

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

DOCKET TG-220243

BASIN DISPOSAL, INC.

DOCKET TG-220215

Complainant,

v.

JAMMIE'S ENVIRONMENTAL, INC.

Respondent.

INITIAL POST-HEARING BRIEF OF BASIN DISPOSAL, INC.

January 18, 2023

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

 A. Introduction and summary..... 1

II. ISSUES PRESENTED..... 3

III. ARGUMENT 4

 A. The record facts demonstrate that Jammie’s operates as an illegal solid waste collection company, and it should be ordered to cease and desist..... 4

 i. The governing statutes and rules define solid waste and solid waste collection broadly and include Jammie’s services to PCA 4

 ii. The hearing record demonstrates that Jammie’s provides solid waste collection services 6

 iii. Exemptions to state regulation of solid waste collection do not apply to Jammie’s regular and ongoing solid waste collection activities..... 9

 B. Jammie’s failed to meet any of the application standards and should be denied a certificate of public convenience and necessity to collect solid waste..... 12

 iv. The legal standards applicable to an overlapping solid waste application present a high bar that Jammie’s cannot clear 12

 v. Jammie’s failed to establish a need for service 13

 vi. Jammie’s cannot establish its fitness to serve 14

 vii. Basin has and will continue providing service to the satisfaction of the Commission .. 17

 viii. Disposal of OCC Rejects is not a specialized service to be evaluated under alternative criteria..... 31

IV. CONCLUSION..... 33

TABLE OF AUTHORITIES

	Page(s)
ADMINISTRATIVE DECISIONS AND RULEMAKINGS	
<i>In re Application of Freedom 2000, LLC d/b/a Cando Recycling and Disposal and In re application of Points Recycling and Refuse, LLC d/b/a Point Recycling and Refuse Company, Dkts. TG-08576 and TG-091687, Order 05/Order 02 (consolidated), (Jan. 27, 2010).</i>	14, 15
<i>In re Application GA-8 of Sure-Way Incineration, Inc., for a certificate of public convenience and necessity, Order M.V.G. No. 1451 (Nov. 30, 1990)</i>	15
<i>In re Application GA-769 of William R. Bell, d/b/a Montleon Trucking Order, M.V.G. No. 1176 (Jul. 9 1984)</i>	13
<i>In re Application GA-75968 of Sure-Way Medical Services, Inc., Order M.V.G. 166 (Nov. 18, 1993).</i>	16
<i>In re Application GA-849 of Superior Refuse Removal Corp., Order M.V.G. 1526 (Nov. 20, 1991)</i>	19, 21, 22, 34
<i>In re Application of GA-864 of Northwest Unitech, Inc., Order M.V.G. No. 1367 (Jan. 18, 1989)</i>	13, 15
<i>In re Application GA-868 of Sure-Way Incineration, Inc., Order M.V.G. No 1451 (Nov. 30, 1990)</i>	15, 17, 18, 32
<i>In re Application GA-75154 of Ryder Distribution Resources, Inc., Order M.V.G. No. 1761 (Aug. 9, 1995).</i>	15
<i>In re Application No. D-2444 Richard & Helen Asche, Bremerton-Kitsap Airporter. Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection, Order M.V.G. No. 1443 (May, 1984)</i>	13
<i>In re Application P-65982 of Glenn Mar, Inc., Order M.V. No. 126429 (Nov. 16, 1982)</i>	13
<i>In re Petition of Arrow Sanitary Service, Inc. d/b/a Oregon Paper Fiber for a Declaratory Ruling, Cause No. TG-2197 (Dec. 14, 1989)</i>	11, 12, 16
<i>In the Matter of Joint Application of Evergreen Trails, Inc., d/b/a Evergreen Trailways & E. M. Wickkiser, d/b/a Bellingham Sea-Tac Airporter for Auth. to Transfer A Portion of Rights Under Certificate of Pub. Convenience & Necessity No, C-819, Order M. V. C. No. 1824 (Jul. 1989)</i>	15

*In re Application of R.S.T. Disposal Company, Inc. d/b/a Tri-Star Disposal to provide
Garbage and Refuse Collection in the City of Kent, Order M.V.G. 1402 (Jul. 28,
1989)*14, 21

STATE STATUTES

RCW 34.05.4134

RCW 34.05.570(3)(e)15

RCW 46.61.65530

RCW 70A.205.010.....12

RCW 70A.205.015.....5

RCW 81.04.3805

RCW 81.040.1104

RCW 81.772, 5, 10, 11

RCW 81.77.0105, 11, 21

RCW 81.77.010(5).....10

RCW 81.77.0301, 4

RCW 81.77.0401, 2, 4, 5, 9, 10, 11, 12, 13, 14, 16, 18, 21

RCW 81.806

Washington Administrative Procedures Act, RCW 34.05 *et seq.*15

REGULATIONS

49 C.F.R. § 395.3(a)(3).....31

WAC 173-350-100.....21, 22

WAC 480-70-006.....4

WAC 480-70-011.....5

WAC 480-70-011(g).....9, 11, 33

WAC 480-70-016.....5

WAC 480-70-016(4).....6

WAC 480-70-201.....31

WAC 480-70-436.....31

WAC 480-70-441.....31

WAC 480-70-451.....31

WAC 480-70-456.....32

OTHER AUTHORITIES

MERRIAM-WEBSTER’S ONLINE DICTIONARY11

I. PRELIMINARY STATEMENT

A. Introduction and summary

- 1 On February 15, 2022, the Washington Utilities and Transportation Commission (“UTC” or “Commission”) staff advised Jammie’s Environmental Service, Inc. (“Jammie’s” or “JEI”) that after review by an Assistant Attorney General, the solid waste collection services Jammie’s was providing and continues to provide to Packaging Corporation of America (“PCA”) require a certificate of public convenience and necessity from the Commission. (“G-Certificate”).¹ Throughout the nine months prior to that email, and openly and continuously during the 10 months since, Jammie’s provided near-daily solid waste collection service at PCA’s paper mill near Wallula, in unincorporated Walla Walla County (“PCA’s Paper Mill”) without a G-Certificate. Specifically, Jammie’s collected all of PCA’s rejects from its Old Corrugated Cardboard recycling (“OCC Rejects”) process and transported them to a Class D municipal solid waste landfill for disposal nearly every weekday commencing on May 19, 2021, through the present date.
- 2 Jammie’s provides this service despite being admonished by multiple parties that its conduct violates state law, thumbing its nose at the Legislature’s charge to the Commission in RCW 81.77.030 that it supervise, monitor and regulate solid waste collection by insisting that its services were exempt. In fact, Jammie’s admitted it only first considered whether its services were authorized under state law after threat of legal action against its illegal solid waste collection services by the incumbent G-Certificate holder for Walla Walla County, Basin Disposal, Inc. (“BDI” or “Basin”).²
- 3 JEI ignored BDI’s demand that it cease providing unlicensed and unlawful solid waste collection services in its exclusive service territory, compelling BDI to file a formal complaint against JEI for violation of RCW 81.77.040 on March 29, 2022. Jammie’s then filed an application for a G-

¹ Exh. CD-15.

² Scott, TR. 181: 21 - 25.

certificate under RCW 81.77 to operate a solid waste collection service providing service at PCA's Paper Mill on April 1, 2022.

- 4 To prevail on its formal complaint against Jammie's, Basin must establish that JEI provided solid waste collection service for compensation over the public roadways without a G-Certificate in violation of RCW 81.77.040. The unequivocal evidence submitted by BDI and confirmed through cross-examination of JEI's and PCA's respective witnesses establishes without question that PCA hired Jammie's for the purpose of collecting, transporting and disposing of solid waste, and JEI did so on hundreds of occasions. And despite JEI's tortuous protest that its regularly scheduled solid waste collection service was just an incident to the loading and processing services (or alternatively all of the industrial cleaning) it provides at PCA's Paper Mill, the evidence comprehensively demonstrates the contrary.
- 5 As noted, JEI applied for a G-certificate to provide solid waste collection service under RCW 81.77.040. Because BDI already provides this service and timely protested JEI's application, to be granted a certificate, JEI must overcome the high bar the Legislature and Commission established for granting overlapping solid waste collection authority. Here, the hearing record conclusively demonstrates that Jammie's fell short of that bar on every element of its burden of proof. Jammie's failed to supply sufficient evidence from which the Commission may determine its financial fitness while JEI's continuous operation of an unlawful solid waste collection operation at PCA demonstrates that it wholly lacks regulatory or operational fitness.
- 6 Most critically, Jammie's failed to demonstrate that BDI will not provide solid waste collection service to the Commission's satisfaction. Although PCA witnesses, and its counsel in its opening statement, made clear that they prefer to receive solid waste collection service from JEI, and that PCA now prefers to use a contractor to load processed OCC Rejects directly into a trailer for disposal, their inconsistent and often contravened critiques of Basin's service lacked any corroboration in objective evidence. Conversely, despite being denied due process through an

opportunity to respond to PCA's witnesses' unfounded, challenged, and ultimately discredited testimony, BDI demonstrated that it proactively sought to work with PCA as its committed partner to improve PCA's fledgling process for removing, collecting, and transporting OCC Rejects for landfill disposal and was simply denied any opportunity to provide that service by any other means.

