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BEFORE THE WASHINGTON STATE UTILITIES  
AND TRANSPORTATION COMMISSION

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

DOCKET TG-220243

Docket TG-220215

BASIN DISPOSAL, INC.’S [PROPOSED]  
REPLY IN SUPPORT OF MOTION FOR  
PARTIAL DISMISSAL

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1. Basin Disposal, Inc. (“Basin Disposal” “BDI”) files this [Proposed] Reply in Support of its Motion to Dismiss pursuant to WAC 480-07-370(5)(b) to rebut a number of new misleading and inaccurate claims made by Jammie’s Environmental, Inc. (“JEI” or “Jammie’s”) in its Response and demonstrate that Jammie’s application under Docket TG-220243 should be dismissed or otherwise summarily denied.

I. INTRODUCTION

2. Jammie’s position in response to BDI’s Motion for Partial Dismissal can be summarized as insisting that BDI’s motion could not be filed after responsive pleadings were due, but if it can be, then JEI alternatively made a prima facie case to support its application (except where it did not), but if it didn’t, then Jammie’s should be allowed to cure all deficiencies by supplying additional evidence through witnesses at the hearing, and a hearing should be allowed on JEI’s application under any circumstances because a hearing will already be convened on BDI’s formal complaint. Jammie’s attempts to support its revolving positions through a series of pejorative comments, citations to inapplicable orders, and misleading arguments. Despite JEI’s efforts to disregard procedural rules in this adjudication to endlessly move the goalposts and surprise BDI as the incumbent carrier, Commission rules both authorize BDI’s Motion for Partial Dismissal and require that parties present their evidence in conformity with the Commission’s procedural schedule. Because JEI failed to demonstrate that it should be allowed to violate BDI’s due process rights through late-filed direct shipper support testimony, while also now acknowledging that it failed to submit all necessary information in its application, its application should indeed be summarily denied.

1 II. ARGUMENT

2 A. Jammie’s argument that BDI’s Motion should be strictly construed disregards a number  
3 of Commission rules.

4 3. Jammie’s Response claims that BDI’s Motion for Partial Dismissal “violated the  
5 Commission’s procedural rules for filing a motion to dismiss” because it was filed after the  
6 deadline for responsive pleadings.<sup>1</sup> On this basis, JEI insists that the Commission construe  
7 BDI’s motion narrowly and strictly, and deny it because it was filed after the deadline for 12(b)  
8 and 12(c) motions in WAC 480-07-380(1)(a). However, Jammie’s incorrectly characterizes  
9 BDI’s Motion and the applicable deadlines and would ostensibly have the Commission violate  
10 WAC 470-07-395 in order to proceed to a hearing. In pertinent part, that rule clearly states that  
11 the Commission will disregard errors or defects in pleadings that do not affect the substantial  
12 rights of parties:

13 The commission, at every stage of any proceeding, will disregard errors or  
14 defects in pleadings, motions, or other documents that do not affect the  
15 substantial rights of the parties.

16 Here, there are in fact multiple bases upon which the Commission may properly consider  
17 BDI’s Motion to Dismiss.

18 4. First, WAC 480-07-375(2) provides, in pertinent part, “[t]he commission may refer to  
19 the Washington superior court rules for civil proceedings as guidelines for handling motions.”  
20 Regarding that standard, the Commission may consider Basin Disposal’s Motion under CR  
21 41(b)(3), which provides “[a]fter the plaintiff, in an action tried by the court without a jury, has  
22 completed the presentation of evidence, the defendant, without waiving the right to offer  
23 evidence in the event the motion is not granted, may move for dismissal on the ground that  
24 upon the facts and the law the plaintiff has shown no right to relief.” Alternatively, the  
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<sup>1</sup> Jammie’s Response, p. 7.

