

BEFORE THE
WASHINGTON 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.,

Complainant,

v.

**JAMMIE’S ENVIRONMENTAL,
INC.,**

Respondent.

Docket TG-220215

**JAMMIE’S ENVIRONMENTAL, INC.
REPLY BRIEF**

FEBRUARY 21, 2023

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INTRODUCTION

1. BDI's brief is based on the false premise that Jammie's—hellbent on “cream skimming” BDI's best and most lucrative industrial customers—conjured up a scheme to take BDI's work by suddenly taking up solid waste disposal services (even though Jammie's core service is and has always been industrial cleaning and cleanup), manufacturing “add-on” services to satisfy the private carrier exemption, and conspiring with PCA to form an “exaggerated smear campaign” to convince the Commission that BDI did not provide satisfactory service and to deprive BDI of due process. This is simply not what happened. Instead, the evidence demonstrates that:

- Jammie's is an industrial cleaning and cleanup company who, like many of its competitors, provides a variety of waste disposal services in conjunction with the industrial cleaning services it provides customers. In total, waste disposal of any kind is a very small part of its business. Jammie's has never previously been required to obtain a solid waste certificate for these services.
- Jammie's has provided industrial cleanup and cleaning services for PCA for years, including and specifically at the OCC plant, and was experienced with the OCC Rejects waste stream prior to its involvement in disposing of the waste.
- PCA solicited BDI to provide a waste disposal solution for PCA's OCC Rejects months prior to OCC plant startup.
- The only realistic option BDI offered PCA was to use its standard container roll-off drop boxes.
- After plant startup, BDI was unable to keep up with the OCC Rejects waste stream resulting in significant safety, environmental, logistical, and ultimately, business risks to PCA.
- In conjunction with industrial cleaning services Jammie's was already providing PCA, PCA initially contracted Jammie's to dispose of the piles of backlogged OCC Rejects that BDI was unable to haul.
- Through that involvement, Jammie's developed an effective on-site process for managing and disposing of the OCC Rejects and quickly solved PCA's OCC Rejects problem.
- Jammie's has successfully provided the service ever since.

These facts should be undisputed. PCA did not hire Jammie's because Jammie's is PCA's “preferred provider,” nor did Jammie's begin assisting PCA with the intent to take BDI's work. Rather, PCA contracted Jammie's because of its desperate need for a solution to its OCC Rejects

problem and Jammie’s desire to serve its customer. BDI’s accusation that Jammie’s or PCA acted nefariously in moving the work to Jammie’s is false and detracts from the proper inquiry.

2. The ultimate question for the Commission is whether Jammie’s should be permitted to continue providing the service to PCA in either an exempt or regulated capacity. As to the private carrier exemption, neither WRRRA nor BDI apply or reference the Commission cases addressing the exemption or the “incidental adjunct” standard, and fail to demonstrate that Jammie’s does not meet the exemption. Instead, they contend that Jammie’s manufactured “add on” onsite management services to evade regulation which is obviously false.

3. As to Jammie’s application, BDI does not rebut the evidence that it failed to provide PCA service to the satisfaction of the Commission or that it is willing and able to provide satisfactory service now. Nor has it demonstrated that Jammie’s is unfit to provide the service.

4. **First**, BDI’s plan to provide only the hauling component of the OCC Rejects service is *prima facie* evidence BDI will not provide PCA service to the satisfaction of the Commission. Due to the nature of the waste stream, Jammie’s has demonstrated that effective management of the OCC Rejects (both onsite and disposal services) is best done by one entity. While Jammie’s has indisputably resolved the OCC Rejects problem for PCA, BDI would have the Commission disrupt that by compelling PCA to adopt a process that will require more coordination and micromanagement, more parties involved, and more expense, when BDI has not demonstrated that it can even do the work. In this context, the law does not provide BDI that much privilege.

5. **Second**, BDI’s refusal to accept any responsibility for its problems disposing of the OCC Rejects is not credible. BDI dictated the method for disposing of the OCC Rejects and does not dispute that there were significant piles of uncollected OCC Rejects in May 2021. While it raises a host of excuses for its problems, the mere fact PCA had to contract Jammie’s in May 2021 to help remove the piles of backlogged OCC Rejects—the core reason BDI was hired—should also be *prima facie* evidence that BDI did not provide satisfactory service.

6. **Third**, BDI’s contention that Jammie’s is unfit to provide the service to PCA is wrong. BDI relies on arguments that were not persuasive in its motion to dismiss and fair no better here.

There is ample evidence of the need for Jammie’s services. Jammie’s has provided all required financial information and BDI has presented no evidence to suggest that Jammie’s is financially unfit to provide the service. Jammie’s excellent service to PCA in good faith demonstrates it is fit to provide the service, and the fact that Jammie’s has been hauling the OCC Rejects without a certificate is not dispositive. BDI’s belabored contention that it was somehow denied due process due to “gamesmanship” by Jammie’s and PCA is baseless. BDI’s revisionist accounting of the procedural schedule does not establish that BDI was denied its due process. Nor has BDI been deprived of due process because Jammie’s did not extensively cross-examine BDI’s witnesses at hearing (has anyone ever heard such a thing).

7. **Fourth**, BDI’s and WRRRA’s argument that Jammie’s is “cream skimming” and that approving Jammie’s application will disrupt Washington’s solid waste regulatory scheme is unsupported by that regulatory scheme and the facts of this case. Indeed, where a generator has a unique industrial waste need that is better served by an entity other than the incumbent neighborhood solid waste provider, Washington law and the Commission’s rules expressly allow for the issuing of limited certificates to carriers that “do not provide traditional residential or commercial solid waste operations. This class includes specialized carriers generally hauling specific waste products for specific customers.”¹ Thus, approving Jammie’s Class C application will not disrupt the regulatory scheme—it fits into it.

8. PCA attempted to work with BDI when it started its OCC plant. Given that PCA is satisfied with BDI’s service with regards to other waste streams at the Mill, it should be given deference to its determination that BDI is ill-suited to service the OCC Rejects. Commission regulations and precedent envision and allow for such a situation. Ordering cessation of safe, reliable and efficient services, and forcing the parties to return to operations that failed the first time, with no indication that BDI grasps what failed, what is necessary, or admits a degree of

¹ WAC 480-70-041.

responsibility, jeopardizes critical operations, gambles with health and safety concerns, and imposes on PCA unnecessary costs that run counter to the solid waste regulatory framework.

ARGUMENT

A. **BDI and WRRRA's arguments against the private carrier exemption trivialize Jammie's services and claims about the erosion of the exemption are baseless.**

1. **BDI and WRRRA's facts are wrong and they use the incorrect legal standard.**

9. BDI and WRRRA contend that Jammie's cannot meet the private carrier exemption because its onsite management of the OCC Rejects came after it initially provided support disposing of the backlogged OCC Rejects.² They contend disposal cannot be an "incidental adjunct" when it came first. There are significant factual and legal problems with this argument.

10. *First*, BDI and WRRRA's facts are wrong. Jammie's initial work assisting in disposing of the OCC Rejects using a dump truck and trailer was simply to triage the piles of backlogged OCC Rejects that BDI was unable to haul.³ It was an intermittent stop gap that lasted a few weeks.⁴ However, it was through that work that Jammie's developed an effective process for cleaning up the OCC Rejects including (a) dewatering and onsite managing the OCC Rejects (b) more efficiently disposing of the OCC Rejects using a belt trailer. What PCA ultimately contracted Jammie's for was this service. In other words, the onsite management of the OCC Rejects was not simply an add on to the disposal service Jammie's was already providing. Rather, Jammie's onsite management plus the loading and disposal using a belt trailer is a different service. It is not simply loading a dump truck and taking it to the landfill. Rather, Jammie's service today is far more comprehensive. Thus, BDI and WRRRA's contention that hauling cannot be an incidental adjunct to Jammie's onsite management because Jammie's initially provided limited hauling of OCC Rejects for a few weeks is not persuasive.

