

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Application of

SUPERIOR WASTE & RECYCLE
LLC

For Authority to Operate as a Solid
Waste Collection Company in
Washington

DOCKET TG-181023

ORDER 05

GRANTING PETITION FOR RULE
EXEMPTION; GRANTING MOTION
FOR CLARIFICATION

BACKGROUND

- 1 On December 13, 2018, Superior Waste & Recycle LLC (Superior Waste or Applicant) filed with the Washington Utilities and Transportation Commission (Commission) an application for authority to operate as a solid waste collection company in Washington (Application). On January 24, 2019, the Commission issued a Notice of Application, which provided 30 days for interested persons to protest the Application, and on February 20, 2019, Waste Management of Washington, Inc., d/b/a Brem-Air Disposal, (Brem-Air Disposal) filed a protest to the Application.
- 2 The Commission convened an evidentiary hearing in this docket on August 5, 2019, before Administrative Law Judge Rayne Pearson. On October 4, 2019, the parties, including Commission staff (Staff), filed post-hearing briefs.
- 3 On November 13, 2019, the Administrative Law Judge entered Order 04, Initial Order Denying Application (Order 04).¹ Order 04 denied Superior Waste's Application and required Brem-Air Disposal to file tariff revisions within 90 days of the effective date of that Order to address gaps in service identified during the pendency of the proceeding, explaining that:

The Commission has learned over the course of this proceeding, however, that a small portion of consumers in Brem-Air Disposal's service territory are, at the very least, inconvenienced by the company's service limitations, and we agree

¹ The Initial Order was originally numbered "Order 03" in error. On November 21, 2019, the Commission issued an Erratum correcting the title of the Initial Order to Order 04.

with Staff that Brem-Air Disposal should be required to remedy the gaps in service created by these limitations. To that end, Brem-Air Disposal must file tariff revisions eliminating its service limitations within 90 days of the effective date of this Order. Based on Brem-Air Disposal's representations, we anticipate the company will: (1) purchase smaller vehicles to ensure it is able to provide drive-in service to customers not currently eligible for such service; (2) remove distance limitations and evaluate its ability to provide drive-in and carry-out service on a case-by-case basis; (3) work with customers who have particularly challenging driveways to accomplish drive-in and carry-out service to the best of its ability, recognizing that this may require customers to properly maintain their driveways as a condition of continued service.²

- 4 On December 3, 2019, Brem-Air Disposal filed with the Commission a Motion for Clarification or, in the Alternative, Petition for Administrative Review (Motion). In its Motion, Brem-Air Disposal first seeks an exemption from Commission rules to allow the presiding administrative law judge to clarify Order 04 rather than construing the motion as a petition for administrative review that requires final resolution by the three-member Commission. A party may request clarification of an initial order but only "to correct obvious or ministerial error."³ After the Commission enters a final order, WAC 480-07-835(1)(a) allows parties to request the Commission clarify "the meaning of, or requirements in, the [final] order so that the parties can accurately prepare compliance filings." Because Order 04 was an initial order, Brem-Air Disposal requests an exemption from the provisions of WAC 480-07-825 and WAC 480-07-835 to allow Brem-Air Disposal to seek clarification of Order 04 as if it were a final order.
- 5 In the alternative, Brem-Air Disposal requests its motion be construed as a petition for administrative review that should be narrowly construed as a request to clarify its obligations under paragraph 56 of Order 04. Brem-Air Disposal only requests administrative review in the event that, upon clarification, it learns that Order 04 requires it to make certain investments.
- 6 In addition to these threshold procedural matters, the Company seeks clarification of Order 04 insofar as it relates to its requirements that Brem-Air Disposal remedy its gaps in service. Specifically, Brem-Air Disposal requests the Commission clarify the following:

² Order 04 ¶ 38 (footnote omitted).

³ WAC 480-07-825(3)(a).