1 Commission may consider BDI’s Motion under CR 50, which provides: “If, during a trial by  
2 jury, a party has been fully heard with respect to an issue and there is no legally sufficient  
3 evidentiary basis for a reasonable jury to find or have found for that party with respect to that  
4 issue, the court may grant a motion for judgment as a matter of law against the party on any  
5 claim...” JEI’s direct case concluded on September 16, 2022, without shipper support  
6 testimony and lacking other requisite elements of its burden of proof. It has thus been fully  
7 heard on presenting all evidence supporting the issue of its application and fell far short of  
8 making a prima facie case. Thus, BDI’s Motion to Dismiss alternatively meets the standards of  
9 a Motion for Judgment as a Matter of Law under CR 41(b)(3) or CR 50 and may be properly  
10 considered under WAC 480-07-375(2).

11 5. Additionally, pursuant to WAC 480-07-375(3), the Commission’s rules permit oral  
12 motions during a hearing, unless the moving party is foreclosed from doing so by rule or in the  
13 presiding offer’s discretion. Contrary to JEI’s exaggerated assertion that “BDI admits it has no  
14 right or authority to file its Motion to Dismiss,”<sup>2</sup> there is neither a rule expressly authorizing a  
15 motion to dismiss for failing to make a prima facie case on direct nor a rule precluding one.<sup>3</sup>  
16 Thus, BDI could well have made the same motion at the hearing which in turn would have  
17 been timely under the rules.

18 6. Finally, although not necessary to do so, the Commission would also be authorized to  
19 treat BDI’s Motion as one for summary determination under WAC 480-07-380(2). Such a  
20 possibility is expressly recognized in WAC 480-07-380(1)(a). Were the Commission to do so  
21 now, there could be no negative impact on JEI’s substantive rights because the Commission  
22 will consider dispositive motions filed at least 30 days before the next hearing in a proceeding  
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<sup>2</sup> JEI’s Response, p. 8, ¶ 18.

<sup>3</sup> JEI claims that BDI’s motion is barred because it is too late under WAC 480-07-385(1)(b), but that deadline expressly applies only to “any motion directed to the pleading.” As addressed below, BDI’s Motion is based on the failure to make a prima facie case through *evidence*. It is not based on inadequacy of pleadings.

1 pursuant to WAC 480-07-380(2)(b). BDI filed its Motion on October 14, 2022, which was  
2 more than 30 days prior to the November 15, 2022 hearing scheduled in these proceedings, and  
3 JEI was afforded an opportunity to respond to all of BDI's substantive legal arguments.<sup>4</sup> Thus,  
4 dispositive relief was then and remains available under BDI's pending Motion to Dismiss.

5 B. BDI did not move to dismiss on the pleadings, and is not bound by the deadline in  
6 WAC 480-07-380(1)(b).

7 7. JEI also erroneously strains to shoehorn BDI's motion into one made under WAC 480-  
8 07-380(1)(a) in order to subject it to the deadline in WAC 480-07-380(1)(b).<sup>5</sup> But as Jammie's  
9 ironically noted elsewhere, motions to dismiss under CR 12(b) and 12(c) are based on the  
10 sufficiency of pleadings.<sup>6</sup> BDI's based its Motion for Partial Dismissal on JEI's failure to  
11 submit necessary *evidence*. Thus, the deadline in WAC 480-07-380(1)(b) is patently  
12 inapplicable to BDI's Motion. Moreover, objecting certificate holders cannot assess all  
13 elements of an applicant's burden of proof at the time their objection is due because certain  
14 allegations need not be made until the objection is filed. For example, neither live shipper  
15 testimony nor evidence that an incumbent solid waste collection company will not provide  
16 service to the Commission's satisfaction are required at the time of an application. Thus, JEI's  
17 rendition of the rules would be overly restrictive, and prevent the Commission from efficiently  
18 denying unsupported applications following the deadline for submission of direct evidence.<sup>7</sup>

22 <sup>4</sup> JEI appears to concede this possibility in its Response to BDI's Motion to Strike on p. 4: 8, referring to the  
23 Motion as "BDI's Motion for Partial Summary Judgment."

<sup>5</sup> JEI's Response, p. 9. n. 13.