² See Initial Post-Hearing Brief of Basin Disposal, Inc., at 9-12; see also WRRRA Initial Post-Hearing Brief at 5-9.

³ Rachford, Exh. SR-04; Exh. SR-1T at 31; Wilhelm, Exh. BW-1T at 18; O. Scott, Exh. OJS-1T at 9:1-11:3.

⁴ Wilhelm, Exh. BW-1T at 18; Rachford, Exh. SR-1T at 31-33; J. Scott, Exh. JDS-1T at 18:14-20:6; O. Scott, Exh. OJS-1T at 11:4-13:7.

11. **Second**, BDI and WRRR are using the wrong legal standard for the private carrier exemption. BDI uses a dictionary to interpret “incidental adjunct” while ignoring the leading Commission cases that directly address the exemption (*Ridwell*)⁵ and the meaning of “incidental adjunct” (*Clark County Disposal*).⁶ As explained in Jammie’s Opening Brief,⁷ those cases teach the relevant inquiry when evaluating whether a carrier is exempt is by reviewing the “nature of the entire business operation” and the company’s “primary business”⁸ rather than any specific service.⁹ The Commission evaluates the carrier’s business as a whole and not only the waste disposal activities at issue.¹⁰ Neither BDI nor WRRR dispute that Jammie’s is an industrial cleaning and cleanup company, that Jammie’s has provided industrial cleaning services to PCA for over a decade, that some of those services directly involve cleaning and cleanup of OCC Rejects in the OCC plant, and that the vast majority of its services to PCA and to the rest of its customers are industrial cleaning services, and that waste disposal of any kind—OCC Rejects or otherwise—represent a very small fraction of Jammie’s total services.¹¹ Disposing of OCC Rejects was clearly an “add on” to those services. Jammie’s disposal of OCC Rejects is an incidental adjunct to the industrial cleaning and cleanup services to PCA, not to mention its services to other customers.¹²

⁵ *In the Matter of Determining the Proper Carrier Classification of Ridwell, Inc.*, Docket TG-200083, Order 05 (Oct. 15, 2020).

⁶ *Clark Cnty. Disposal, Inc., d/b/a Vancouver Sanitary Serv. & Twin City Sanitary Serv. (G-65); & Buchmann Sanitary Serv., Inc. (G-79), Complainants, vs. Envtl. Waste Sys., Inc., & R & R Transfer & Recycling, Inc., Respondents.*, Docket TG-2195, Final Order (Wash. U.T.C. Oct. 19, 1989).

⁷ Jammie’s Environmental Services, Inc. Opening Post-Hearing Brief ¶ 61.

⁸ *Clark Cnty. Disposal, Inc.*, Docket TG-2195, Final Order; *In the Matter of Determining the Proper Carrier Classification of Ridwell, Inc.*, Docket TG-200083, Order 04 (Initial Order) (Aug. 10, 2020).

⁹ *Clark Cnty. Disposal, Inc.*, Docket TG-2195, Final Order.

¹⁰ *Ridwell*, Docket TG-200083, Order 05.

¹¹ See J. Scott, Exh. JDS-1T at 3:20-4:9, 8:12; Rachford, Exh. SR-1T at 30; Wilhelm, Exh. BW-1T at 18; J. Scott, Exh. JDS-17T at 9:21-10:1; Exh. JDS-18.

¹² BDI has highlighted that Ms. Scott provided inconsistent testimony at the hearing regarding which services she considered to be the primary and incidental adjunct services. To the extent Ms. Scott’s testimony is inconsistent, it is because she—a lay witness—was asked about her understanding of a legal term. There can be no doubt that Ms. Scott believes that Jammie’s primary business is industrial cleaning, or (even if the Commission were to accept the more limited inquiry involving only the OCC Rejects business and not the overall business) that the primary reason Jammie’s received the OCC Rejects business was primarily because of Jammie’s management services, not only its capacity to haul OCC Rejects.

12. WRRRA and BDI's claim that Jammie's manufactured "add on" onsite OCC Rejects services as pretext in a *post facto* attempt to circumvent regulation is just wrong.¹³ Neither WRRRA nor BDI offer any evidence that Jammie's offered OCC Rejects management services for the purpose of meeting the private carrier exemption. Nor could they, as the evidence overwhelmingly demonstrates that Jammie's on-site management of the OCC Rejects was instrumental in effectively resolving the OCC Rejects issue. PCA hired Jammie's, in part, *because* of Jammie's effective on-site management of the OCC Rejects motivated solely by a desire to manage and dispose of OCC Rejects for its customer, which it did.¹⁴
13. The single case BDI cites to support its argument that Jammie's does not meet the private carrier exemption did not cite WAC 480-70-011(1)(g) or analyze "incidental adjunct."¹⁵ In *In re Petition of Arrow Sanitary Service, Inc., d/b/a Oregon Paper Fiber*, the petitioner hauled garbage from a Fred Meyer store for 14 years prior to seeking a declaratory order as to its regulatory status.¹⁶ It provided no other service beyond hauling and sought to be exempt from regulation *not* under the private carrier exemption but "because it seeks to serve only one customer in the state of Washington [and therefore] it does not fall within the definition of a garbage and refuse collection company" because it "does not serve all potential customers within a specialized area."¹⁷ Thus, the Commission's holding in *Arrow* that "no *de minimis* exception exists" has nothing to do with the *nature* of a service (i.e., whether a given service is incidental or adjunct) as BDI asserts, but rather the *number* of customers serviced.¹⁸ *Arrow* is similar to the case at hand only in the superficial sense that at issue is a single waste stream that Jammie's hauls for a single customer. The fact that OCC Rejects hauling constitutes a small proportion

¹³ WRRRA Opening Brief, at 9; BDI Opening Brief at ¶ 26.

¹⁴ See PCA Opening Brief ¶ 15, 20; Jammie's Opening Brief ¶ 45-47 (collecting cites).

¹⁵ BDI Opening Brief, ¶ 25 (citing *In re Petition of Arrow Sanitary Service, Inc. d/b/a Oregon Paper Fiber for a Declaratory Ruling*, TG-2197 (Dec. 14, 1989)).

¹⁶ *Arrow Sanitary Service*, TG-2197.

¹⁷ *Id.*

¹⁸ See BDI Initial Brief, ¶¶ 25-26.

(even a *de minimis* proportion) of Jammie’s overall business and of its business with PCA is simply support for a finding that Jammie’s is a private carrier.

14. The only case WRRRA cites to support its argument that Jammie’s is not a private carrier, *In re Daniel Stein d/b/a Seabeck Waste & Recycle*,¹⁹ also does not analyze the private carrier exemption. Though WRRRA implies otherwise the company in that case never asserted that it was exempt from regulation because of any on-site collection services. *Seabeck* involved a company who provided rural residential garbage collection services. The company advertised “home pick-up service” or “Driveway Trash Pick-up” services and its owner admitted that he only hauled solid waste and did not provide any other service. There is no evidence in docket records that the company provided any on-site service other than collecting residential trash for people with long rural driveways. The supporting shipper statement was an elderly customer who stated she was unable to bring her garbage to the disposal facility herself. Indeed, as described by WRRRA, “the company would drive down long rural driveways or enter onto a residents [sic] property to retrieve their waste/container.”²⁰ The company does not appear to have asserted that any such services were the basis that it should be exempt, and the Commission did not address whether the company provided any on-site collection services, or whether that was relevant.

15. Even assuming the company in *Seabeck* considered traversing a driveway to collect waste to constitute “on-site solid waste handling to prepare the waste for transport,” as WRRRA contends, WRRRA’s claim that this is akin to Jammie’s services for PCA is not credible. Jammie’s and PCA have extensively covered the labor-intensive and complicated onsite management and loading that PCA requires for its OCC Rejects.²¹ *Seabeck* does not apply

¹⁹ *In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against: Daniel Stein d/b/a Seabeck Waste & Recycle*, Docket TG-180181, Order 02 (Dec. 10, 2018).