- 7 On the present hearing record, Jammie's application also presents a clear danger to the public interest as particularly articulated by intervenor Washington Refuse and Recycling Association in their opening statement in this record. JEI proposes to provide service to a single industrial customer rather than serve as a common carrier providing universal service, serving to dilute the revenue base of the incumbent, Basin, and ultimately creating upward pressure on rates for all other BDI customers without a corresponding public benefit. Further, to allow Jammie's to whitewash its flagrant violation of state law through the prospective issuance of a G-certificate simply because a large industrial generator insists on being granted its desired preference would encourage and facilitate other companies in providing unlawful services in deliberate attempts to circumvent state law and identify and siphon off valuable customers from the regulated system. The Commission should refuse to permit Jammie's to undermine the system selected by the Legislature which well serves all Washington generators and summarily deny Jammie's application.

II. ISSUES PRESENTED

- 8 Basin Disposal's formal complaint against JEI, and JEI's application for authority to provide solid waste collection services to the area of PCA's Paper Mill present overlapping questions of fact, but distinct issues to be resolved. The primary question to be resolved in BDI's formal complaint can be stated as follows:

- 1) Whether regular collection and transportation of solid waste for disposal is exempt from state economic regulation merely because the company alternatively provides:
(1) unrelated services to the generator or related ancillary services that would be

unnecessary; or (2) unregulated accessorial services in connection with the collection of solid waste.

Jammie's application for solid waste collection authority presents a host of additional issues for resolution by the Commission:

- 2) Whether a company that has provided routine and continuous unlicensed solid waste collection service can establish regulatory fitness merely by belatedly applying for authority, despite its refusal to cease unlicensed solid waste transportation while its application is pending.
- 3) Whether an unlicensed solid waste collection company that collects ordinary municipal solid waste from an industrial generator can qualify as a specialized solid waste collection company merely by providing pre-collection solid waste management or de-watering.
- 4) Whether an applicant that fails to submit necessary financial and cost-of-service records in support of a contested solid waste collection authority application can simultaneously avoid the scrutiny of cross-examination at hearing by offering to supplement records after the hearing and establish financial fitness.
- 5) Whether Jammie's demonstrated that Basin Disposal will fail to provide service to the Commission's satisfaction even though objective contemporaneous and undisputed evidence demonstrates that Basin proactively offered to work with PCA to improve its processes, hire additional drivers, assign drivers to PCA's facility, acquire additional equipment, and offer service by any means authorized by its Commission-approved tariff.

III. ARGUMENT

A. The record facts demonstrate that Jammie's operates as an illegal solid waste collection company, and it should be ordered to cease and desist

i. The governing statutes and rules define solid waste and solid waste collection broadly and include Jammie's services to PCA

- 9 As noted, BDI filed its formal complaint against Jammie's to obtain an order from the Commission directing JEI to cease and desist from further violation of state law prohibiting operating as a solid waste collection company without first obtaining a certificate of public convenience and necessity from the Commission, RCW 81.77.040. The Commission has jurisdiction over BDI's complaint pursuant to RCW 81.040.110, 81.77.040, 34.05.413 and WAC 480-70-006 and 041 and is required by the Legislature to supervise and regulate solid waste collection companies pursuant to RCW 81.77.030. The Commission also may issue penalties

against Jammie’s for violation of a provision of RCW Title 81 or of Commission rules pursuant to RCW 81.04.380.

10 JEI’s conduct is governed by RCW 81.77.040, which prohibits a solid waste collection company from “operat[ing] for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation.” Prohibited activities also include “advertising, soliciting, offering, or entering into an agreement to provide that service.”³

11 Although it is itself quite simple and straightforward, the statutory prohibition in RCW 81.77.040 is expanded upon by definitional statutes and Commission rules as well. RCW 81.77.010 defines both “solid waste” and “solid waste collection company” broadly. “Solid waste” is given the same broad meaning as the one under RCW 70A.205.015, but excludes source-separated residential recyclables:

all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials.

Considering the broad scope of this definition, there should be no question that the materials transported by Jammie’s from PCA constitute “solid waste” under Chapter 81.77, RCW.

12 RCW 81.77.010 further defines “solid waste collection company,” providing an expansive description that encompasses any business transporting solid waste for collection or disposal:

every person... owning, controlling, operating, or managing vehicles used in the business of transporting solid waste for collection or disposal, or both, for compensation, except septic tank pumpers, over any public highway in this state as a “common carrier” or as a “contract carrier.”

The UTC has also adopted rules interpreting when a company transporting solid waste falls within its jurisdiction, set forth in WAC 480-70-016 and WAC 480-70-011. The former provides

³ RCW 81.77.040.

clarity to circumstances where a company like Jammie's is not primarily engaged in the business of transporting solid waste, but does indeed transport solid waste on a more-than-occasional basis:

Persons holding permits issued by the commission under the provisions of chapter 81.80 RCW, whose primary business is not the collection of solid waste, normally will also need to obtain a certificate of public convenience and necessity if they transport solid waste to a disposal site on more than an occasional basis, or if they hold themselves out to the public as providing solid waste collection service.

Further guidance is provided in WAC 480-70-016(4) as to whether a G-certificate is required when a specific commodity might conceivably be transported as a commodity subject to the UTC's jurisdiction under RCW 81.80. That rule considers the following factors:

- (a) The intent of the shipper;
- (b) The intended destination of the shipment;
- (c) The actual destination of the shipment;
- (d) Special handling or conditions placed on the shipment by the shipper and/or receiver;
- (e) The value of the commodity being transported;
- (f) Whether the carrier is primarily engaged in the business of providing solid waste collection or is primarily engaged in the business of providing a service other than the collection of solid waste; and
- (g) Whether the carrier holds itself out to the public as a transporter of solid waste.

ii. The hearing record demonstrates that Jammie's provides solid waste collection services

13 The testimony and evidence submitted supports only one inescapable conclusion: that Jammie's is operating as a solid waste collection company by collecting and transporting OCC Rejects from PCA's Paper Mill over the public highways for compensation on to a landfill for disposal on a regularly scheduled basis. No serious dispute can be raised to the classification of the

materials transported by JEI; OCC Rejects are solid waste. Once they are collected by Jammie's they are transported to and directly disposed of in a landfill.⁴

14 Jammie's also admits it provides a solid waste collection service, and the written evidence and PCA's testimony corroborate its admissions. As Owner and President of JEI, Jammie Scott described the process of Jammie's first involvement in collecting OCC Rejects from PCA, and how it expanded from merely transporting OCC Rejects waste for disposal, to providing additional accessorial loading and on-site processing:

Initially, beginning in late May 2021, our role was simply to help PCA and BDI with managing and disposing of the OCC Rejects mess...⁵

At that time, PCA was primarily responsible for loading the OCC Rejects while BDI and Jammie's focused on disposal.⁶

Jammie's ultimately recommended to PCA that Jammie's bring in an 86 cubic yard belt trailer to more efficiently haul the OCC Rejects. PCA agreed to try Jammie's proposal on a trial basis.⁷

[The trial] went very well. The belt trailer turned out to be the most efficient way to collect and dispose of the OCC Rejects and Jammie's later added a second belt trailer to help with hauling. While PCA initially stated it would provide the loading, to keep up with the volume, Jammie's ultimately assumed that role as well with their own five-yard wheel loader, which was more efficient.⁸

15 Skyler Rachford corroborated the nature of JEI's services, testifying: "Jammie's stated they could provide a full-time onsite person to manage the waste, provide a front-end loader for mixing and loading, load the waste into a conveyor trailer, and then haul the waste for disposal."⁹

16 As discussed by Charlie Dietrich, records produced by Jammie's also demonstrate that with respect to OCC Rejects waste, the primary purpose for which PCA retained JEI's services was for solid waste collection, transportation and disposal.¹⁰ First, on May 19, 2021, Owen Scott

⁴ Scot, TR. 99: 4 - 10.

⁵ Exh. JDS-1T. 18: 15 - 16.

⁶ *Id.* at 18: 19 - 20.

⁷ *Id.* at 19: 5 - 7.

⁸ *Id.* at 19: 10 - 14.

⁹ Exh. "No. 01T" (hereinafter referred to as "SR-1T") at p. 31 - 32.

¹⁰ Exh. CD-1T. 18: 17 - 21.

emailed Kasey Markland to provide a cost estimate for “T&D of the OCC material.”¹¹ The attached cost estimate included a description of the proposed service: “Cost Estimate for Transportation of OCC Waste based on a 12 hour day for 5 days includes mob demob” and included a rate for “Landfill Disposal Cost Per Ton.”¹² Pursuant to its standard practice for new services, PCA then issued a purchase order on May 20, 2021 to cover services as described in JEI’s proposal for “Transportation of OCC Waste.”¹³ These records demonstrate from the very start, JEI proposed to provide solid waste collection and transportation of PCA’s OCC Rejects for disposal. And, at that time, Jammie’s proposal included no additional accessorial services for loading. That work was performed by PCA directly.