<sup>6</sup> *Id.*, p. 6.

24 <sup>7</sup> See *In re Application P-76085 of Brian C. McCulloch, d/b/a Parralax Moving Systems for Permit to Operate as*  
25 *a Common Carrier*, Order M.V.G. No. 146379 (Apr. 15, 1993)(finding 9, stating "Protestants moved to dismiss  
this application after all applicant's financial information had been presented. The motion was properly granted.  
Determination of the issue of adequacy of financial information at this stage will save an enormous amount of  
time, resources, and inconvenience to the parties and the public witnesses.")

1 C. The Commission's procedural rules prohibit the unending direct case that Jammie's  
2 seeks to rely upon.

3 8. To avoid the repercussions of its failure to make a prima facie case, Jammie's also  
4 erroneously contends that it may amend its application, supplement the record, and otherwise  
5 introduce additional new evidence in support of its burden of proof up to and including the date  
6 of the hearing. This argument is incorrect. The hearing in these proceedings will not be of the  
7 legislative type, at which evidence may be presented in any sequence. Instead, the  
8 Commission adjudicates protested applications in its quasi-judicial role under RCW 34.05.  
9 Under these standards, Jammie's assumed the both burden of proof and the responsibility to  
10 determine what evidence to present in its direct case to establish each element of a prima facie  
11 case.<sup>8</sup> Failure to do so may result in dismissal.<sup>9</sup>

12 9. Further, Jammie's bases its premise on Commission orders that can be readily  
13 distinguished and otherwise shown to be unhelpful to JEI's position or otherwise inapplicable  
14 here. The first, *AT&T Communications of the Northwest, Inc. v. U.S. West Communications,*  
15 *Inc.*, involved a formal complaint rather than a contested application, and the motion to dismiss  
16 at issue was one made under CR 12(b), contending that the Commission lacked jurisdiction to  
17 adjudicate the claims raised in the complaint.<sup>10</sup> While the Commission denied the initial  
18 motion, that was hardly based on any fluid procedural right to supplement the record at the  
19 hearing as contended by Jammie's. Instead, the Commission initially concluded that "[the non-  
20 moving party's] complaint met the threshold for stating a claim on which relief could be  
21 granted; that case law regarding the filed-rate doctrine does not speak to or control the  
22 issues presented to the Commission in this docket; and that the parties cited no binding legal  
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24 <sup>8</sup> *GTE Northwest Inc. v. Whidbey Telephone Co.*, Dkt. UT-950277, Fifth Supp. Order (Apr. 2, 1996)(dismissing  
25 complaint following direct case for failure to make a prima facie case under CR 41(b)(3)).

<sup>9</sup> *Id.*

<sup>10</sup> Dkt. UT-991292, Tenth. Supp. Order (May 18, 2000).

1 authority providing that the FCC has exclusive, preemptive jurisdiction over the  
2 provisions of intrastate service even though it may be provided under an interstate tariff.”<sup>11</sup>  
3 Moreover, the Commission stated that it expected that evidence establishing jurisdiction could  
4 be established based on the pleadings themselves.<sup>12</sup> The motion was then renewed under CR  
5 41(b)(3) and CR 50 at the conclusion of the complainant’s direct presentation at the hearing  
6 because the witnesses failed to meet the burden of proof.<sup>13</sup>

7 10. The second cited case, which JEI boldly asserts “illustrates even more clearly the  
8 Applicant’s right to put on its case-in-chief at hearing,”<sup>14</sup> can also be readily distinguished as  
9 wholly inapplicable here.<sup>15</sup> Although Jammie’s does generally characterize the 1992  
10 proceeding correctly,<sup>16</sup> the Commission’s procedural rules applicable to contested  
11 transportation application hearings in 1992 were significantly different than the current  
12 procedural rules. At that time, the parties were not widely entitled to discovery and all  
13 evidence in contested applications was presented at the hearing rather than through prefiled  
14 testimony and exhibits. It was not until January 1, 1994, via Order R-400, Docket A-930517,  
15 that the Commission implemented rules permitting the Commission to authorize prefiled  
16 testimony and exhibits via WAC 480-09-736 (1994). Now, pursuant to WAC 480-07-460 and  
17 470, the Commission requires that evidence be submitted and distributed in advance of a live  
18 hearing through written testimony and exhibits. And although the party with the burden of  
19 proof presents first at the hearing pursuant to WAC 480-07-470(5), the Commission rules do  
20 not allow for live direct testimony at the hearing, and redirect examination is expressly limited  
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<sup>11</sup> *Id.*, ¶ 14.