²⁰ WRRRA Initial Brief, 6.

²¹ See e.g., Rachford, Exh. SR-1T at 33 (“The rotating, blending, and loading the OCC Rejects is a complicated process ... This continuous management and loading prevents the rejects from building up and becoming a fire hazard.”); 34 (“Jammie’s communicates effectively, coordinating with our workers and management ... The onsite person actively manages the OCC Reject piles so that the Rejects are dried and ready for transportation. This takes a lot of onsite time and coordination to ensure their belt trailers can be loaded effectively.”).

2. Jammie's does not need to generate waste to qualify for the private carrier exemption.

16. Without providing any authority, WRRRA claims that Jammie's does not meet the requirements of the private carrier exemption because "Jammie's does not generate the OCC Rejects itself [sic], nor is the waste generated by Jammie's onsite services."²² There is no requirement that Jammie's be a generator to qualify for the private carrier exemption.

17. To the contrary, the Commission has long held that industrial cleaners, which almost uniformly are not the original generating source of a waste stream, are exempt as private carriers.²³ In *Crosby & Overton*, the applicant was "the largest and most complete heavy-duty industrial and marine cleaning company in the Western United States" and had operated for three decades without a permit for numerous public and private customers performing similar services to those which Jammie's offers its customers.²⁴ The Commission held that it was exempt as a private carrier:

The Commission believes that tank cleaning and environmental clean-up are specialized operations and that transportation service of materials cleaned in conjunction with such bona fide operations are merely incidental to the conduct of the specialized operations. The carrier thus is a "private carrier" pursuant to the definition in RCW 81.80.010(6).²⁵

The relevant inquiry was not whether the industrial cleaner generated the waste in the first instance, but whether its primary service was to clean the facility or to haul the waste:

Where a tank is emptied through the process of cleaning, the activity is unregulated. ... Transportation of a commodity from one location to another which is accomplished by emptying a tank, thus rendering it clean, is a regulated activity. The 'cleaning' is incidental to the transportation process, and the Commission recognizes that environmental cleaning or 'mitigation' which encompasses the clean-up of oil or other materials spilled upon the waters, the highways, or the ground of the state is a highly specialized activity; subsequent transportation of recyclable materials resulting from that activity, from

²² WRRRA Initial Brief, at 6.

²³ See *In re Application P-66968 of Crosby & Overton, Inc. for authority to operate as a Common Carrier*, App. No. P-66968, Order M. V. No. 130721 (Oct. 22, 1984).

²⁴ *Id.* at Findings of Fact ¶¶ 3-4.

²⁵ *Id.* at Memorandum.

the site of that activity to a reprocessing center, is incidental to the carrier's primary function and is also considered private carriage.²⁶

Under this analysis, Jammie's is exempt, as Jammie's performs the cleaning, cleanup, sorting, and management services on-site and does not merely transport the OCC Rejects and then clean out the receptacle at the landfill.

18. This is further supported by the only recent case examining the private carrier exemption, *In the Matter of Determining the Proper Carrier Classification of: Ridwell, Inc.*,²⁷ which not only instructs that no generation requirement exists but also indicates that there is no requirement that the carrier be at all involved in handling the waste prior to transportation. Ridwell collected reusable and recyclable materials from residential customers for delivery to local non-profits and specialized recyclers. It did not generate any of the material that it transported, yet the Commission determined that it was exempt as a private carrier because the primary nature of its business was not solid waste hauling.²⁸

19. Without citing any legal authority, WRRRA narrowly describes the types of entities or situations it *believes* should qualify under the private carrier exemption.²⁹ But even in WRRRA's "typical scenarios" such as a roofing contractor or the junk removal company, those entities still do not generate waste in the sense that they are the originating source of the material that they haul. In the very least, they generate waste no more than industrial cleaners generate waste by cleaning out equipment and hauling the residual waste. If WRRRA were correct that only the

²⁶ *Id.*

²⁷ Docket TG-200083, Order 05 (Oct. 15, 2020).

²⁸ *Ridwell*, Docket TG-200083, Order 05. Considering *Ridwell* is the first case in which the Commission noted it analyzed the private carrier exemption (including the incidental adjunct analysis), Jammie's anticipates that WRRRA or BDI may attempt to distinguish *Ridwell* and addresses potential points here. They may claim that *Ridwell* involved recycling and upcycling rather than disposal. It's a distinction without a meaningful difference here, because to the extent that materials were recyclable in *Ridwell*, the company would have (absent the application of the private carrier exemption) needed a certificate. They may attempt to distinguish *Ridwell* on the basis of that each of Jammie's loads contains a higher volume than *Ridwell*'s, but this too misses the mark. The more relevant inquiry under the "primary nature of the business" standard is that *all* of *Ridwell*'s customers (and there were thousands) required this service, and *only* this service, whereas Jammie's conduct here (for a single customer, and one waste stream) is not the primary service that Jammie's offers its customers. As explained in Jammie's Opening Brief, volume in tonnage is not the right proxy in light of this analysis. Volume of hours devoted to the task, or percentage of income, is the more appropriate metric here. The Commission also expressly rejected Staff's argument that volume mattered in *Ridwell*. *Ridwell*, TG-200083 ¶ 26 (Initial Order).

²⁹ WRRRA Initial Brief, 6-7.

industrial generator itself could avail itself of the private carrier exemption, then every industrial cleaner would need a certificate to haul the waste generated by its cleaning activities, which the Commission has already held not to be the case.³⁰

3. A finding that Jammie’s meets the private carrier exemption will not open the door to BDI and WRRRA’s parade of horrors.

20. Finally, the Commission should reject BDI and WRRRA’s hyperbolic claims that a finding that Jammie’s is exempt as a private carrier would result in a precedent under which “nearly any operator could circumvent Commission regulation by providing some on-site solid waste handling services to a large industrial facility.”³¹ Whether the private carrier exemption applies to other situations depends on the unique facts and circumstances of those cases. The Commission capably evaluates waste hauling scenarios to determine whether Commission regulation of the service is necessary or appropriate under the law and if so, in what manner. Whether Jammie’s is exempt under the law depends on this case, not hypothetical cases.

B. If the Commission decides regulation is necessary, BDI’s abandonment of any attempt to provide on-site services is *prima facie* evidence that BDI is unable and unwilling to provide the services needed.

21. BDI and PCA disagree on the events resulting in PCA’s dissatisfaction in BDI’s service, but the Commission does not need to reach a determination on many of these facts in order to grant Jammie’s application. This is because BDI has made it clear, despite initially equivocating on the issue, that it has no intent to provide any on-site services to PCA above and beyond the hauling of PCA’s OCC Rejects.³² This alone is *prima facie* evidence that BDI is unable, unwilling, and unfit to provide service to PCA to the satisfaction of the Commission.

³⁰ See *Crosby & Overton*, Order M. V. No. 130721. Even basic examples demonstrate why WRRRA is wrong. Under WRRRA’s theory, a homeowner could not take garbage for a neighbor or a family member to the dump on a one-off occasion because they would not be the “generator” of the waste.

³¹ WRRRA Initial Brief, 9.

³² See BDI Initial Brief, ¶ 36.