17 The evidence also demonstrates that after providing service for several weeks, JEI proposed a trial for a modified version of its solid waste collection service that would include a scheduled landfill haul and additional equipment. Brian Wilhelm discussed the trial in an email dated June 17, 2021, stating:

The purpose of this trial is to determine what the load time will look like, dump time at the landfill and turnaround times to solidify our best path forward.

- We will need to build up material to accommodate as best we can within reason.
- Jammies will bring their loader over to load their own trucks. (We will use our loader to help assist the jammies loader for filling the trucks).
- Each truck that they anticipate to take to the landfill is 80 yards. (We expect to hit the volume capacity before the weight capacity).

Ideal schedule:

- Haul 2 loads Tuesday
- Haul 3 loads Wednesday
- Haul 1 load Thursday

18 Jammie’s subsequent written estimate dated July 7, 2021, held out that JEI would collect and transport waste for disposal on a regular Monday through Friday schedule, describing that service as follows:

¹¹ Exh. CD-09, p. 6.

¹² *Id.* at p. 7.

¹³ *Id.* at p. 9.

Daily rate for JEI to provide a loader, belt trailer and operator to load and transport the OCC waste for disposal. This pricing is based on working Monday through Friday, this pricing is based on working eleven (11) hour shifts and transporting three (3) loads of waste per shift. If the project falls on a weekend or a holiday the pricing will be adjusted accordingly.¹⁴

The subsequent purchase orders all confirm the same intent to use JEI for regularly scheduled solid waste collection services.¹⁵ Finally, as synopsised by Charlie Dietrich, the landfill disposal tickets Jammie's produced in discovery further establish that JEI indeed transported solid waste from PCA for disposal nearly every weekday from the commencement of service through the date for which records were last produced in August 2022.¹⁶ Considering the record as a whole, the Commission should readily conclude that Jammie's provided PCA with a traditional solid waste collection service in violation of RCW 81.77.040.

iii. Exemptions to state regulation of solid waste collection do not apply to Jammie's regular and ongoing solid waste collection activities

19 Ignoring the facts outlined above, Jammie's contends that all of its daily solid waste collection activities at PCA's Paper Mill should be found exempt from Commission supervision and regulation as an incidental adjunct to its other business under WAC 480-70-011(g). That rule exempts from Commission regulation:

The operations of private carriers who, in their own vehicles, transport solid waste purely as an incidental adjunct to some other established private business owned or operated by them in good faith.

20 On this topic, like many others, Jammie's demonstrates it will say almost anything to justify or otherwise avoid the adverse consequences of its actions, modulating its positions and contradicting its sworn testimony at whim. JEI vacillated wildly within both its prefiled testimony and hearing testimony as to which of its other services to PCA the Commission should be considering as its "other established private business." Ms. Scott first implied in her initial prefiled testimony that JEI's solid waste collection should be exempt simply because it provides

¹⁴ *Id.* at p. 26.

¹⁵ Exh. CD-1T. 19: 1 – 23; 11; Exh. CD-06.

¹⁶ *Id.*

wholly unrelated industrial cleaning services to the paper mill and its other customers.¹⁷ Then, within the same testimony, she insisted that all solid waste collection for PCA is “associated with its cleaning or cleanup services” at PCA’s Paper Mill.¹⁸ Flip-flopping once again, in her response-phase pre-filed testimony, Ms. Scott adamantly and unequivocally insisted that JEI’s solid waste collection was actually incidental to all of its other services for PCA, based on a quantitative analysis of all hours performed by JEI at PCA’s Paper Mill, both within the OCC Plant and the overall mill.¹⁹ She went on to insist that solid waste is only a very small part of JEI’s business and that it “does not seek out solid waste collection hauling or disposal.”²⁰

21 When asked about this at the hearing however, Ms. Scott modified her position yet again. First, she testified that the myriad of services to which JEI’s solid waste collection are incidental include all services JEI provides to PCA at its mill, including those outside of the OCC Plant.²¹ But she reversed course immediately after that, testifying, “I felt that the services we’re providing was [sic] incidental to the managing of the waste for the customer.”²² When asked to reconcile those positions, she insisted that Jammie’s solid waste collection could only be incidental to JEI’s cleaning services and mixing services within PCA’s OCC Plant.²³

22 Regardless of which of these inconsistent positions the Commission considers, the Commission should conclude that Jammie’s is a solid waste collection company under RCW 81.77.040 because JEI provides regular solid waste collection service to PCA rather than incidental and occasional service and that no *de minimis* exception to RCW 81.77 exists. To qualify as a private carrier rather than a solid waste collection company, both the statutory definition in RCW

¹⁷ Exh. JDS-1T. 3: 16 - 17; 4: 11 - 18.

¹⁸ *Id.* at 30: 12 - 16.

¹⁹ Exh. JDS-17T. 2: 10 - 15; 8: 11 - 11: 4.

²⁰ *Id.* 13: 13 - 15. Ms. Scott’s sworn statement that JEI does not seek out solid waste collection hauling is also directly contradicted by the company website, which holds out the company as providing “waste transportation & disposal.” Exh. CD-19, p. 7.

²¹ Scott, TR. 128: 3 - 21.

²² Scott, TR. 129: 14 - 22.

²³ Scott, TR. 129: 23 - 131: 2.

81.77.010(5) and exemption in WAC 480-70-011(g), require that the solid waste collection be an “incidental adjunct to some other established private business.” Jammie’s attenuated, deliberate and disjointed interpretations of this rule would ignore both the words *incidental* and *adjunct*.

- 23 “Incidental” means “being likely to ensue as a chance or minor consequence.”²⁴ Because Jammie’s was hired by purchase order to provide the primary service of transportation of OCC Rejects for disposal, it obviously cannot be by mere chance or as a minor consequence of all of its unrelated industrial cleaning services that JEI engages in solid waste collection. Jammie’s plainly intended to and does provide solid waste collection.
- 24 “Adjunct” means “something joined or added to another thing but not essentially a part of it.”²⁵ Jammie’s provided collection and transportation services before it ever began providing solid waste management or pre-collection processing. Loading and processing services were added as an incidental adjunct to its existing solid waste collection services, not the other way around.
- 25 Additionally, while Jammie’s may contend it is not a solid waste collection company because the majority of its business is something other than solid waste collection, the Commission previously rejected similar claims. In *In re: Petition of Arrow Sanitary Service, Inc. d/b/a Oregon Paper Fiber for a Declaratory Ruling*, TG-2197 (Dec. 14, 1989), a motor carrier sought a declaratory order from the Commission that it was not a solid waste collection company subject to Commission regulation under RCW 81.77 because it conducted business as a motor carrier, provided solid waste collection to just one large commercial customer, and did not hold itself out as a solid waste collection company. The Commission’s Final Order concluded that the petitioner was indeed a solid waste collection company subject to RCW 81.77.040’s requirements. In reaching its conclusion, the Commission noted that the Legislature included a definition of “contract carrier” in RCW 81.77.010, which applied to anyone providing solid

²⁴ MERRIAM-WEBSTER’S ONLINE DICTIONARY at <https://www.merriam-webster.com/dictionary/incidental>

²⁵ *Id.* at <https://www.merriam-webster.com/dictionary/adjunct>

waste collection under a contract to a single customer. Based on this, the Commission concluded “[t]his is a clear indication that service to a single customer is not excluded from the regulatory scheme and that no *de minimis* exception exists.”²⁶

26 Considering that its services are neither incidental nor an adjunct, the Commission should reject Jammie’s dangerous premise that its regularly scheduled solid waste collection services to PCA are exempt merely because it subsequently added unregulated accessorial services and/or offers unrelated services to PCA. To permit otherwise would allow the exception to easily swallow the rule because any unlicensed solid waste hauler in the state could evade the Commission’s statutory obligations to supervise and regulate solid waste collecting by simply agreeing to offer additional unregulated accessorial services, and then every motor carrier in the state could begin collecting solid waste from their existing customers. The result could provide a roadmap to the complete evisceration of the Legislature’s goals of regulating solid waste collection and handling to “prevent land, air and water pollution and conserve the natural, economic, and energy resources of this state.”²⁷

B. Jammie’s failed to meet any of the application standards and should be denied a certificate of public convenience and necessity to collect solid waste

iv. The legal standards applicable to an overlapping solid waste application present a high bar that Jammie’s cannot clear

27 Applications for certificates of public convenience and necessity to provide solid waste collection service are also governed by RCW 81.77.040. The Commission must consider, but is 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 an affidavit or declaration;

²⁶ *In re: Petition of Arrow Sanitary Service, Inc. d/b/a Oregon Paper Fiber for a Declaratory Ruling*, TG-2197 (Dec. 14, 1989).

²⁷ RCW 70A.205.010.

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 an affidavit or declaration;

and sentiment in the community contemplated to be served as to the necessity for such a service.²⁸

v. Jammie's failed to establish a need for service

28 The application factors set forth in RCW 81.77.040 have long been interpreted to require that an applicant establish that the public convenience and necessity require the applied-for service. In other words, an applicant must show that the public needs the service.²⁹ In these proceedings, Jammie's application was supported by the testimony of representatives of PCA, but PCA's witnesses never testified that they were unable to obtain the regulated services they now claim to need from JEI. In fact, Basin Disposal was providing solid waste collection service to PCA before it commenced operations at its OCC plant, and to its OCC Plant via drop boxes precisely as PCA had requested. When PCA subsequently decided it preferred have its OCC Rejects transported by different equipment, it never gave BDI an opportunity to provide that service. Consequently, JEI simply cannot show that there is a need for any additional service.