23 <sup>12</sup> *Id.*

24 <sup>13</sup> *Id.* *AT&T* not only demonstrates that BDI’s motion to dismiss was timely, but that dismissal is proper if the  
25 party with the burden of proof fails to make a prima facie case in its direct case.

<sup>14</sup> JEI’s Response, p. 11.

<sup>15</sup> Order M.V. No. 146257, *In re Application P-75994 of Allen Frank Dale*, (Mar. 12, 1993).

<sup>16</sup> The precise date of the hearing is not referenced in Order M.V. No. 146257, but the initial order was entered on  
October 28, 1992, after the live hearing.



1 to the issues raised during cross-examination.<sup>17</sup> Thus, contrary to JEI's assertions, there is no  
2 modern procedural basis to permit allow JEI a hearing by ambush by continuing to submit  
3 additional evidence beyond the deadline for its direct case on September 16, 2022, when there  
4 is no opportunity to respond

5 11. The Commission's Order in *In re Application of International Resource Management,*  
6 *Inc. d/b/a WasteXpress* also offers JEI no additional support.<sup>18</sup> Indeed, that application was  
7 uncontested before any hearing or prefiled testimony submission after it was amended to  
8 include certificate restrictions and was granted by only an initial order without an  
9 adjudication.<sup>19</sup> Thus, it provides no guidance here, and cannot meaningfully establish the  
10 minimum threshold for evidence of need or fitness in a contested application for overlapping  
11 solid waste collection authority.

12 12. Finally, JEI curiously relies on an order in *In re Application of Brian McCulloch, d/b/a*  
13 *PARRALAX MOVING SYSTEMS, for a Permit to Operate as a Common Carrier*<sup>20</sup> to support  
14 its unilateral premise that applications can supplemented "at any time prior to rendering a  
15 determination on the application."<sup>21</sup> Like the order in *In re Application P-75994 of Allen*  
16 *Frank Dale*, this proceeding also predated the existing procedural rules and is not directed to  
17 the timing of the applicant's direct evidentiary presentation. Nonetheless, as discussed above,  
18 when the *pro se* applicant there failed to make a prima facie case for its financial fitness in its  
19 direct case, the Commission concluded that dismissal of the application was appropriate.<sup>22</sup>  
20 Thus, the very case relied upon by JEI confirms conclusively that if a party fails to meet its

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<sup>17</sup> WAC 480-07-470(10).

<sup>18</sup> Dkt. TG-200764, Order 01 (Dec. 23, 2020).

<sup>19</sup> *Id.*, Appendix A.

<sup>20</sup> Order M.V.G. No. 146379 (Apr. 15, 1993).

<sup>21</sup> JEI's Response, p. 16.

<sup>22</sup> *Id.*, Finding 9.

1 burden of proof in its direct case, dismissal “will save an enormous amount of time, resources,  
2 and inconvenience to the parties and the public witnesses.”<sup>23</sup>