22. As PCA and Jammie’s long suspected BDI was only interested in doing, BDI proposes its only role going forward would be limited to hauling OCC Rejects.³³ How BDI believes this arrangement would work is unclear. PCA has stated it has no desire to use BDI’s drop boxes again,³⁴ leaving the only other option belt trailers. Assuming BDI could provide the belt trailers (which it does not currently have), BDI provides no detail on who would load the trailers, or any details regarding coordinating the onsite management services with the loading, hauling and disposal. Although BDI’s brief complains about its challenges communicating with PCA during its first attempt to dispose of the OCC Rejects,³⁵ BDI apparently believes that now that PCA and Jammie’s have figured out the onsite management of the OCC Rejects, it can simply resume pick-up services like regular garbage service.³⁶ But BDI’s proposal to provide hauling only is ill conceived and devoid of any actual details that would give the Commission or PCA confidence that BDI’s second go around will be any better than the first.
23. BDI’s bigger problem, however, is there is no evidence that the OCC Rejects work can efficiently and effectively be managed like that given the volume of OCC Rejects generated and the unpredictability surrounding the moisture content of the OCC Rejects. Indeed, the evidence shows otherwise. The record is clear that managing the OCC Rejects requires a contractor that can (a) dewater and manage the OCC Rejects as they are generated from the OCC plant; (b) load, haul and dispose of the OCC Rejects on demand and as needed—which can fluctuate unpredictably; and (c) is able to triage and respond when upset conditions arise.³⁷ BDI has not demonstrated it can do any of these things while Jammie’s is uniquely qualified to do them.
24. BDI’s haul-only proposal reflects a fundamental misunderstanding of the services needed to manage and dispose of the OCC Rejects—an ongoing problem for BDI in this case. BDI

³³ Initial Post-Hearing Brief of Basin Disposal, Inc. ¶ 36 (“Now that PCA has found solutions to the high moisture contents of its OCC Rejects through bunkers constructed for temporary storage and dewatering its waste, there is no reason BDI should not resume collecting all of PCA’s OCC Rejects” either via drop-boxes or tractor-trailer.)

³⁴ See e.g., Rachford, Exh. SR-1T, at 23, 31, Wilhelm, Exh. BW-1T at 18.

³⁵ BDI Opening Brief ¶ 52.

³⁶ *Id.* at ¶ 36.

³⁷ See PCA Opening Brief ¶ 15; Jammie’s Opening Brief ¶ 46.

complains that “it could readily have handled PCA’s production had only PCA processed it and loaded it dry.”³⁸ But that is not how OCC Rejects work. PCA’s OCC Rejects are now successfully managed and disposed of because of the comprehensive service Jammie’s provides. The evidence in the record establishes that both the on-site management and hauling of the OCC Rejects are essential components of the process and should be done by one party. Segmenting the on-site management from the hauling services would result in the same inefficiencies that hampered BDI’s first attempt to provide the service. Having multiple contractors increases the risk of communication breakdowns and overlapping equipment and workers, which will only increase the cost of service to PCA. In other words, as demonstrated by Jammie’s, two overlapping contractors is totally unnecessary and would do more harm than good.

25. In short, BDI continues to misunderstand the services needed and the reasons that PCA’s OCC Rejects operations run smoothly now, *i.e.*, the comprehensive service Jammie’s provides and the services that PCA requires. Jammie’s process for managing and disposing of the OCC Rejects has been exactly what PCA needs. Jammie’s completely and totally solved the OCC Rejects problem for PCA. BDI does not dispute this but nevertheless asks the Commission to disrupt that arrangement and require PCA to revert to using BDI for haul-only irrespective of how bad BDI’s first attempt went. BDI’s proposal to take over *only* the hauling component of the service is *prima facie* evidence that it is unwilling, unable, or unfit to provide the service needed.

C. BDI’s assertion that it provided “exemplary service” does not match reality and does not establish it provided or will provide service to the satisfaction of the Commission.

26. BDI asserts that it “consistently provided not just satisfactory service, but in fact exemplary service.”³⁹ BDI clearly was not listening to its customer PCA when it was attempting to dispose of OCC Rejects and still is not listening now. BDI’s belief that it provided “exemplary service” is inconsistent with the record. Jammie’s Opening Brief described in detail the serial

³⁸ BDI Initial Brief ¶ 63.

³⁹ BDI Initial Brief ¶ 39.

missteps BDI took that led to PCA ultimately asking Jammie's to take over the primary OCC Rejects service and will not repeat them here.⁴⁰ However, there are several arguments in BDI's brief that need correcting which Jammie's addresses.

27. First, BDI's core argument as to how it provided satisfactory service to PCA is its assertion that it provided PCA exactly what PCA asked for; i.e., it dropped off roll-off boxes and attempted to haul the boxes when they were full.⁴¹ Everything else, including the moisture content problems, the logistical problems with the boxes, and the piles of uncollected OCC Rejects that quickly accumulated and created safety and operational problems for PCA, are not BDI's fault.⁴² For BDI's argument to succeed, however, it must first be right that its method of disposing of the OCC Rejects using its drop boxes was the right one, which it was not.

28. BDI contends that PCA made a business decision to use BDI's drop boxes instead of a Seabright compactor dumpster and that "PCA performed its own cost projections based upon the expected miles to the transfer station in Pasco and projected tonnage, and reached its own conclusions regarding what service to request, the number of drop boxes it would use, and even the areas within the mill where those drop boxes would be placed."⁴³ BDI is telling a half truth. As explained in Jammie's Opening Brief, PCA's original plan was to use the Seabright compactor dumpsters and in mid-2020, had BDI retrofit the dumpsters so they could fit on BDI's trucks.⁴⁴ In fall 2020, PCA then prepared the Seabright loading area for the Seabright dumpster to hook onto the Seabright press and BDI came out with the dumpster and practiced loading and off-loading the dumpster.⁴⁵ PCA believed its plan for disposing of the OCC Rejects was solved.⁴⁶

29. However, in December 2020, despite months of preparing to use the Seabright dumpsters, PCA was surprised to learn learned for the first time that BDI's trucks had a ten-ton weight limit

⁴⁰ See Jammie's Opening Brief ¶¶ 71-93.

⁴¹ See BDI Initial Brief ¶¶ 46-47.

⁴² See BDI Initial Brief ¶¶ 52-63.

⁴³ BDI Initial ¶ 47

⁴⁴ Rachford, TR. at 354:12-23.

⁴⁵ Rachford, TR. at 354:5-355:11.

⁴⁶ Rachford, TR. at 355:14-16.

and because the Sebright dumpsters weigh six tons empty, PCA could only load four tons of OCC Rejects, which “wasn’t even close to half full.”⁴⁷ Using the Sebright dumpsters would require PCA to only fill the dumpsters part way and BDI would have to make more frequent trips to dispose of the OCC Rejects. This was further complicated by the fact that BDI did not provide 24/7 service “which is something we would have needed to service these dumpsters because they needed to be switched out and hauled away about every eight hours or so.”⁴⁸ As explained by Mr. Rachford, “BDI ... determined it was not an immediate option due to DOT load restrictions and determined that BDI would need to buy a different truck with a larger axle to carry more weight.”⁴⁹ Thus, while it is true PCA made a business decision to use BDI’s drop boxes, that is because BDI presented no other realistic option. PCA believed BDI’s drop boxes were its only option but had reservations about whether the boxes would be a long-term solution.⁵⁰

30. As demonstrated by Jammie’s quick transition to belt trailers that could move waste faster and more efficiently, as PCA feared, it is clear that drop boxes were not the correct or most cost-effective solution to dispose of the OCC Rejects.⁵¹ BDI cannot fairly claim that it performed its regulatory duty when the service it provided was the wrong approach from the start.

31. Second, BDI falsely claims that the February 2021 meeting PCA scheduled to discuss other options aside from the drop boxes resulted in PCA confirming it wanted to use the drop boxes.⁵² That is false. PCA has been clear that the February meeting was not productive because BDI was noncommittal on alternative options and failed—both during and after the meeting—to provide PCA with any meaningful alternatives within a reasonable time period.⁵³

⁴⁷ Rachford, TR. at 355:22-356:3, 18-23, 360:24-361:25; Rachford, Exh. SR-1T at 14-15; Dietrich, Exh. CD-26X (Dec. 14, 2020 email from Rachford to May).

⁴⁸ Rachford, TR. at 356:4-8.

⁴⁹ Rachford, Exh. SR-1T at 15.

⁵⁰ See Wilhelm, Exh. BW-02 (Feb. 18, 2021 email from Holm to Dietrich).

⁵¹ See PCA Opening Brief ¶¶ 10; Jammie’s Opening Brief ¶ 45; Rachford, TR. 338:14-15.