29 Moreover, pursuant to long-standing Commission precedent, an applicant for a certificate of public convenience and necessity must support its application through the live testimony of a supporting shipper.³⁰ In this proceeding, JEI failed to include shipper support witnesses in its initial direct testimony. Instead, PCA submitted its support testimony in the response phase, subsequently and inaccurately representing that BDI had agreed to permit all intervenors to testify in the response phase. PCA's claims are contradicted by the pre-hearing conference

²⁸ RCW 81.77.040.

²⁹ See Order M.V.G. No. 1176, *In the Matter of Application GA-769 of William R. Bell, d/b/a Montleon Trucking* (Jul. 9 1984).

³⁰ *In re Application No. D-2444 Richard & Helen Asche, Bremerton-Kitsap Airporter, Inc., d/b/a Bremerton-Kitsap Airporter, Inc., Kitsap-Sea-Tac Airporter, Inc., The Sound Connection*, Order M.V.G. No. 1443 (May, 1984); *In re Application P-65982 of Glenn Mar, Inc.*, Order M.V. No. 126429 (Nov. 16, 1982).

transcript, which demonstrate that the parties submitted only a proposed schedule for “response” testimony. Because JEI and PCA’s gamesmanship has thus denied BDI an opportunity to respond, which was further truncated by JEI and PCA’s avoidance of all meaningful cross-examination during the hearing, BDI has been denied procedural due process. BDI thus objects once more to the consideration of PCA’s out-of-sequence testimony without an opportunity to respond via its own witnesses, who would have credibly rebutted many of PCA’s erroneous claims.³¹

vi. Jammie’s cannot establish its fitness to serve

30 An applicant must also demonstrate that it is both financially fit and operationally fit to serve. Regarding financial fitness, the Commission previously concluded “applicants have an affirmative burden to come forward with evidence about the cost of facilities and of providing service and the economic feasibility of the service.”³² Further, the UTC “must determine whether a company is financially fit by considering whether it can finance the proposed operations for a reasonable time.”³³ Although the bar for financial fitness of a new service is low, and the applicant need not demonstrate that it can guarantee a profit, RCW 81.77.040 requires that the applicant provide “an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal.” This requires “some demonstration of feasibility.”³⁴ Such a demonstration could have been provided in the form of a pro forma budget

³¹ BDI further incorporates here by reference paragraphs 5 and 13 – 15 of its Motion for Partial Dismissal. As set forth there, the docket notice issued by the Commission contains a glaring internal inconsistency that deprived the public of fair notice regarding the scope of JEI’s application. Without republishing the Docket notice to indicate more precisely the service JEI is seeking, Commission precedent precludes the granting of JEI’s application on this ground as well.

³² *In re Application of GA-864 of Northwest Unitech, Inc.*, Order M.V.G. No. 1367 (Jan. 18, 1989).

³³ *In re Application of Freedom 2000, LLC d/b/a Cando Recycling and Disposal* and *In re application of Points Recycling and Refuse, LLC d/b/a Point Recycling and Refuse Company*, Dkts. TG-08576 and TG-091687 (consolidated), Order 05/Order 02, ¶ 72 (Jan. 27, 2010).

³⁴ *In re Application of R.S.T. Disposal Company, Inc. d/b/a Tri-Star Disposal to provide Garbage and Refuse Collection in the City of Kent*, Order M.V.G. 1402 (Jul. 28, 1989).

reflecting the projected cost of service, or sufficient financial records to reflect its cost of service.³⁵

31 Despite the low bar, there must be at least some credible evidence in the record to support a finding that the proposed business can sustain operations. And when evidence necessary to make such a finding is absent from the record, the Commission historically concludes it is unable to find an applicant financially fit, and will ultimately deny an application.³⁶ Indeed, this outcome is legally required when the record is devoid of supporting evidence because, as an adjudication subject to the Washington Administrative Procedures Act, the Commission's orders on applications must be based on substantial evidence.³⁷ Here, Jammie's made absolutely no evidentiary showing regarding its statutorily required underlying costs of service. It provided no pro forma budget addressing its operations, testimony describing its cost of service, or anything else beyond its balance sheet and equipment list. The record is bereft of any information from which profit could be analyzed or projected. Thus, the Commission should conclude that JEI failed to carry its affirmative burden of proof to establish its financial fitness.

32 The Commission's regulatory fitness analysis considers, among other things, "whether the Company is in compliance with state laws and rules, and is willing and able to continue to do so."³⁸ Although past violations are not an absolute bar to a finding of regulatory fitness, "the Commission will consider whether the violations are repeated or flagrant, whether corrective action was promptly taken, and whether the applicant can now provide credible assurances of compliance."³⁹ When a history of non-compliance is shown, the Commission may consider "an

³⁵ See, e.g., *In re Application of Freedom 2000, LLC*, supra n. 35; *In re Application GA-8 of Sure-Way Incineration, Inc., for a certificate of public convenience and necessity*, Order M.V.G. No. 1451 (Nov. 30, 1990).

³⁶ See *In re Application of GA-864 of Northwest Unitech, Inc.*, Order M.V.G. No. 1367 (Jan. 18, 1989); *In the Matter of Joint Application of Evergreen Trails, Inc., d/b/a Evergreen Trailways & E. M. Wickkiser, d/b/a Bellingham Sea-Tac Airporter for Auth. to Transfer A Portion of Rights Under Certificate of Pub. Convenience & Necessity No. C-819*, Order M. V. C. No. 1824 (Jul. 1989).

³⁷ RCW 34.05.570(3)(e).

³⁸ *In re Application of Freedom 2000, LLC*, supra n. 34, Order 05, ¶ 76.

³⁹ *In re Application GA-75154 of Ryder Distribution Resources, Inc.*, Order M.V.G. No. 1761 at 5 (Aug. 9, 1995).

applicant's assurances of future compliance, when combined with objective manifestations of intent to comply” as evidence of fitness.⁴⁰

33 In this proceeding, Jammie’s actions speak louder than any words could and demonstrate conclusively that it lacks regulatory fitness. As addressed above, Jammie’s has engaged in near-daily continuous violations of RCW 81.77.040 through its unlicensed solid waste collection service to PCA. Jammie’s made no credible effort to justify its conduct, nor could it. No applicable precedent supports its fledgling exemption arguments and the Commission has previously concluded that Washington law includes no *de minimis* exceptions.⁴¹ Even after being advised by Commission Staff that the Assistant Attorney General (“AAG”) had advised a G-Certificate was required for its service,⁴² Jammie’s continued to conduct its illegal hauling rather than ceasing its service pending the outcome of its application. In fact, Jammie’s lacked even a common carrier certificate until it contacted the Commission after BDI was forced to threaten legal action for JEI’s ongoing infringement upon BDI’s property rights.⁴³ These actions demonstrate that it is disinterested in voluntary or proactive regulatory compliance, clearly preferring to ask for forgiveness rather than permission.

34 And while Jammie’s might continue to protest in its brief that it acted in good faith upon Commission Staff’s initial mistaken informal opinion that JEI’s haul was exempt from regulation, it offers no excuse whatsoever for failing to obtain temporary authority or continuing to haul after that opinion was reversed following a factual investigation and specific guidance was provided by the AAG. Additionally, Ms. Scott claims to have long had knowledge of UTC regulations based on her calls to the Commission staff when renewing JEI’s insurance,⁴⁴ and testified at great length regarding the Commission’s application and exemption standards.⁴⁵ Ms.

⁴⁰ *In re Application GA-75968 of Sure-Way Medical Services, Inc.*, Order M.V.G. 166, at 7-8 (Nov. 18, 1993).

⁴¹ *In re: Petition of Arrow Sanitary Service, Inc.*, *supra* n. 26.

⁴² Exh. CD-15.

⁴³ Exh. CD-12T. 10: 3 - 12.

⁴⁴ Exh. JDS-1T. 6: 6-9.

⁴⁵ *Id.* 23:1 – 31:16.

Scott cannot claim to have knowledge of UTC regulation and simultaneously feign ignorance of state law requiring a certificate to provide solid waste service and expect the Commission to find JEI fit for service. In fact, the Commission previously concluded that such inconsistent testimony demonstrates an applicant is unfit for service:

It is simply incredible that a witness profess familiarity with the law and a willingness to comply on the one hand, and claim ignorance of the law's requirements on the other hand. Either [the applicant] is in fact unfamiliar with the regulatory requirements or he is familiar with the requirements but chooses not to comply with them, Neither posture should be successful in a regulated environment. Evidence of record... demonstrates that the applicant was familiar with at least some of the requirements it chose to disregard.

...

The applicant's testimony and the actions of the company are inconsistent. The Commission in this case has given due consideration to the conclusions of the administrative law judge regarding the credibility of [the applicant], but is unable to affirm those conclusions in light of the substantial objective evidence showing an unwillingness or inability of the applicant to comply with regulatory requirements.