3 D. RCW 81.77.040 requires both the missing financial evidence and the testimony of a  
4 shipper.

5 13. Jammie’s is similarly incorrect that the Commission supplanted all express statutory  
6 factors in RCW 81.77.040 when it adopted its current application form and WAC 480-70-091.  
7 In fact, JEI’s Response cites to numerous Commission orders that directly apply the very  
8 standards identified in RCW 81.77.040,<sup>24</sup> yet the sole isolated order it would have the  
9 Commission rely upon here is the initial order in the ultimately uncontested application of  
10 WasteExpress.<sup>25</sup> This hardly demonstrates that the Commission need not follow the  
11 legislature’s requirements in contested application proceedings such as this.<sup>26</sup> Contrary to  
12 Jammie’s broad statements, the Commission still expects parties to meet all statutory  
13 requirements. As stated in the interim order (Order 04) of Judge Kopta in *In the Matter of the*  
14 *Application of Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of*  
15 *Washington*,<sup>27</sup>:

16 The bar for demonstrating financial and operational fitness under RCW  
17 81.77.040 may be low... but it is higher than the Company's showing... The  
18 statute requires, at a minimum, a description and analysis of the facilities  
needed, the estimated attendant costs, and the assets the applicant commits to  
provide, to offer the requested service.

19 14. Jammie’s continues its misreading of Commission orders when it claims that no shipper  
20 support testimony was required to support its direct case because “the Commission articulated  
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22 <sup>23</sup> *Id.*

<sup>24</sup> JEI’s Response, p. 12, n. 20.

23 <sup>25</sup> *In re Application of International Resource Management, Inc., d/b/a WasteXpress*, Dkt. TG-200764 (Aug. 28,  
2020).

24 <sup>26</sup> JEI’s position itself also demonstrates otherwise, because if all statutory standards were supplanted by the  
25 Commission’s application rule, JEI would not have bothered to argue that BDI did not provide solid waste  
management service to PCA’s satisfaction, because neither the Commission’s application form nor WAC 480-70-  
091 would require such a showing.

<sup>27</sup> Dkt. TG-120033, Order 04 (Jun. 4, 2012).

1 a broader standard for evaluating need.”<sup>28</sup> For that latest erroneous pronouncement, JEI relies  
2 on *In re Application P-73623 of Safco Safe Trans., Inc. for Permit to Operate as a Common*  
3 *Carrier*.<sup>29</sup> But despite Jammie’s implication, the Commission there was not addressing whether  
4 live shipper support testimony was necessary. Instead, as demonstrated in the cases internally  
5 cited by the Commission there, that statement addressed the substance of the testimony that  
6 must be supplied by the testifying shippers.<sup>30</sup> And subsequent to the Commission’s 1991 order  
7 in *In re Application of Safco*, in 1996, the Commission reiterated its requirement that live  
8 shipper testimony be supplied in an applicant’s direct case in *In re Application D-78198 of*  
9 *Apple Blossom Lines, Inc.*<sup>31</sup> There, the Commission made this clear:

10       The written shipper support statements attached to the application, and  
11       again attached to the petition for review, were properly excluded from  
12       evidence. In a protested proceeding, an applicant must present live witnesses  
13       to demonstrate that the public convenience and necessity require the service it  
14       proposes. The Commission will not consider written statements of witnesses  
15       whom the applicant has not made available for cross examination at hearing.<sup>32</sup>

16 Thus, live shipper support testimony must indeed be presented during an applicant’s direct  
17 case. Because JEI failed to supply shipper support testimony in its direct case, and has  
18 attempted to collaterally attack BDI through the back-door submission of PCA’s testimony in  
19 the response phase, the Commission should not reward JEI’s late filing by considering it as part  
20 of its direct case application case.

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<sup>28</sup> JEI’s Response, p. 22.

<sup>29</sup> Order M.V. No. 143916 (Oct. 9, 1991).

<sup>30</sup> The Commission cited to Order M. V.G. No. 1176, *In re Bell, d/b/a Montleon Trucking, App. No. GA-76* (July, 1984); Order M. V. No. 126429, *In re Glen Mar, Inc., App. No. P-65982* (Nov., 1982).

<sup>31</sup> Order M.V.C. No. 2139 (Jan. 24, 1996).

<sup>32</sup> *Id.* at p. 5.