⁵² BDI Initial Brief ¶ 47.

⁵³ See Wilhelm, Exh. BW-1T at 6-8; Rachford, TR. at 360:17-23, 363:10-366:15, 369:3-369:25.

32. Third, BDI spends several pages blaming its inability to haul its container boxes on the moisture content of the OCC Rejects.⁵⁴ While PCA has acknowledged that overly wet moisture problems hampered some of the early efforts to move OCC Rejects, PCA testified that this issue resolved itself after a few weeks of operating the plant and that under normal operating conditions, OCC Rejects have a moisture content that is capable of being hauled with little to no onsite management.⁵⁵ PCA does not blame BDI for its inability to haul overly wet OCC Rejects.⁵⁶ Rather, PCA's primary frustration was BDI's inability to haul full containers with acceptably dry OCC Rejects weeks after OCC plant startup.⁵⁷ The pictures from May 2021 with full containers surrounded by piles of OCC Rejects tell a thousand words.⁵⁸ Indeed, as noted above, the mere fact that PCA had to hire Jammie's to help move the piles of backlogged OCC Rejects demonstrates that BDI simply was not moving material fast enough. This was not an issue of moisture content but about staying on top of the OCC Rejects was stream which BDI never demonstrated it could do. And, to the extent there are upset conditions, Jammie's is uniquely qualified to manage that waste. That is why PCA moved to Jammie's and ultimately why BDI failed to provide satisfactory service to PCA. BDI's brief states that PCA "continued loading containers and expected BDI to find solutions."⁵⁹ BDI did not have a solution, but Jammie's did, which was why PCA moved to Jammie's.

33. Fourth, BDI's assertions that it provided other alternatives to PCA that PCA rebuffed and that it offered to provide on-site support to PCA is not credible.⁶⁰ There is no documented evidence that BDI offered any service aside from its drop boxes until it submitted a proposal to provide the same service Jammie's was already providing in the fall 2021. The Commission should also be skeptical of BDI's suggestion that it genuinely offered PCA unregulated on-site

⁵⁴ See BDI Initial Brief ¶¶ 53-59, 61.

⁵⁵ See Jammie's Opening Brief ¶ 40 (citing Rachford, TR. at 349:2-13).

⁵⁶ See Rachford, TR. at 302:8-12.

⁵⁷ See Rachford, TR. at 304:21-25, 378:4-20.

⁵⁸ See Rachford, Exh. SR-1T at 19-24.

⁵⁹ BDI Initial Brief ¶ 53.

⁶⁰ BDI Initial Brief ¶ 47.

services. While Mr. Dietrich and Mr. Rachford discussed BDI bringing a loader on-site and a bunker in July 2021,⁶¹ BDI did not present an actual proposal for services for several weeks later (which it qualified by needing a tariff revision)⁶² by which point Jammie's was fully serving BDI. BDI's apparent abandonment of any plans to provide on-site services as explained in its brief confirms it does not intend to foray into unregulated work and probably never planned to.

34. Fifth, BDI references its non-OCC Rejects service to PCA and that this should be used as evidence of satisfactory service.⁶³ This is nonsensical. The entire purpose of this proceeding is because while PCA takes no issue with BDI's ability to provide standard garbage collection service, BDI is ill-suited to handle the OCC Rejects waste stream. Moreover, the fact that PCA "lodged absolutely zero complaints"⁶⁴ about BDI's standard garbage service only lends further credibility to PCA's complaints with BDI's ability to manage the OCC Rejects. If BDI is right about PCA's assessment of BDI's service in one context, it must accept PCA's assessment in another. BDI cannot have it both ways.

35. Sixth, BDI's contention that PCA only moved to Jammie's because Jammie's negotiated a better rate than BDI is patently false.⁶⁵ While it is true Jammie's service is cheaper than BDI's was, that is because Jammie's service is more cost effective due to Jammie's efficiency in providing the service.⁶⁶ Indeed, when BDI offered to provide a similar service, its rate was comparable to Jammie's.⁶⁷ Thus, PCA was clear that while cost is a factor, PCA's "primary true concern" was quality of service not cost. As explained by Mr. Thorne:

Jammie's had done a far superior job than BDI. ***They are also less expensive than BDI because their process was so much more efficient. But quite frankly, that was only a small bonus.*** We chose to continue

⁶¹ See Rachford, Exh. SR-05; Exh. SR-1T at 27-28.

⁶² Rachford, Exh. SR-1T at 28; TR. 369:8-10.

⁶³ BDI Initial Brief ¶ 29.

⁶⁴ BDI Initial Brief ¶ 39.

⁶⁵ BDI Initial Brief ¶ 41.

⁶⁶ Rachford, Exh. SR-1T at 31-33; Wilhelm, Exh. BW-1T at 11; O. Scott, Exh. OJS-1T at 10:10-13:7.

⁶⁷ Dietrich, Exh. CD-48X (August emails between PCA and BDI); Wilhelm, Exh. BW-1T at 14-16; Wilhelm, Exh. BW-06.

with Jammie’s because of their expertise in this area, their excellent responsiveness and customer service, and the overall quality of service.⁶⁸

Of course, as discussed in Jammie’s Opening Brief, BDI’s proposal to provide PCA a similar service to Jammie’s at a similar cost at least six months after OCC plant startup begs a serious question for BDI: *why did it not offer to PCA months earlier the more cost-effective option?*

36. Seventh, BDI continues to make confusing and inconsistent statements about its tariff. In its brief, BDI blames its tariff on its inability to “compet[e] via rates” and suggests it could not have changed its rates as it is bound by the rates in its tariff.⁶⁹ BDI has again contradicted itself. In August 2021, BDI told PCA that it would need to revise its tariff to provide a different service and was waiting on Commission approval to that.⁷⁰ BDI later backtracked and claimed that it could provide a comparable service to PCA at a comparable cost under its tariff and that no tariff revision was necessary.⁷¹ BDI cannot seem to get its story straight.

37. Eighth, BDI places all blame on PCA for the piles of OCC Rejects but this too is false. BDI states that Mr. Thorne admitted at hearing that “PCA and not BDI created the mess.”⁷² This patently misstates Mr. Thorne’s and other PCA witnesses’ testimony who were clear that the primary cause of the piles of OCC Rejects was because BDI was not hauling full containers filed with dry OCC Rejects fast enough and PCA had no place to dump the OCC Rejects.⁷³ BDI also states that PCA deliberately created the piles.⁷⁴ This is disingenuous. On one occasion, PCA and Jammie’s built-up piles so they could test loading a belt trailer.⁷⁵ Aside from this, PCA did not deliberately create piles. BDI then states that “both the piles and mess are an inherent and constant problem at the OCC Plant.”⁷⁶ It is true, OCC Rejects are a messy waste stream. This is why any contractor handling the waste stream needs to be equipped and experienced with

⁶⁸ Thorne, Exh. KT-1T at 8 (emphasis added).

⁶⁹ BDI Initial Brief ¶ 42.

⁷⁰ Wilhelm, Exh. BW-1T at 9-10, 16.

⁷¹ Wilhelm, Exh. BW-1T at 9-10, 16.

⁷² BDI Initial Brief ¶ 49

⁷³ See e.g., Thorne, Exh. KT-1T at 8-9; Rachford, TR. 378:9-23.

⁷⁴ BDI Initial Brief ¶ 49.

⁷⁵ J. Scott, Exh. JDS-17T at 16:3-7.