Overall, the applicant's behavior shows a pattern of disregard for voluntary compliance with law. The applicant chooses to remain uninformed about regulatory requirements, preferring to wait until enforcement action is taken to begin compliance. The applicant's past conduct shows it to be unwilling or unable to comply with Commission rules and laws, As such, the applicant is not fit to receive authority to operate as a solid waste collection company.⁴⁶

35 Moreover, the record itself is once again absent of any evidence demonstrating an intent to comply with the law in the future. To credibly assert that it will comply with state law, the Commission should expect such commitments under oath and subject to cross-examination. Jammie's made no such promises. Instead, once again, the Commission should conclude that Jammie's wholly failed to meet its burden of proof in establishing its regulatory fitness.

vii. Basin has and will continue providing service to the satisfaction of the Commission

36 While the Commission should deny JEI's application on fitness standards alone, it also failed to demonstrate that there is any justification to permit multiple solid waste collection companies to

⁴⁶In the Matter of Application Ga-8 68 of Sure-Way Incineration, Inc., supra n. 35.

operate within Basin Disposal's service territory. As detailed below, Basin Disposal provided precisely the service that PCA requested and proactively sought to work with PCA to improve its service as PCA worked through numerous issues upon startup of its new OCC Plant. BDI was able and willing to acquire new equipment, hire new employees and otherwise do what was necessary to ensure successful and exemplary solid waste collection service to PCA. That PCA now insists it is unhappy that BDI was unable to cure all of the issues that PCA encountered with the startup of its OCC Plant is clear. However, the objective and credible evidence shows that PCA made few complaints until now, and its new complaints, offered in support of Jammie's application relate to whether BDI could solve PCA's pre-collection moisture problems to PCA, not with BDI's solid waste collection service. Now that PCA has found solutions to the high moisture contents of its OCC Rejects through bunkers constructed for temporary storage and de-watering its waste, there is no reason BDI should not resume collecting all of PCA's OCC Rejects, which can be provided either through drop-boxes as PCA originally requested, or via tractor-trailer as PCA apparently now prefers.

a. Legal standards for determining satisfactory service

37 Where there is an existing and protesting solid waste collection company serving the territory which an applicant seeks to serve, the Commission may only grant an application for new service if the applicant establishes that the incumbent provider "will not provide service to the satisfaction of the Commission."⁴⁷ In evaluating applications under this standard, the Commission has concluded this standard typically favors exclusive service:

...the Commission believes that in the context of neighborhood solid waste collection, the statute contemplates an exclusive grant of authority as the best and most efficient way of serving all customers in a given territory. In this general context, it is assumed that all or most people and businesses in a given territory are also customers needing garbage service. Under these circumstances, an exclusive grant of authority in a given territory promotes service, efficiency, consistency and is generally in the public interest.⁴⁸

⁴⁷ RCW 81.77.040.

⁴⁸ *In re Application GA-868 of Sure-Way Incineration, Inc.*, *supra* n. 35.

38 In interpreting whether an incumbent has demonstrated that they will provide satisfactory service, the Commission has consistently stated that it will consider factors relating to the overall quality of the existing service, including:

the nature, the seriousness and the pervasiveness of complaints about that service; the carrier's response to customer complaints, and its demonstrated ability to resolve them to the Commission's satisfaction; and the carrier's history of compliance with regulation, with special attention to the carrier's cooperativeness on matters central to the Commission's regulation in the public interest.⁴⁹

b. PCA made no complaints regarding BDI's drop box collection service provided elsewhere in PCA's Paper Mill

39 Applying these standards, there is no doubt that Basin Disposal consistently provided not just satisfactory service, but in fact exemplary service, and will continue to do so in the future.

PCA's own words demonstrate these facts. As explained by PCA's witness, Skyler Rachford, BDI provides drop box service to PCA's Paper Mill and operates on a daily collection, hauling containers once they require service:

At the Mill, BDI hauls trash and other typical solid waste like lunchroom garbage, general office trash, and scrap metal. BDI also hauls some select dry OCC Rejects, the Ragger and Sedimator rejects, which are mostly glass, plastic, wires, staples, rock, and dirt. These rejects are dry by nature and can be dumped into the BDI dumpsters. All this trash/waste is placed by PCA in BDI's dumpsters which are placed in locations throughout the Mill. BDI sends a driver everyday (M-F) to periodically check on the dumpsters. If the dumpsters are full, they load them onto their trucks, and haul the trash to the landfill for disposal. Once emptied, BDI returns the empty dumpsters to the Mill.⁵⁰

PCA lodged absolutely zero complaints about this service, which should demonstrate that BDI's service remains consistent and more than satisfactory. In fact, prior to the initiation of these proceedings, PCA witness Kurt Thorne had described BDI's service stating "overall we have been happy with the other trash hauling BDI performs for the Mill."⁵¹

⁴⁹ *In re Application GA-849 of Superior Refuse Removal Corp.*, Order M.V.G. 1526 (Nov. 20, 1991).

⁵⁰ Exh. SR-1T. p. 13 – 14.

⁵¹ Exh. CD-2, p. 78.

c. JEI's (and PCA's) contrived critiques rely on inaccurate statements

40 Despite PCA's overall satisfaction with BDI's drop box collection service, Jammie's attempts here to overcome the Commission's high bar for overlapping applications through its ultimately unsupportable and vigorously contested allegations that BDI provided poor service to PCA's OCC Plant. Jammie's concerted efforts were fully supported by PCA's witnesses, but their mutual testimonies demonstrate that the sole cause of alleged service problems attributed to BDI started and ended with PCA's failure to sufficiently anticipate the problems the moisture content of its waste stream would create and identify a workable solution for de-watering, processing and loading its waste so that it could be efficiently hauled for disposal. Moreover, whatever their motivations may be, the record in these proceedings clearly demonstrates that JEI and PCA alike are determined to override the Legislature's established system for solid waste collection to impose their own interests through an exaggerated smear campaign built upon supposed evidence that falls apart under even the most cursory of examinations.

41 To start, prior to the commencement of these proceedings, PCA's Mill Manager, Kurt Thorne, expressed precisely why PCA preferred that Jammie's haul its OCC Rejects, which had nothing to do with unsatisfactory service. Instead, according to Mr. Thorne, PCA preferred Jammie's better negotiated rate and the fact that it offered ideas for alternative methods of processing and managing its OCC Rejects waste stream:

In regards to your assertion that Jammies is illegally hauling our waste, that is between you and Jammies. Jammies has hauled waste for other mill operations and brought us a plan that was significantly less expensive, more efficient, and much safer for our employees than what you were offering. Prior to getting ideas from Jammies, we brought you out to the mill and asked for better and cheaper ways of hauling the waste and we did not hear any ideas from BDI. Frankly, Jammies has earned this business. I believe you are required to be competitive in your pricing and service and in this case of hauling OCC rejects, there is no doubt you were not.⁵²

⁵² Exh. CD-2, p. 78.

42 Commission rules and state law in fact proscribe a regulated carrier from competing via rates; solid waste collection companies are actually *required* to charge the rates set forth in their Commission-approved tariff.⁵³ In fact, failure to comply with a Commission-approved tariff may serve as the basis of a finding that a regulated solid waste collection company *will not* serve to the Commission’s satisfaction.⁵⁴ The Commission also previously concluded that rates are not a proper consideration for determining whether an application should be granted.⁵⁵ Thus, PCA’s primary true concern with BDI’s service cannot establish unsatisfactory service.

43 Additionally, many of PCA’s untimely complaints relate to whether BDI helped PCA *manage* its waste rather than adequately *dispose* of its waste. For example, Skyler Rachford testified “[w]hile BDI complained about the wet OCC Rejects, they never offered any ideas on how BDI could help manage the wet waste material. Instead, BDI told us that PCA needed to address the moisture content in the OCC Rejects.”⁵⁶ Similarly, Brian Wilhelm offered concerns about BDI’s ability to “adequately manage the OCC Reject waste.”⁵⁷ As addressed below it is simply inaccurate to assert that BDI didn’t offer to help with PCA’s processing and loading issues, and PCA never requested that BDI help with processing, loading or solid waste management. Moreover, these complaints widely miss the mark. Solid waste management and processing are not solid waste collection under the law.⁵⁸ These proceedings revolve around questions about the quality of the latter and not the former.

44 Nor do PCA’s more recent and disingenuous justifications support that BDI failed to provide service to the Commission’s satisfaction. Again and again, JEI and PCA contrived alleged service failures by BDI that simply did not occur or are falsely and inaccurately attributed to

⁵³Application of R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, Order M.V.G. No. 1402 at 23 (Jul. 28, 1989).

⁵⁴ *Id.* at 31.

⁵⁵ *Id.* at 32.

⁵⁶ Exh. SR-1T, p. 16.

⁵⁷ Exh. BW-1T, p. 4.

⁵⁸ Solid waste collection is defined in RCW 81.77.010, the specific acts subject to UTC jurisdiction are described in RCW 81.77.040; compare with the definition of “processing” in WAC 173-350-100.

BDI. But contrary to PCA's self-serving opinions, the record and common sense demonstrate the total lack of credibility of these accusations.