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- Whether references in paragraph 38 of Order 04 to “service limitations” are synonymous with “distance limitations”;
- Whether Order 04 requires Brem-Air Disposal to purchase smaller vehicles to reach hard-to-serve customers, or whether Order 04 leaves to the Company’s discretion how to best serve those customers; and
- Whether the only specific change to Brem-Air Disposal’s tariff required by paragraph 56 of Order 04 is to remove the distance limitations on drive-in and carry-out services.

7 In light of the unique procedural posture of Brem-Air Disposal’s Motion, the presiding officer granted Superior Waste leave to respond to the Motion, then subsequently granted Staff and Brem-Air Disposal leave to reply to Superior Waste’s response.⁴

8 On December 12, 2019, Superior Waste filed a response to Brem-Air Disposal’s Motion (Response). In its Response, Superior Waste argues that Order 04 requires Brem-Air Disposal both to remove distance limitations and to purchase smaller vehicles to ensure it is able to provide service to all of its customers. Superior Waste argues that Brem-Air Disposal fails to account in its Motion for its own testimony that purchasing new vehicles is likely necessary to provide service to the Commission’s satisfaction. Superior Waste further contends that the Motion fails to acknowledge that the Commission’s decision to deny Superior Waste’s Application was likely based on Brem-Air Disposal’s representations to that effect. Superior Waste requests the Commission require Brem-Air Disposal to purchase smaller vehicles, or, in the alternative, that it grant Superior Waste’s Application.

9 On December 20, 2019, Staff filed a reply to Superior Waste’s Response. Staff argues that the customer comments Superior Waste referenced in the Response were filed after the conclusion of the evidentiary hearing and may not be evaluated as part of the record. Staff also states that the Commission may not consider subsequent improvements made by an incumbent carrier in its analysis of whether that carrier will provide service to the Commission’s satisfaction. Staff requests the Commission clarify that it did not rely on Brem-Air Disposal’s representations related to purchasing new vehicles as part of its analysis regarding satisfactory service or its decision to deny Superior Waste’s Application.

⁴ All communications occurred via email and have been filed in, and made part of, the record in this docket.

10 Staff further argues that Superior Waste may not seek to change the outcome of Order 04 by requesting the Commission grant Superior Waste's Application as part of its response to Brem-Air Disposal's Motion. In addition, Staff contends that Superior Waste did not challenge the Commission's finding that Brem-Air Disposal provides service to the Commission's satisfaction.

11 Also on December 20, 2019, Brem-Air Disposal filed a reply to Superior Waste's Response. Brem-Air Disposal argues that Superior Waste does not oppose the relief requested, nor does it object to the presiding officer clarifying Order 04. Brem-Air Disposal notes that Superior Waste did not timely file a petition for administrative review, and its request to overturn Order 04 is not reasonably related to Brem-Air Disposal's Motion.

DISCUSSION AND DECISION

12 As a preliminary matter, we grant Brem-Air Disposal's petition for exemption from WAC 480-07-825(3)(a), which limits the scope of motions to clarify an initial order, and from WAC 480-07-835(1)(a), which applies only to motions for clarification of final orders. The purpose of a motion for clarification of any order is to ensure parties know their rights and responsibilities under the terms of the order, and may include, as Brem-Air Disposal's Motion does here, a request that the Commission clarify the order's meaning to ensure appropriate compliance.

13 WAC 480-07-110(1) authorizes the Commission to modify the application of any of its rules in individual circumstances, and on its own initiative during a particular adjudication, if the exemption or modification is consistent with the public interest, the purposes underlying regulation, and applicable statutes. Here, we modify the provisions of WAC 480-07-825(3) and WAC 480-07-835(1) to permit Brem-Air Disposal to file a motion to clarify the meaning of, or requirements in, an initial order, thereby allowing a request for clarification for issues similar to those allowed in rule for final orders. We agree with the Company's assertion, to which no other party objects, that the presiding administrative law judge is in the best position to clarify Order 04's requirements and that permitting such clarification is the most efficient use of the Commission's and the parties' resources. Accordingly, we conclude that granting Brem-Air Disposal's Motion to modify the application of WAC 480-07-825(3) and WAC 480-07-835(1) to allow the presiding administrative law judge to clarify Order 04 is in the public interest and is consistent with the purposes underlying regulation and applicable statutes.