⁷⁶ BDI Initial Brief ¶ 49.

dealing with messy industrial wastes. Fortunately, this is Jammie's specialty. Jammie's has successfully managed the waste, while BDI could not. As shown in the testimony of Mr. Rachford, the pictures of the piles of OCC Rejects in May 2021 provide indisputable evidence of BDI's problems hauling and the urgent need for a different solution.⁷⁷ Comparing those photos with how the yard looked after Jammie's had taken over is indisputable evidence that BDI failed to provide satisfactory service to PCA.⁷⁸

38. Finally, BDI's continued dismissal of the environmental, safety, operational, and business risks to PCA is shocking and BDI patently misstates Mr. Thorne's testimony.⁷⁹ Contrary to BDI's suggestion, Mr. Thorne did not admit that there was no safety or business risk to PCA by having piles of OCC Rejects in the yard. Rather, he stated that PCA was concerned about the risks and took action to prevent those risks: "that's why we went with Jammie's."⁸⁰

39. In sum, BDI's contention that it did everything it was required to do from a regulatory perspective is not supported by the evidence. The evidence demonstrates that BDI was unable to provide the service PCA needed and BDI has not offered any sufficient evidence to demonstrate that it can provide the service going forward. BDI has failed to rebut that it did not and cannot provide service to PCA to the satisfaction of the Commission.

D. Jammie's is fit to provide the service and met all application requirements.

40. BDI's argument that Jammie's is unfit to provide the service to PCA does not match reality. This is not a scenario involving an untested applicant with no track record of success. Rather, Jammie's has demonstrated that it has the experience, staffing, and resources to effectively provide the OCC Rejects service to PCA. That is not debatable. BDI simply has not demonstrated that Jammie's is unfit to be granted the limited certificate it asks for in this case.

⁷⁷ Rachford, Exh. 1T at 20-26.

⁷⁸ See O. Scott, Exh. 1T at 12:12.

⁷⁹ BDI Initial Brief ¶¶ 50-51.

⁸⁰ See Thorne, TR. at 230:17-234:5, 238:17-240:16, 243:1-245:14.

1. Jammie’s established a need for the service.

41. BDI’s contention that Jammie’s failed to establish a need for the OCC Rejects service is disconnected from and inconsistent with the facts of this case. BDI asserts that Jammie’s failed to establish need because PCA never stated that it was unable to obtain the regulated services it needs from BDI.⁸¹ BDI asserts that PCA was able to obtain drop boxes from BDI just as PCA requested and that PCA never gave BDI an opportunity to provide the service using different equipment.⁸² This is not consistent with PCA’s testimony.

42. First, as explained above, BDI’s suggestion that it met its regulatory duty by providing drop boxes “precisely as PCA had requested” ignores that PCA only ordered drop boxes when it learned in December 2020 that BDI’s trucks could not carry its compactor containers and the only other option BDI provided was its drop boxes.⁸³ As to BDI’s suggestion that it never had a fair opportunity to do something different, that is false. Having known about PCA’s OCC Rejects needs months in advance of startup, BDI had multiple opportunities to present other options. The record is clear, it only presented the drop boxes.⁸⁴ By the time BDI got around to proposing something different—at least six months after OCC plant startup—PCA had moved to Jammie’s because it needed the OCC Rejects problem solved and it could not wait for BDI.⁸⁵

43. Second, BDI’s brief recycles its earlier argument that Jammie’s failed to provide a shipper statement with its direct testimony.⁸⁶ The Commission already rejected this argument in its order denying BDI’s motion for partial dismissal.⁸⁷ Likewise, BDI’s complaint that it has been denied due process because PCA filed testimony responding to BDI’s testimony on the only day it was allowed to under the schedule negotiated by the parties is baseless and has been

⁸¹ BDI Initial Brief at ¶ 28.

⁸² BDI Initial Brief at ¶ 28.

⁸³ PCA Opening Brief at ¶ 4.

⁸⁴ PCA Opening Brief at ¶¶ 4-5.

⁸⁵ PCA Opening Brief ¶ 12; Jammie’s Opening Brief ¶ 47.

⁸⁶ BDI Opening Brief ¶ 29.

⁸⁷ Order 05 ¶ 28. Jammie’s incorporates its response to BDI’s Motion for Partial Dismissal herein by reference. *See* Response to BDI Motion to Dismiss, at ¶¶ 6, 16, 27, 33-39.

rejected by the Commission, now several times.⁸⁸ BDI’s accusation that Jammie’s and PCA engaged in “gamesmanship”⁸⁹ is false and unprofessional. There can be no credible argument that the lone customer in this case has adequately expressed its need for Jammie’s service.⁹⁰

2. Jammie’s is financially fit to serve.

44. BDI also recycles its argument that Jammie’s failed to establish its financial fitness,⁹¹ but has never claimed that Jammie’s is financially unfit or has hidden the ball. BDI admits that “the bar for financial fitness of a new service is low,”⁹² requiring only “at least some credible evidence in the record to support a finding that the proposed business can sustain operations.”⁹³ It is undisputed that Jammie’s is an established business, that it is financially healthy, that it owns the equipment it uses to provide the service, and Jammie’s has been clear about how its rates are structured for providing the service.⁹⁴

45. Jammie’s provided the financial information requested by the Commission in its form application in accordance with WAC 480-70-091, which *requires* that applicants submit applications on forms provided by the Commission.⁹⁵ The information Jammie’s provided is consistent with or exceeds the amount of financial information provided by other successful Class C certificate applications.⁹⁶ Staff has not expressed a concern with Jammie’s financials.

⁸⁸ Order 05 ¶ 28; TR. 35:25-36:5. Jammie’s incorporates its response to BDI’s Motion to Strike herein by reference. *See* Response to BDI Motion to Strike, at ¶¶ 2-9, 16-19.

⁸⁹ BDI Initial Brief ¶ 29.

⁹⁰ BDI also renews its claim that Jammie’s application must be dismissed because the Commission’s docket notice is unclear. BDI Opening Brief, n.31. The Commission has already determined that Jammie’s Application and the Commission’s docket notice are grammatically clear and that regardless, denial of Jammie’s Application on this basis is not the appropriate remedy. *See* Order 05 at ¶¶ 32-33. It is implausible that BDI is still confused about the waste stream at issue in this proceeding.

⁹¹ BDI Initial Brief ¶ 14.

⁹² BDI Initial Brief ¶ 30.

⁹³ BDI Initial Brief ¶ 31.

⁹⁴ Exh. CD-6; Exh. CD-7; Exh. OJS-2; Exh. OJS-3; Exh. JDS-10.

⁹⁵ *See* WAC 480-70-091(1) (“A company must submit its application for certificated authority on forms provided by the commission); WAC 480-70-091(2) (“Applications must include all requested information...”); *see also* Jammie’s Application for New Solid Waste Certificate (Apr. 1, 2022); Exh. JDS-11; Exh. OJS-2; Exh. OJS-3; Exh. JDS-10; Exh. CD-6; Exh. CD-7.

⁹⁶ *See e.g., In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against: International Resource Management, Inc., d/b/a WasteXpress and d/b/a WasteXpress Hazardous Waste Disposal*, Docket TG-200131, Order 02 (Jan. 8, 2021), discussed in Jammie’s Opening Brief, at 46, n.307.

Charlie Dietrich, the only witness to question Jammie’s financials, is unqualified to do so and has not identified any specific discrepancy or concern (there are none).⁹⁷

46. Not a single case cited by BDI supports a finding that Jammie’s is financially unfit. No case involves a Class C applicant or is otherwise factually comparable. To the contrary, each involves evidence of either significant, costly operational barriers, profit loss, internally inconsistent or inaccurate records, or other red flags. For example, *In re Application of Freedom 2000, LLC*, involved solid waste collection in “an isolated and unincorporated community” reachable only through Canada or by crossing Boundary Bay, where there were significant operational barriers (including two border crossings, a small population, and challenging local regulations) and company-specific financial concerns called.⁹⁸ In *In re Application of R.S.T. Disposal Company, Inc.*,⁹⁹ the Commission was unable to determine the applicant’s ownership, composition or financial condition because of a complex web of ownership and finances with profit centers potentially held by other branches of the partnership.¹⁰⁰ Inaccurate annual reports and other evidence of noncompliance with the applicant’s existing tariff further supported a finding that the applicant was unfit.¹⁰¹ In *In re Application of GA-864 of Northwest Unitech, Inc.*,¹⁰² the applicant was “thinly financed,” held “no contracts to provide the service,” and “intended to construct a [biomedical waste processing] facility and purchase transportation equipment through a joint venture, the details of which were not presented of record.”¹⁰³ In *In the*

⁹⁷ Jammie’s Opening Brief ¶ 101.