45 To start, both JEI and PCA bash BDI for its alleged poor selection of service models to transport PCA's OCC Rejects for disposal. Specifically, Jammie Scott initially opined:

BDI's use of garbage container bins was a mistake. In my opinion, while container bins are appropriate for normal garbage, they were not appropriate for this type of waste, which requires specialized handling, due to the volume of OCC Rejects generated (the bins were not large enough) and because the OCC Rejects are wet (BDI could not load the bins filled with wet OCC Rejects due to weight and leaking water). BDI did not seem prepared for either of these factors.⁵⁹

PCA witnesses offered similarly misleading implications, contending that BDI would not provide satisfactory service based upon the collection methods employed.⁶⁰ But these conclusory complaints rely on the supposed premise that BDI hoisted upon PCA a service model that it had no choice but to accept. Instead, the record demonstrates that to support Jammie's application, PCA merely attempts to shift onto BDI all responsibility for PCA's choices and lack of adequate planning to ensure its waste was sufficiently dry to be quickly transported.

46 Indeed, well before PCA even contacted BDI about hauling its OCC Rejects, PCA investigated alternative methods of disposing of its OCC Rejects, including burning on-site, disposal in its own landfill, and off-site landfill disposal using various methods of collection.⁶¹ PCA eventually ruled out the possibility of burning and on-site disposal, and instead focused on two options that both involved landfill disposal: using a Seabright dumpster and use of a 20-yard drop box supplied by BDI.⁶² Relying on the rates it requested from BDI, PCA performed its own cost projections based upon the expected miles to the transfer station in Pasco and projected tonnage,

⁵⁹ Exh. JDS-1T, 11: 11 – 17.

⁶⁰ *See, e.g.*, Exh. SR-1T, p. 25, blaming BDI's use of drop boxes for creating safety hazards when PCA employees spilled waste during the loading process; Exh. BW-1T, p. 8 (“BDI effectively took the same approach with OCC Rejects as it does with general trash. This turned out to be a mistake.”)

⁶¹ Exh. SR-20CX, p. 2 – 20.

⁶² Exh. SR-20CX, p. 21 – 48.

and reached its own conclusions regarding what service to request, the number of drop boxes it would use,⁶³ and even the areas within the mill where those drop boxes would be placed.⁶⁴

47 BDI was ultimately consulted regarding possible alternative options for transporting PCA's OCC Rejects, but this occurred only days before PCA was scheduled to commence its operations, and at a time when there was no opportunity to change PCA's existing plans. Emails between BDI and PCA at that time show that PCA requested that drop box containers be delivered to PCA's Paper Mill starting on February 10, 2021,⁶⁵ and that PCA planned to commence operations at its OCC Plant on March 1, 2021.⁶⁶ Between those dates, on February 18, 2021, PCA requested that BDI join a meeting to discuss alternative options the next day at PCA's Paper Mill.⁶⁷ Alternative options were discussed, but BDI and PCA both agree that the meeting concluded with no change in plans: PCA proceeded to request that BDI provide the drop box service for its OCC Rejects disposal.⁶⁸ And BDI provided exactly the service that PCA requested. BDI first delivered the drop-boxes PCA requested,⁶⁹ and then proactively followed up with PCA on its planned plant commencement date to inquire as to whether operations had started.⁷⁰ Thus, to the extent there were any real issues with the choice of containers used for collecting OCC Rejects, the choice remained PCA's, not BDI's.⁷¹

48 Similarly emblematic of the devised critiques of BDI is Jammie Scott's sworn statement that "BDI needed a reminder email on the first day of OCC production to start disposing of OCC Rejects."⁷² Ms. Scott's claim cites for support to her Exhibit JDS-7, an email on March 3, 2021

⁶³ *Id.*

⁶⁴ *Id.* at 51; Exh. CD-02, p. 2 – 4; Rachford, TR. 290: 4 – 9.

⁶⁵ Exh. CD-02, p. 1.

⁶⁶ Exh. CD-02, p. 28 - 31.

⁶⁷ *Id.* at p. 6-23.

⁶⁸ Exh. CD-01Tr. 5: 4 – 11; Rachford, TR. 298: 24 – 300: 8.

⁶⁹ Exh. CD-02, p. 24 – 29.

⁷⁰ Exh. CD-02, p. 30.

⁷¹ And as discussed below, there was no problem with transporting OCC Rejects via drop box. The issue was the moisture content of the materials loaded by PCA.

⁷² Exh. JDS-1T. 16: 10 – 11.

discussing the need to empty filled dumpsters. But Ms. Scott failed to disclose to the Commission what the full record now reflects: BDI checked in with PCA on March 1, 2021, when PCA originally planned to commence operations to determine if the OCC Plant had started operations. Skyler Rachford wrote back “I will keep you updated on the plant start up date and our waste disposal needs.”⁷³ The March 3, 2021 email to BDI was nothing more than PCA “keeping BDI posted.”

49 Ms. Scott also erroneously insisted that the mess and piles of OCC Rejects left by BDI created a problems at PCA’s Paper Mill that JEI would never have permitted because it would violate PCA’s terms and conditions.⁷⁴ First, as Kurt Thorne admitted at the hearing, PCA and not BDI created the mess.⁷⁵ PCA operated its own bobcats to load BDI’s containers, and the mess was created in the process of loading, not by collecting containers for disposal.⁷⁶ The piles were also deliberately created by PCA, not BDI.⁷⁷ And finally, as Ms. Scott admitted under cross-examination, both the piles and mess are an inherent and constant problem at the OCC Plant.⁷⁸ Put simply, the mess and piles at PCA’s Paper Mill have nothing to do with the BDI’s quality or caliber of service.

50 JEI and PCA further develop the theory that BDI created risks to PCA’s employees at the mill. But, ironically, none of the claims here hold water. First, JEI and PCA witnesses insist that piling OCC Rejects on the ground against a PCA building created a significant fire hazard. Piling on in her rebuttal testimony, Ms. Scott claims that Mr. Dietrich’s failure to recognize the fire hazard “demonstrates a lack of professional experience with industrial wastes.”⁷⁹ She goes on to claim that BDI failing to take the issue seriously demonstrates BDI is not qualified to

⁷³ Exh. CD-02. p. 30.

⁷⁴ Exh. JDS-1T. 14: 4 – 15: 2; 15: 14 – 18.

⁷⁵ Thorne, TR. 225: 24 – 226: 21.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Scott, TR. 150: 19 – 155: 10.

⁷⁹ Exh. JDS-17T. 8: 4 – 6.

“manage and haul the OCC Rejects.”⁸⁰ Skyler Rachford complained that loading OCC Rejects via bobcat into BDI’s drop boxes damaged its equipment, and splashed water onto PCA’s employees.⁸¹ He further blamed BDI when a fire hydrant was covered in OCC Rejects.⁸² Yet each of these feigned critiques ignores the reality that BDI took no part in the on-site management or handling of OCC Rejects prior to collecting loaded drop boxes. PCA removed its OCC Rejects from the plant itself, and made its own choices regarding how to load, including what equipment to use, and whether to and how to process and or store its waste.

51 As Mill Manager, Kurt Thorne testified in his prefiled response testimony that no manager wants to make the choice between slowing production or piling material on the ground.⁸³ But what he did not say next speaks volumes about the truth. Under cross-examination, he admitted that not only was it his choice to pile the material on the ground, he also did not believe doing so was a sufficiently serious fire hazard to slow or stop production.⁸⁴ Indeed, PCA continued to pile OCC Rejects against its building for months after JEI commenced hauling for PCA, and continues to this day to store OCC Rejects in its Conex bunker in close proximity to the building, demonstrating that if there is indeed a fire hazard, neither PCA nor JEI must take it seriously themselves.⁸⁵ Moreover, Mr. Thorne admitted (at least partially) what no other witness would: that PCA owns responsibility for any hazards created when PCA piled waste on the ground at its paper mill.

d. PCA’s pile resulted from its poor communication and refusal to address its moisture problem, not the quality of BDI’s service

52 Even then, Mr. Thorne blamed BDI for PCA’s own deliberate choices because he blames BDI for PCA’s inability to dispose of OCC Rejects at the same rate it produced them. Once again, these misplaced claims ignore the reality that PCA’s poorly planned operations were an absolute

⁸⁰ Exh JDS-17T. 8: 8 – 10.

⁸¹ SR-1T, p. 16.

⁸² *Id.*, p. 22.

⁸³ Exh. KT-1T, p. 7.

⁸⁴ Thorne, TR. 230: 1; 231: 4 – 18.

⁸⁵ Exh. CD-03.

mess from the start. The first problem was communication. When PCA first commenced operations, it incorrectly relayed on March 4, 2021, that *all* of its drop boxes were full and BDI raced to send drivers and equipment to find just a handful of the 14 containers had been loaded.⁸⁶ Although that precise problem did not recur, both Charlie Dietrich and Andy Foxx had frequent difficulties reaching PCA personnel. Andy Foxx would call both Skyler Rachford and Kasey Markland to coordinate drop box collection, and had frequent trouble reaching either of them.⁸⁷ Charlie Dietrich repeatedly reached out proactively *on four separate occasions* to coordinate meetings and discuss ideas for how the collection process could be improved and received radio silence in response.⁸⁸ Mr. Dietrich also complained that PCA would increase production and fail to notify BDI of the need for collecting additional containers.⁸⁹ Rather than acknowledge these shortcomings and offer to work on improving its communication, PCA simply contends that it does not have the resources to manage its own waste and that it would be outrageous and presumptuous to expect it to notify its waste hauler in advance of an increase in production.⁹⁰ And when asked why he didn't respond to multiple requests for meetings to discuss ways to improve the OCC Rejects disposal process, Brian Wilhelm dismissively claimed he might have been busy.⁹¹ If the sky was truly falling, PCA would surely have returned an email offering to seek ways to improve.

