collection service. Mr. Brazill testified that the first sentence in RCW 81.77.040 makes it almost impossible for a new or small business to enter the industry. He opined that in a free enterprise system, everyone should have the opportunity to compete. He testified further that the public is best served by open competition and not by a closed and controlled monopoly. (Tr. 27-28) He noted that some construction projects require minority or small business participation, and questioned how his company could bid on such projects if it is unable to get a permit. Mr. Brazill closed his remarks by stating the following:

We realize that we're fighting an uphill battle because the rules that was laid out by the legislators as they current exist makes it impossible for us to participate. (Tr. 31)

- 13 Mr. Brazill did not present any evidence that Protestants have failed, or are unable or unwilling to provide such service as is required to the satisfaction of the Commission.
- 14 Following the close of Applicant's case-in-chief, Protestants Rabanco Ltd. & Rabanco Recycling, Inc. d/b/a Rabanco Companies, Tri-County Disposal, Rabanco Connections International, Inc. d/b/a Issaquah Division, Maltby Division, Fiorito Enterprises, Inc. and Rabanco Companies d/b/a Kent-Meridian Disposal Co., Murrey's Disposal Company, Inc., and American Disposal Company, Inc. moved for summary determination under WAC 480-09-426(2) and dismissal of the application. Protestants cited Title 81 RCW and Commission precedent in support of their position that dismissal is warranted when applicant fails to present live testimony of supporting generators to establish the need for additional service. Protestants Washington Refuse & Recycling Association, University Place Refuse Service, Inc., Commission Staff, and Intervenor Waste Management of Washington, Inc. joined in the motion.
- 15 **Decision.** WAC 480-09-426(2) provides that a party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor.
- 16 When an application for solid waste authority is protested, the applicant must demonstrate that the public convenience and necessity require the proposed service through the testimony of members of the public present at the hearing. Further, when the territory already is served by a certificate holder, live public testimony also generally is needed to establish that the existing carriers will not provide service to the satisfaction of the Commission. *RCW 81.77.040*; Order M.V.C. No. 2270, *In re Alice Modig and Michael Peterson d/b/a ALI's*, App. No. D-78826, *Initial Order Granting Motion to Deny Application* (January 2000); Order M.V.C. No. 2279, *In re Alice Modig and Michael Peterson d/b/a ALI's, Commission Decision and Order Affirming and Adopting Initial Order* (April 2000); Order M.V.C. No. 2210, *In re Alexandr Milman and Walter Kazak d/b/a Checker Express*, App. No.

D-78596, *Initial Order Dismissing Application* (July 1997); Order M.V.C. No. 2217, *In re Alexandr Milman and Walter Kazak d/b/a Checker Express*, App. No. D-78596, *Commission Decision and Order Affirming Initial Order Dismissing Application* (August 1997); Order M.V. No. 143632, *In re C & C Transfer Co., Inc.*, App. No. E-74249, *Commission Decision and Order Denying Petition for Reconsideration; Affirming Final Order* (July 1991).

- 17 Here, Mr. Brazill, acknowledged that he was familiar with the laws and rules regarding solid waste authority, and affirmed that he read Appendix B of the Prehearing Conference Order, which set forth the information the Commission would need to rule on the application, including that Applicant must present testimony of members of the public who require the service to establish public need. Yet, Mr. Brazill is the only witness to testify in support of his application.
- 18 Self-serving testimony by an applicant regarding others' need for its service will not support a protested application for authority. Cross-examination could not adequately explore the details of the generators' need or the sufficiency of existing service, or even its truth. Fundamental fairness requires that the person supporting the application appear in person to describe his or her experiences. Order M.V.C. No. 2270, *In re Alice Modig and Michael Peterson d/b/a ALI's*, App. No. D-78826, *Initial Order Granting Motion to Deny Application* (January 2000); Order M.V.C. No. 2279, *In re Alice Modig and Michael Peterson d/b/a ALI's*, *Commission Decision and Order Affirming and Adopting Initial Order* (April 2000); Order M.V.C. No. 2210, *In re Alexandr Milman and Walter Kazak d/b/a Checker Express*, App. No. D-78596, *Initial Order Dismissing Application* (July 1997); Order M.V.C. No. 2217, *In re Alexandr Milman and Walter Kazak d/b/a Checker Express*, App. No. D-78596, *Commission Decision and Order Affirming Initial Order Dismissing Application* (August 1997).
- 19 Accordingly, the motion for summary determination should be granted and the application should be dismissed.

### FINDINGS OF FACT

- 20 (1) On June 28, 2002, J & M Disposal, Inc. filed an application for a certificate of public convenience and necessity to operate motor vehicles in furnishing solid waste collection service consisting of construction and demolition debris in King and Pierce counties in the state of Washington.

- 21 (2) Washington Refuse & Recycling Association, University Place Refuse Service, Inc., Rabanco Ltd. & Rabanco Recycling, Inc. d/b/a Rabanco Companies, Tri-County Disposal, Rabanco Connections International, Inc. d/b/a Issaquah Division, Maltbay Division, Fiorito Enterprises, Inc. and Rabanco Companies d/b/a Kent-Meridian Disposal Co., Murrey's Disposal Company, Inc., and American Disposal Company, Inc. filed timely protests to the docketed application, and Waste Management of Washington, Inc. filed for and was granted intervention status.
- 22 (3) Applicant failed to present live generator testimony that the public convenience and necessity require the service described in its application.
- 23 (4) Applicant failed to show that existing service provided by Protestants and Intervenor in the territory encompassed by its application fails to satisfy present or foreseeable demand for such service or otherwise to show that such service is not or will not be provided to the Commission's satisfaction.
- 24 (5) Protestants moved for summary determination and dismissal of the application because of the absence of supporting generator witnesses, and Intervenor and Commission Staff joined in the motion.

**CONCLUSIONS OF LAW**

- 25 (1) The Washington Utilities and Transportation Commission has jurisdiction under Chapter 81.77 RCW over the subject matter of and the parties to this proceeding.
- 26 (2) Protestants' motion for summary determination and dismissal of the application should be granted based upon the absence of generator witness testimony to establish need for the service required by RCW 81.77.040.
- 27 (3) It is not in the public interest or required by the public convenience and necessity pursuant to RCW 81.77.040 that Applicant be granted authority to operate motor vehicles in furnishing solid waste collection service as described in this application.

**ORDER**

28 Protestants' motion for summary determination is granted and the application is dismissed.

DATED at Olympia, Washington, and effective this 15th day of May, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

KAREN M. CAILLÉ  
Administrative Law Judge



**NOTICE TO THE PARTIES**

This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-09-780(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-09-780(3). WAC 480-09-780(4) states that any *Answer* to any Petition for review may be filed by any party within (10) days after service of the Petition.

WAC 480-09-820(2) provides that before entry of a Final Order any party may file a *Petition to Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

One copy of any Petition or Answer filed must be served on each party of record, with proof of service as required by WAC 480-09-120(2). An Original and nineteen copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Secretary  
Washington Utilities and Transportation Commission  
P.O. Box 47250  
Olympia Washington 98504-7250.