⁹⁸ *In re Application of Freedom 2000, LLC, d/b/a Cando Recycling and Disposal; In the Matter of Application of Points Recycling and Refuse, LLC d/b/a Point Recycling and Refuse Company*, (Consolidated) Docket TG-081576, Order 05, Docket TG-091687, Order 02; Docket TG-081576, Order 05; (Jan. 27, 2010).

⁹⁹ *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).

¹⁰⁰ The company was actually “a partnership composed of other firms ... some of which may be partnerships or proprietorships ... [with] So-called ‘profit centers’ --- under dba’s different from the partner controlling operations.” Ultimately, the Commission found that “It is extremely difficult under these circumstances to determine accurately the actual costs of specific operations.”

¹⁰¹ *R.S.T. Disposal Company, Inc.*, Order M.V.G. 1402.

¹⁰² *In re Application of GA-864 of Northwest Unitech, Inc.*, Order M.V.G. No. 1367 (Jan. 18, 1989).

¹⁰³ *Id.*

Matter of Joint Application of Evergreen Trails, Inc.,¹⁰⁴ the applicant had “significant, unexplained operating losses,” with “no evidence of a plan to correct the financial situation and no evidence of other source of financial support for the business.”¹⁰⁵ In sum, all of these cases evidence not a *lack* of information but the *presence* of concerning financial information.

47. In fact, the Commission specifically rejected a call for extensive financial information in *In re Application GA-8 of Sure-Way Incineration, Inc.*¹⁰⁶ There, too, there were red flags: the applicant was operating at a loss, provided no evidence of a potential break-even point, and provided internally inconsistent cost and revenue estimates precluding accurate financial analysis. But despite finding the applicant was unfit, the Commission found that the applicant provided sufficient financial records¹⁰⁷ and specifically rejected calls by the protestants that the applicant provide more detailed financial records:

This proceeding is not a rate case. The type of detailed financial information necessary in a rate case is not required in an application for authority. The statute does require certain financial information to assist the Commission in evaluating the application as a whole; the information may be somewhat more general than the specific numbers required in a rate proceeding.¹⁰⁸

The Commission needed only “enough information to be reasonably certain that the company will not go out of business” and “has enough money to start and maintain operations.”¹⁰⁹

48. The common thread in these cases was not a lack of information but the presence of concerning information about whether the operations were financially feasible or whether the applicant was financially honest and responsible. No party has offered any evidence to suggest Jammie’s is not financially fit or that Jammie’s OCC Rejects service is not financially feasible. If

¹⁰⁴ *In the Matter of Joint Application of Evergreen Trails, Inc., d/b/a Evergreen Trailways & E. M. Wickkiser, d/b/a Bellingham Sea-Tac Airpporter for Auth. to Transfer a Portion of Rights Under Certificate of Pub. Convenience & Necessity No. C-819*, Order M. V. G. No. 1824 (Jul. 1989).

¹⁰⁵ *Id.*

¹⁰⁶ *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).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

BDI really had cause to question Jammie’s financial fitness or cost of service, or believed Jammie’s documentation was inadequate, it could have requested discovery seeking additional information. It did not.

3. Jammie’s is regulatorily fit to serve.

49. The “Commission’s ultimate goal” is to bring companies into compliance.¹¹⁰ The Commission should grant an otherwise deserving application if a formerly noncompliant party has voluntarily brought itself into compliance and demonstrates a willingness and ability to remain compliant.¹¹¹ In assessing whether a party is regulatorily unfit, the Commission considers *not* whether that party was merely in or out of compliance with Commission regulation, but rather whether the party operated in “wanton disregard” or with “disdain” for Commission authority.¹¹² Further, the Commission looks to the entirety of the circumstances, including public need and sentiment, such that even in cases of noncompliance, the Commission may still grant an application if there is need for and strong customer support for the services.¹¹³

50. Under this framework, the Commission should find that Jammie’s is regulatorily fit. Contrary to BDI’s claims, Jammie’s is not a rogue actor with a history of evading the law or violating Commission rules. Rather, from the start, Jammie’s reasonably believed in good faith that its disposal of OCC Rejects for PCA was exempt under WAC 480-70-011 and that its motor carrier permit was sufficient.¹¹⁴ Prior to this case Jammie’s, like its competitors, has never been

¹¹⁰ *In the Matter of Determining the Proper Carrier Classification of, & Complaint for Penalties Against Cascade Recycling Inc.*, Docket TG-210102, Order 02 (Initial Order) (Dec. 16, 2021) (suspending subject to waiver a portion of a penalty against an unpermitted operator); *see also In the Matter of a Penalty Assessment Against Bainbridge Disposal, Inc., in the amount of \$7,000*, Docket TG-210587, Order 01 (Oct. 13, 2021); (suspending portion of penalty where regulated solid waste carrier violated commercial driver’s license regulations but promptly corrected the violations and took action to prevent the violations from reoccurring); *In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against Sean Smith*, Docket TG-190488, Order 03 (Dec. 6, 2019) (vacating decision to impose penalties against party who did not appear at group classification proceeding hearing).

¹¹¹ *In re Application GA-767 of Amalgamated Services Inc. for a Certificate of Public Convenience and Necessity to operate motor vehicles in furnishing garbage and/or refuse service*, Order M. V. G. No. 1183, Hearing No. GA-767 (Oct. 29, 1984).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ J. Scott, Exh. JDS-1T at 30:1-31:16.

required to obtain a common carrier or solid waste certificate despite prior communications with Commission Staff.¹¹⁵ Solid waste disposal, even after being contracted by PCA, still only amounted to a fraction of Jammie’s total services as a company and was closely tied to other services Jammie’s was providing PCA.¹¹⁶ Jammie’s was not starting a new solid waste disposal business or actively seeking solid waste disposal customers.

51. Thus, when BDI began threatening that Jammie’s was violating BDI’s certificate, Jammie’s affirmatively reached out to Commission Staff for guidance on whether the services provided by Jammie’s required Commission regulation.¹¹⁷ When Commission Staff confirmed that Jammie’s was exempt from solid waste regulation but recommended that Jammie’s obtain a common carrier permit, it immediately did so.¹¹⁸ When Commission Staff changed its earlier direction and recommended that Jammie’s apply for a solid waste certificate, Jammie’s did so.¹¹⁹

52. Consistent with Commission caselaw, BDI admits that past violations do not bar a finding of regulatory fitness.¹²⁰ In *In re Application GA-767 of Amalgamated Services Inc.*,¹²¹ where the Commission granted an application despite the carrier’s years of unpermitted operations, the Commission explained that unlawful activities are **not** only a *per se* bar to a finding of regulatory fitness, in fact they do not even “automatically constitute an *indication* that an applicant is unfit to conduct operations.”¹²² That is because even upon a finding of past violations, the Commission “examines the circumstances to determine whether the unpermitted operations reflect such a *wanton disregard* for Commission authority that they demonstrate the

¹¹⁵ J. Scott, Exh. JDS-1T at 6:3-6.

¹¹⁶ J. Scott, Exh. JDS-17T at 9:21-10:8, 13:4-12; J. Scott, Exh. JDS-18.

¹¹⁷ J. Scott, Exh. JDS-1T at 31:5-9; J. Scott, Exh. JDS-15.

¹¹⁸ Jammie’s received its common carrier permit on January 21, 2022, one day after Commission Staff provided a link for Jammie’s to apply for a common carrier permit on January 20, 2022.

¹¹⁹ J. Scott, Exh. JDS-1T at 32:1-2.

¹²⁰ BDI Initial Post-Hearing Brief at ¶ 15 (admitting that “past violations are not an absolute bar to a finding of regulatory fitness”), ¶ 32 (same).