53 The other huge problem PCA created was moisture. PCA continuously loaded drop boxes with OCC Rejects so full of water that they could not legally be transported over the public highways.⁹² BDI immediately notified PCA that loading drop boxes full of wet OCC Rejects was a problem, and that BDI could not haul containers that were dripping water.⁹³ But PCA took

⁸⁶ Exh. CD-01Tr. 5: 18 – 6: 10.

⁸⁷ Exh. AF-1T. 5: 24 – 6: 5.

⁸⁸ Exh. CD-02, p. 51 – 54. Exh. CD-1T. 11: 9 – 18.

⁸⁹ Exh. CD-1T. 7: 18 – 22.

⁹⁰ Exh. SR-1T. p. 27.

⁹¹ Wilhem, TR. 401: 17 – 23.

⁹² Exh. CD-01Tr. 6: 11 – 19; Exh. CD-03, p. 1.

⁹³ Exh. CD-01Tr. 6: 20 – 22.

no immediate steps to resolve the problems with moisture content.⁹⁴ Instead, it continued loading containers wet and expected BDI to find solutions.⁹⁵

54 And contrary to PCA's later attempt to claim otherwise, the record reflects that the moisture content of PCA's OCC Rejects and PCA's refusal to address it was indeed the most significant cause of delayed solid waste collection from PCA. As Charlie Dietrich testified:

BDI can't haul containers when liquid is leaking from them, and because we continued to find wet materials in the containers, this meant that containers could not be transported, emptied and returned to PCA. As I noted earlier, BDI can't haul containers when liquid is leaking from them, and because we continued to find wet materials in the containers, this meant that containers could not be transported, emptied and returned to PCA. Instead those containers sat idled at PCA's facility until the materials were dry enough for the container to be hauled without leaking liquids onto the roadway. This meant that there were fewer empty containers to be loaded and at times PCA had nowhere to put its OCC rejects other than on the ground.⁹⁶

55 JEI's witness Jammie Scott agreed at the hearing that the moisture content of PCA's OCC Rejects was a genuine problem for collection and transportation, and that like BDI, JEI could not have hauled PCA's OCC Rejects had they been loaded directly into Jammie's trucks.⁹⁷ In fact, she testified that it would not have mattered what container was used if the OCC Rejects were not first dried because "that material was too wet to just shovel out of the building and load into anything at all."⁹⁸

56 PCA's witnesses initially further corroborated that the problem was wet OCC Rejects delaying disposal. Brian Wilhem testified "wet rejects were loaded into BDI dumpsters and would sit for days until the Rejects dried out."⁹⁹ Skyler Rachford added to this that moisture issues are an inherent issue of OCC Rejects, stating "[t]he wet nature of OCC Rejects makes it very different

⁹⁴ *Id.* 7: 6 – 9.

⁹⁵ Exh. SR-1T. p. 23.

⁹⁶ Exh. CD-01Tr. 7: 23 – 8: 7.

⁹⁷ Scott, TR. 145: 13 – 21.

⁹⁸ Scott, TR. 145: 19 – 21.

⁹⁹ Exh. BW-1T. p. 12.

from other waste material.”¹⁰⁰ Mr. Rachford also initially swore under oath that this caused containers to sit and cause PCA to pile OCC Rejects on the ground:

It is true that BDI did complain to PCA about the moisture content of the Rejects. Yet, BDI never offered any additional services to PCA that would help remedy the wet issue with the Rejects. So, PCA would load the wet OCC Rejects into the dumpsters and allow the water to drain before transporting. The dumpsters would sometimes sit for onsite days before they were dry enough to haul to the landfill. This was such an inefficient way to dry the Rejects. But BDI had not offered any other options to PCA. As a result, the piles of OCC Rejects grew so massive to the point BDI could never catch up.¹⁰¹

57 Despite the significant issue that loading water directly into BDI’s drop boxes presented, PCA initially ignored the problem. Only after it began dumping OCC Rejects directly onto the ground, did PCA begin to address its moisture issue at all. According to a PCA data request response, PCA first modified its process for the Junk Tower/Grapple Claw on April 27, 2021, (after it began dumping waste on the ground on April 26), to permit rejects to dry for six minutes rather than just one.¹⁰² Then, in May 2021, PCA modified the design of the effluent Sidehill screens, which meant that this waste stream no longer required disposal except when the process had been upset.¹⁰³ Despite these process improvements, however, PCA’s OCC Rejects continued to contain at least 42.6% water according to PCA testing performed in October 2021.¹⁰⁴

58 Because of the high water content of PCA’s OCC Reject waste stream, the only practical solution that would permit efficient landfill transportation was to develop an on-site process to dewater the OCC Rejects prior to loading. Even Ms. Scott agrees, testifying that the solution to ensuring that OCC Rejects could be quickly transported for disposal was processing the materials to dry them prior to loading to permit safe transportation.¹⁰⁵

¹⁰⁰ Exh. SR-1T. p. 23.

¹⁰¹ *Id.*

¹⁰² Exh. SR-12X.

¹⁰³ *Id.*

¹⁰⁴ Exh. SR-13X.

¹⁰⁵ Exh. JDS-1T. 13: 17 – 14: 1.

59 Mr. Thorne was familiar with dewatering processes from his time working for other paper mills in Oklahoma and Georgia.¹⁰⁶ Yet if he ever offered guidance or internal solutions for the moisture problems to PCA, it wasn't acted upon quickly, and certainly not at all until well after PCA started using Jammie's to haul its OCC Rejects.¹⁰⁷ And contrary to Mr. Wilhelm's claims, BDI suggested the use of a de-watering bunker on a number of occasions in reliance upon Richard Dietrich's experience working with paper mills prior to joining BDI. As Charlie Dietrich testified, Richard Dietrich had recommended to him the use of a bunker to store and dewater OCC Rejects based on his experience.¹⁰⁸ In turn, BDI discussed bunkering the OCC Rejects with PCA repeatedly.¹⁰⁹

60 PCA, through Brian Wilhelm, now disingenuously contends that BDI never proposed use of a bunker and that BDI was only willing to propose ideas until Jammie's was already employing them.¹¹⁰ Yet here once again, Mr. Wilhelm, who also denied under oath ever hearing of the UTC before November 2021 despite his own exhibit proving otherwise,¹¹¹ demonstrates PCA's willingness to contort reality to fit JEI and PCA's desired narrative. The patent truth is that Charlie Dietrich proposed using a bunker at meetings with PCA representatives no later than June and July, 2021.¹¹² His written testimony on this subject is clearly corroborated by July 2021 follow-up emails with Skyler Rachford discussing the process for getting the bunker approved and constructed.¹¹³ Yet Owen Scott testified that Jammie's did not begin using a bunker to assist with storing and processing OCC Rejects at PCA's Paper Mill until August 15,

¹⁰⁶ Thorne, TR. 215: 6 – 218: 14.

¹⁰⁷ Wilhelm, TR. 443: 3 – 444: 20.

¹⁰⁸ CD-12T. 22: 4 – 17.

¹⁰⁹ Exh. CD-1Tr. 5: 4 – 11; 10: 10 – 15; 11: 29 – 24; 13: 15 – 19; 14: 11 – 18; 15: 3 – 16. Exh. CD-02, p. 95 – 107.

¹¹⁰ Exh. BW-1T. p. 13.

¹¹¹ Compare Exh. BW-1T, p. 19 and p. 15-16; Mr. Wilhelm was also confronted with this obvious inaccuracy during the hearing. Wilhelm, TR. 435: 7 – 438: 19.

¹¹² Exh. CD-1T. 11: 19 – 24; 13: 15 – 14: 18; Exh. CD-02

¹¹³ Exh. CD-02, p. 55.

2021.¹¹⁴ Thus, there exists no reality in which BDI merely attempted to copy-cat the service Jammie's was already providing.

61 With the excessive water content PCA placed into BDI's drop boxes, it is no wonder that they could not be immediately hauled for disposal. As Ms. Scott ultimately agreed under cross-examination, attempting to haul wet drop boxes was a safety problem.¹¹⁵ Mr. Rachford seemed confused about this fact, testifying in his response testimony that he was not certain as to why Charlie Dietrich would testify that the moisture content of the OCC Rejects presented a problem for BDI to haul the waste.¹¹⁶ Regardless of Mr. Rachford's confusion and uncertainty, state law is clear. Operating a motor vehicle leaking onto the roadway can result in a citation or criminal charge.¹¹⁷ And although PCA may have preferred that BDI collect the drop boxes PCA loaded wet more quickly, BDI made the right choice in protecting the public by refusing to do so.

e. BDI and its equipment were never the problem

62 Considering that there was, after all, a solution that would prevent loading wet OCC Rejects directly into drop boxes (and one that BDI had proposed for months), it seems Mr. Thorne was also incorrect about the perceived dichotomy of his choice: PCA was never forced to choose between slowing production or dumping materials on the ground. It could also have constructed the bunker that BDI recommended and which Brian Wilhelm claims was originally PCA's idea. De-watering OCC Rejects before loading them, as PCA does now, would have immediately increased the efficiency and speed of disposal because even using the drop box transportation PCA originally requested, and BDI could then have readily kept up with PCA's volume.