1 E. Jammie’s admission that its application is incomplete and that it seeks contract carrier  
2 authority mandates re-docketing or dismissal

3 15. Jammie’s also now belatedly defaults to a premise that its application is one for contract  
4 carrier authority and that it was therefore not required to submit a proposed tariff under WAC  
5 480-70-091 and admits that it did not supply a proposed tariff and that the contract it filed with  
6 its application does not confirm to Commission rules.<sup>33</sup> Its application should also be denied  
7 on this basis alone because of its admission that its application is incomplete. If Jammie’s  
8 actually now seeks contract carrier authority, this also raises new concerns because its  
9 application was not expressly docketed as one for contract carrier authority. The docket notice  
10 merely indicated that JEI’s application was one for “Specialized solid waste collection (as a  
11 class C company), providing service to Packaging Corporation of America located at 31831 S  
12 Hwy 12 in Walulla, WA 99363.” This merely describes an application for common carrier  
13 authority to provide service in a restricted geographic rather than traditional contract carrier  
14 authority. By Commission definition, “contract carrier” means “a person holding a certificate  
15 issued by the commission authorizing transportation of solid waste for collection and/or  
16 disposal under special and individual contracts or agreements.”<sup>34</sup> Thus, a docket notice for an  
17 application for contract carrier authority would have been signaled through language stating it  
18 was for service “...under contract with” PCA.<sup>35</sup> The Commission has previously concluded  
19 that notice of one form of application in the Commission’s docket notice is not sufficient for  
20 another form of application.<sup>36</sup> Thus, JEI’s application again should not now proceed to  
21 hearing.

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24 <sup>33</sup> JEI’s Response, p. 14, n. 24.

<sup>34</sup> WAC 480-70-041.

25 <sup>35</sup> See, e.g., Docket Notice in *In re Application of Northwest Liquid Transport 1, Inc.*, Dkt. TG-091026.

<sup>36</sup> Order M.V. No. 126620, *In re Application E-18606 of Steve L. & Lester R. Waggoner d/b/a Waggoner Trucking*  
for Extension of Authority Under Common Carrier Permit No. 26716 (Dec. 6, 1982).

1 F. The Commission’s Docket Notice controls and JEI’s argument mischaracterizes the  
2 contents of the docketed notice.

3 16. Similarly, as noted in BDI’s Motion, the Docket Notice for Jammie’s application states  
4 that the applied-for certificate will exclude municipal solid waste. Jammie’s response to this  
5 point is highly misleading though because it actually parses the language in its filed application  
6 rather than addressing the Docket Notice, and then simply claims that: “similar language is  
7 mirrored in the Commission’s Docket Notice.”<sup>37</sup> Yet, the Docket Notice does not identify  
8 “primary commodities” and “other commodities” as JEI contends. It identifies materials to be  
9 hauled in a list, and then identifies exceptions including municipal solid waste. As emphasized  
10 by BDI in its Motion, when there is a conflict between the authority sought and the language of  
11 a docket notice, the docket notice controls and an application must then be republished in order  
12 to afford due process to those interested parties who might have relied upon the docketed  
13 language to their detriment by not filing a protest or otherwise seeking to intervene in the  
14 proceeding.<sup>38</sup>

15 III. CONCLUSION

16 17. As BDI addressed in its Motion and now in this reply, Jammie’s glaringly failed to  
17 establish a prima facie case of its financial fitness and of the public need for its service in its  
18 direct case. JEI’s Response broadly deflects and misinterprets Commission rules and long-  
19 standing precedent regarding both the showing that must be made by direct case and the liberal  
20 construction that the Commission applies to pleadings and motions. The Commission should  
21 not reward this tactic by allowing the applicant to cure its deficiencies through eleventh hour  
22 filings and out-of-sequence testimony. Once again, BDI urges the Commission to dismiss  
23 Jammie’s application.

24 DATED this 31st day of October, 2022.

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<sup>37</sup> *Id.*, p. 24.

<sup>38</sup> Order M.V.G. No. 1451, *In re Application of GA-68 of Sure-Way Incineration, Inc.* (Nov. 30, 1990).

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