14 We turn now to the substance of Brem-Air Disposal's Motion by addressing each request for clarification in turn. Following that discussion, we address briefly other procedural issues raised by Superior Waste.

- 15 **“Service Limitations” and “Distance Limitations.”** We clarify by this Order that the term “service limitations” as used in Order 04 includes “distance limitations,” but also, in some instances, includes other barriers that prevent Brem-Air Disposal from providing service to certain customers. Order 04 intended to instruct Brem-Air Disposal to remove distance limitations from its tariff within 90 days, but also to remove other service limitations caused by access issues, albeit not within the specified timeframe. To provide clarification, references to “service limitations” in both paragraphs 51 and 53 are amended by replacing the word “service” with the word “distance.” In those instances, Order 04 referred specifically to distance limitations. We make one additional replacement in paragraph 38 of Order 04, which is discussed below in paragraph 17.
- 16 **Whether Order 04 requires Brem-Air Disposal to purchase smaller vehicles.** Order 04 does not require Brem-Air Disposal to purchase smaller vehicles. Rather, Order 04 stated the Commission “anticipates” that Brem-Air Disposal will purchase smaller vehicles to ensure it is able to provide universal service to its customers. The use of the word “anticipates” rather than “requires” signaled that our statement was based solely on Brem-Air Disposal’s representations that purchasing new vehicles was the likely means it will use to address gaps in service.
- 17 Our ultimate objective is to ensure that Brem-Air Disposal provides universal service to its customers; at least as an initial matter, the Company should determine how best to meet that expectation. The Commission does not pre-approve a regulated company’s investments, nor will it make the decision to invest on a regulated company’s behalf. As such, we strike language related to Brem-Air Disposal’s anticipated investment for the sake of clarity. Accordingly, we amend paragraph 38 of Order 04 to read as follows:

... Brem-Air Disposal must file tariff revisions eliminating its ~~service~~ distance limitations within 90 days of the effective date of this Order. Based on Brem-Air Disposal’s representations, we also anticipate the company will: (1) ~~purchase smaller vehicles to~~ take steps to ensure it is able to provide drive-in service to customers not currently eligible for such service due to accessibility issues; (2) ~~after removing remove~~ distance limitations, and evaluate its ability to provide drive-in and carry-out service to customers with accessibility issues on a case-by-case basis; and (3) work with customers who have particularly challenging driveways to accomplish drive-in and carry-out service to the best of its ability, recognizing that this may require customers to properly maintain their driveways as a condition of continued service.⁵

⁵ Removed language is noted in strikethrough, and new language is underlined.

18 **Required changes to Brem-Air Disposal's tariff.** As discussed above, the Commission requires Brem-Air Disposal to remove distance limitations from its tariff within 90 days of the effective date of Order 04. Brem-Air Disposal correctly identified in its Motion that this is the only tariff revision it is required to file within 90 days. Order 04 does, however, further require that Company continue to evaluate and ultimately determine its best course of action for serving hard-to-reach customers that remain inaccessible to the Company's existing vehicles even in the absence of distance limitations. Order 04 did not provide a timeframe for accomplishing this task, but again, relied on the Company's representations that plans are well underway. Because it is appropriate for Brem-Air Disposal to determine how best to resolve this issue, we decline to establish a timeframe for the Company to take action.

19 **Other issues raised by Brem-Air Disposal's motion and responses/replies thereto.** Staff's assessment that Order 04 found Brem-Air Disposal provides service to the Commission's satisfaction independent of its requirement that Brem-Air Disposal address universal service issues is correct.

20 In that Order, we found that Brem-Air Disposal has "a positive history of compliance with Commission regulations," and, "[o]verall ... an exemplary history of complying with Commission rules, Commission orders, and its tariffs."