63 Although BDI was denied an opportunity to testify in response to PCA's out-of-sequence support testimony, there is ample evidence to support BDI's representation that it could readily have handled PCA's production had only PCA processed it and loaded it dry. First, Mr.

¹¹⁴ Scott, TR. 203: 22 – 204: 3.

¹¹⁵ Scott, TR. 98: 15 – 19.

¹¹⁶ Exh. SR-1T. p. 23.

¹¹⁷ RCW 46.61.655.

Rachford's analysis and corroborating testimony on cross-examination showed that each BDI drop box could be loaded with 9 tons of OCC Rejects for disposal.¹¹⁸ With an expected average of 80 tons per day of OCC Rejects waste,¹¹⁹ just 9 of the 21 drop boxes BDI provided would need to be emptied on average each day. Further, Mr. Rachford's analysis in Exh. SR-20CX on p. 39, reflects that the drive from PCA's Paper Mill to the Pasco transfer station was just 13.5 miles, and estimated to take a 16 minute drive. Travelling just 32 minutes round-trip in transit, BDI's drivers could handily make one round-trip to dispose of 9 tons of OCC Rejects every hour. And under UTC and DOT rules each BDI driver can drive for up to 11 hours per work day.¹²⁰ Thus, considering Mr. Rachford admitted that in addition to its regular dispatch, BDI advised it had assigned an additional driver to transport OCC Rejects from PCA's Paper Mill full time,¹²¹ BDI could have completely accommodated all of PCA's OCC Rejects waste had it been tendered by PCA in a safe and dry condition.

viii. Disposal of OCC Rejects is not a specialized service to be evaluated under alternative criteria

64 In somewhat of a tacit admission of BDI's satisfactory service under the Superior Refuse standards, JEI alternatively contends that its service to PCA should be evaluated as a specialized service similar to that of biomedical waste. Under this novel theory, JEI no doubt will argue that no preference for monopoly service exists, that a competitive marketplace should be permitted, and that BDI's service should be evaluated under the same standards applied to medical waste applications. Like its strained incidental private solid waste collection theory, however, JEI's premise promotes the erosion of the Legislature's preferred universal service model because the factors it relies on are so superficial as to permit any large industrial generator to pick and choose

¹¹⁸ Exh. SR-20CX, p. 22; Rachford TR. 278: 3 – 279: 14.

¹¹⁹ Exh. CD-09, p. 15.

¹²⁰ WAC 480-70-201; 49 C.F.R. § 395.3(a)(3).

¹²¹ Rachford, TR. 341: 6 - 10.

its solid waste collection company to the detriment (and higher rates) of all remaining customers in the same territory.

65 To be clear, the handling of biomedical waste is starkly different from OCC Rejects. Biomedical waste is subject to unique Commission rules requiring the creation of a biomedical waste operating plan,¹²² special training requirements,¹²³ special containers for collection,¹²⁴ special disposal facilities,¹²⁵ and is subject to unique post-collection processing for treatment prior to disposal.¹²⁶

66 While Jammie's also initially claimed OCC Rejects are also subject to special requirements, upon cross-examination those excuses quickly dissolved. Ms. Scott first admitted that the trucks used by JEI for collection were not specially built or modified in any way to suit any "unique" requirements for transporting OCC Rejects.¹²⁷ Just like BDI's drop boxes and its proposed use of belt-trailers, if the OCC Rejects were loaded wet, JEI's trucks could not safely operate over the public roadways.¹²⁸

67 JEI also uses ordinary loaders. Ms. Scott testified that Jammie's uses a 7 or 5-yard wheel loader. The loader does not in-itself resolve PCA's moisture issues. It's an ordinary loader like any other industrial generator might use to load a drop box.¹²⁹

68 Further, despite the protests of JEI and PCA's witnesses that OCC Rejects are special waste¹³⁰ and must be handled specially, Ms. Scott admitted under cross-examination that PCA's OCC

¹²² WAC 480-70-436.

¹²³ WAC 480-70-441.

¹²⁴ WAC 480-70-451.

¹²⁵ WAC 480-70-456.

¹²⁶ See *In re Application GA-868 of Sure-Way Incineration*, *supra* n. 35.

¹²⁷ Scott, TR. 96: 10 – 97: 7; 97: 24 – 98: 6.

¹²⁸ *Id.*

¹²⁹ *Id.* at 97: 8 – 15.

¹³⁰ See JEI's application for its contention that OCC Rejects are special waste. (This is also an apparent misnomer and misapprehension of what constitutes special waste under Washington law); Jammie Scott discusses her claims that OCC Rejects require special handling in Exh. JDS-1T. 24: 10 – 25: 16.

Rejects are not subject to any restrictions on disposal.¹³¹ After collecting OCC Rejects into its vehicles, the material is subject to no further processing or treatment either.¹³² It is transported by JEI, like BDI before it, directly for disposal.¹³³ JEI was never provided documents or manifests of any kind that would indicate that OCC Rejects are special waste under state law.¹³⁴

69 Also unlike biomedical waste, which is subject to special rules, OCC Rejects are simply municipal solid waste and treated as such under the law. Further, biomedical waste haulers typically serve both densely populated centers and isolated generator customers throughout the entire state on routes often traversing many miles in between stops. By contrast, JEI is applying to provide service to a single lucrative customer with a significant single-site volume for disposal. Consequently, considering the vast differences between truly specialized service like that provided by biomedical waste providers and Jammie’s single industrial haul, there is no basis to evaluate JEI’s application under similar standards.

IV. CONCLUSION

70 As noted in opening statements at the outset of the hearing in these consolidated matters, Basin Disposal is requesting that the Commission enter multiple specific findings and conclusions:

- a. First, the Commission should find that Jammie’s is providing solid waste collection service. The Commission has never previously interpreted Washington law to conclude that a company providing other legitimate services may also provide regularly scheduled solid waste collection to a single customer and avoid such classification. Moreover, JEI failed to credibly demonstrate that its daily collection of approximately 80 tons of solid waste from PCA’s Paper Mill can be deemed merely “incidental” under WAC 480-70-011(g) based on its provision of additional unrelated services to the generator.

¹³¹ Scott, TR, 98: 25 – 99: 2.

¹³² *Id.* at 99: 4 – 6; 11 – 18.

¹³³ *Id.* at 99: 15 – 18.

¹³⁴ *Id.* at 99: 19 – 24.

- b. Second, the Commission should find that Jammie's failed to establish its financial fitness. The statutory burden of proof, applied by the Commission for multiple decades, requires applicants to demonstrate the feasibility of their operations through at least some showing of their cost of service. JEI failed to present this evidence and fell short of its burden of proof.
- c. Third, the Commission should find that JEI demonstrated that it is utterly operationally unfit for service. Rather than cease its solid waste collection activities or apply for temporary authority, Jammie's has thumbed its nose at regulatory compliance, while openly and admittedly providing ongoing (and illegal) solid waste collection service. Jammie Scott professes to have had multiple contacts with the Commission Staff over a number of years, and provides lengthy testimony regarding regulatory standards applicable to solid waste collection companies. Yet, despite being advised her company needs a certificate to operate, she contends its activities are conducted in continuing good faith. If the Commission rewarded such disregard for state law, it would offer incentive to a never-ending stream of illegal haulers, each hoping to poach a large industrial generator from the revenue base of the local regulated common solid waste collection carrier to the detriment of the community.
- d. Finally, the Commission should first confirm that the *Superior Refuse* standards for considering satisfactory service apply to applicants seeking to serve industrial generators like JEI, and then subsequently find that BDI provided satisfactory service. Despite its efforts to manufacture superficial distinctions applicable only to PCA's solid waste stream, the record demonstrates that Jammie's provides traditional solid waste collection service. And as discussed in detail above, neither JEI nor PCA make any legitimate or corroborated claim that BDI failed to provide satisfactory solid waste collections service. Instead, their contrived claims attempt to shift all fault for PCA's poor planning and waste management onto BDI, who was never asked to provide planning or management services in the first place. BDI performed exactly the solid waste collection service PCA requested, and did so

admirably under the circumstances. Rather than tarnishing BDI's reputation by permitting the disingenuous and exaggerated claims of JEI and PCA to prevail, the Commission should conclude that BDI provided exemplary service and reject Jammie's application.

DATED this 18th day of January, 2023.

RESPECTFULLY SUBMITTED,

By /s/ Blair I. Fassburg
Blair I. Fassburg, WSBA # 41207
bfassburg@williamskastner.com

David W. Wiley, WSBA #08614
dwiley@williamskastner.com

Attorneys for Basin Disposal, Inc.