21 In analyzing Superior Waste's specific claims that Brem-Air Disposal is not providing service to the Commission's satisfaction, we examined three factors: (1) the nature, seriousness, and pervasiveness of complaints against Brem-Air Disposal; (2) Brem-Air Disposal's demonstrated ability to resolve complaints to the Commission's satisfaction; and (3) Brem-Air Disposal's history of compliance with regulation, with attention on the carrier's cooperativeness on matters central to regulation in the public interest. Based on those factors, the Commission found unequivocally that Brem-Air Disposal provides service to the Commission's satisfaction. Because the evidentiary record upon which Order 04 relied did not include any complaints related to the service issues identified in this proceeding, the Initial Order did not consider late-submitted customer comments,⁶ nor were Brem-Air Disposal's representations about service improvements a factor in our determination that Brem-Air Disposal provides service to the Commission's satisfaction.

⁶ Although several customers submitted comments to the Commission in this matter on October 9 through 11, 2019, these comments were not evidence upon which the decision in Order 04 was based. The comments were received well after the hearing, after the final set of exhibits and exhibit list was posted to the record, and after the parties filed post-hearing briefs.

22 In addition, Superior Waste is procedurally barred from requesting that the Commission grant Superior Waste's Application in response to Brem-Air Disposal's Motion. As both Brem-Air Disposal and Staff noted, Superior Waste did not timely file a petition for administrative review, and its response to Brem-Air's Disposal Motion is a procedurally improper means for attempting to change the outcome of Order 04.

23 **Conclusion.** We grant Brem-Air Disposal's petition for exemption and modify the application of WAC 480-07-825(3) and WAC 480-07-835(1) to permit the presiding officer to clarify Order 04 to provide further guidance to the parties related to Brem-Air Disposal's compliance obligations. In addition, we amend Order 04 as described in paragraphs 15 and 17, above, and clarify that the only action Brem-Air Disposal must take within 90 days of the effective date of Order 04 is to remove existing distance limitations from its tariff.

ORDER

THE COMMISSION ORDERS THAT:

- 24 (1) Waste Management, Inc., d/b/a Brem-Air Disposal's Petition for Exemption from WAC 480-07-825(3) and WAC 480-07-835(1) is granted.
- 25 (2) Waste Management, Inc., d/b/a Brem-Air Disposal's motion for clarification is granted.
- 26 (3) Paragraph 38 of Order 04 is amended to read as follows:

Brem-Air Disposal must file tariff revisions eliminating its ~~service~~ distance limitations within 90 days of the effective date of this Order. Based on Brem-Air Disposal's representations, we also anticipate the company will: (1) ~~purchase smaller vehicles to~~ take steps to ensure it is able to provide drive-in service to customers not currently eligible for such service due to accessibility issues; (2) ~~after removing~~ remove distance limitations, ~~and~~ evaluate its ability to provide drive-in and carry-out service to customers with accessibility issues on a case-by-case basis; and (3) work with customers who have particularly challenging driveways to accomplish drive-in and carry-out service to the best of its ability, recognizing that this may require customers to properly maintain their driveways as a condition of continued service.

Language that has been removed has been stricken, and language that has been added or modified is underlined.

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- 27 (4) The only requirement in Order 04 that Waste Management, Inc., d/b/a Brem-Air Disposal, must accomplish within 90 days of the effective date of Order 04 is to file revisions to its tariff to remove distance limitations. The Commission expects, based on Waste Management, Inc., d/b/a Brem-Air Disposal's representations, that it will continue to work diligently and expeditiously to resolve other access issues unrelated to distance limitations to achieve universal service to the extent it is safely and reasonably able to do so.
- 28 (5) The Commission retains jurisdiction over the subject matter and the parties to this proceeding to effectuate the provisions of this Order.

DATED at Lacey, Washington, and effective December 31, 2019.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ Rayne Pearson

RAYNE PEARSON
Administrative Law Judge