¹²¹ *Amalgamated Services Inc.*, Order M. V. G. No. 1183.

¹²² *Id.*

applicant to be likely unable or likely unwilling to conduct its operations in compliance with law.”¹²³

53. There is no evidence that Jammie’s disregarded (let alone exhibited a wanton disregard for) the Commission once it was notified of the Commission’s position; indeed, the opposite is true. Throughout this case, Jammie’s has looked to Commission Staff for guidance on how to proceed and has followed Staff’s direction. It is notable that even after Staff recommended that Jammie’s apply for a solid waste certificate in February 2022, Staff did not initiate an administrative proceeding to classify Jammie’s as a solid waste collection company.¹²⁴ To date, Jammie’s has never received a cease-and-desist from Staff, or any other notice that Jammie’s should cease operations.¹²⁵ Staff declined to participate in this proceeding even when asked by BDI to participate.¹²⁶

54. BDI faults Jammie’s for hauling for PCA after Commission Staff recommended that Jammie’s apply for a solid waste certificate as evidence of Jammie’s disregard for Commission rules.¹²⁷ The fact that Jammie’s continued to offer OCC Rejects services to PCA is justified by the exigent need to manage the OCC Rejects waste stream, including the significant safety, health and regulatory compliance risks that resulted from the uncollected piles of OCC Rejects.¹²⁸ The exigent need to address and minimize the risk of fire at a paper pulp mill, to name just one risk, is sufficiently distinguishable so as to eliminate any concern of would-be illegal haulers, and Commission has found that the public need outweighed evidence of noncompliance

¹²³ *Id.* (emphasis added).

¹²⁴ WAC 480-70-221.

¹²⁵ WAC 480-70-221.

¹²⁶ Dietrich, Exh. CD-35X.

¹²⁷ BDI Initial Brief ¶¶ 33-34.

¹²⁸ PCA Opening Brief ¶ 11.

under less dire circumstances.¹²⁹ This is especially true when considered in light of Jammie’s good faith and the lack of any cease and desist instruction from Staff And Jammie’s asked Staff whether it should obtain a temporary permit pending resolution of this matter which Staff counseled against.¹³⁰ Jammie’s has also been clear that it will fully adhere to the Commission’s ultimate decision in this proceeding.

55. BDI offers no case indicating that denial of an application is appropriate solely on the basis that the company continued to operate following submission of its application. Indeed, Commission precedent, including those cited by BDI, demonstrate that years of unpermitted operations is alone not evidence of bad faith. For example, in *In re Petition of Arrow Sanitary Service, Inc., d/b/a/ Oregon Paper Fiber* (cited by BDI), the company operated without a permit for *fourteen years* before its application was *granted*.¹³¹ In *Amalgamated Services*, the applicant operated without a certificate for at least *three years* for an array of customers, yet despite opposition from numerous incumbent certificate holders, the Commission *granted* its application.¹³² In *Arrow*, the Commission relied on another case, *In re Application No. GA-802 of Fedderly-Marion Freight Lines, Inc.*, in which the applicant transported kiln dust for the supporting shipper for *several years* before it submitted its (*successful*) application.¹³³ These cases demonstrate that operating without a permit—even for years—is alone, not evidence of bad

¹²⁹ See *Freedom 2000, LLC*, (Consolidated) Docket TG-081576, Order 05, Docket TG-091687, Order 02 (finding need for solid waste carrier services in remote town with significant operational barriers outweighed concerns with prior noncompliance, especially in light of assurances of future compliance and Commission audit and enforcement tools); see also *In re Application GA-75154 of Ryder Distribution Resources*, Order M.V.G. No. 1596, Hearing No. GA-75154 (Jan. 25, 1993) (in the biomedical waste context, history of noncompliance was outweighed by the acute public health and safety needs for biomedical waste collection services and the “considerable weight” given by the Commission to generator testimony of “service requirements” in that context).

¹³⁰ See *Amalgamated Services*, Order M. V. G. No. 1183 (consider circumstances in assessing applicants good faith in prior unpermitted operations).

¹³¹ *Arrow Sanitary Service, Inc.*, Cause No. TG-2197.

¹³² *Amalgamated Services*, Order M. V. G. No. 1183 (emphasis added).

¹³³ *In re Application No. GA-802 of Fedderly-Marion Freight Lines, Inc. for a Certificate of Public Convenience and Necessity to operate motor vehicles in furnishing Garbage and/or Refuse Collection Service*, Order M. V. G. No. 1201, Hearing No, GA-802 (June 4, 1985).

faith. These cases also dispel BDI's doomsday predictions that granting Jammie's application will result in a "never-ending stream of illegal haulers."¹³⁴

56. The Commission considers a history of noncompliance in light of "the entirety of circumstances surrounding unpermitted operations which are conducted in good faith" including customer statements, the public need, and the ability and willingness of existing carriers to provide the service.¹³⁵ In *Amalgamated Services*, the fact that the applicant sought legal advice, provided a specialized service at a time when protestants did not yet possess the equipment or personnel (despite asserting they actively sought to), and the community sentiment strongly favored the applicant.¹³⁶ In *Freedom 2000*, cited by BDI, an application was granted despite evidence that the applicant lacked registration with the Department of Licensing of Secretary of State and complaints about prior companies with which the applicant's president had been associated, on the basis that these defects were outweighed by community sentiment and a need for the services in an environment with significant operational barriers. In *Ryder Distribution*,¹³⁷ also cited by BDI, the application was also granted despite the applicant's violation of prior Commission orders, which the Commission viewed as occurring in good faith due to "a new service provider, changes in operations, and confusion regarding responsibilities."¹³⁸ Where the Commission has denied an application on the basis that an applicant is regulatorily unfit, the facts paint a much clearer picture of bad faith. For example, BDI cites *In re Sure-Way*,¹³⁹ where an application was denied on the basis of regulatory fitness. There, Sure-Way was operating in violation of its tariff, despite notice from Commission Staff that it was noncompliant.¹⁴⁰ That is obviously not the situation here.

¹³⁴ BDI Initial Brief ¶ 70(c).

¹³⁵ *Amalgamated Services*, Order M. V. G. No. 1183.

¹³⁶ *Amalgamated Services*, Order M. V. G. No. 1183.

¹³⁷ *In re Application GA-75154 of Ryder Distribution Resources, Inc.*, Order M.V.G. No. 1761 at 5 (Aug. 9, 1995).

¹³⁸ *Ryder Distribution Resources, Inc.*, Order M.V.G. No. 1761 at 5.

¹³⁹ *In re Application GA-75968 of Sure-Way Medical Services, Inc.*, Order M.V.G. 1663, at 7-8 (Nov. 18, 1993).

¹⁴⁰ *Id.*

57. There are compelling reasons to grant Jammie’s application notwithstanding its ongoing hauling including its good faith belief it was exempt from regulation, the exigent need for the service, its excellent service for PCA, PCA’s strong request that Jammie’s be allowed to continue providing the service, and the significant questions about BDI’s ability to do so.

E. BDI and WRRRA’s arguments that a finding in Jammie’s favor will deteriorate the regulatory scheme are not persuasive.

58. BDI claims “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[.]”¹⁴¹ Far from sparking a revolution, a finding in Jammie’s favor is consistent with the law as it stands today. Jammie’s responds to three concerns here: first, Jammie’s is not engaged in cream-skimming; second, consideration of PCA’s needs and concerns does not undermine Commission authority and is in fact a necessary component of the Commission’s determination; and third, granting Jammie’s application does not require a regulatory change as occurred in *Stericycle* nor is Jammie’s seeking such a change.

1. Jammie’s did not engage in cream-skimming.

59. As an initial matter, there is no cream skimming if Jammie’s is exempt from regulation as a private carrier.¹⁴² But even if regulation is necessary, Jammie’s did not engage in cream-skimming. Cream-skimming is “selective service to the most lucrative accounts and avoidance of less lucrative or more expensive accounts to serve.”¹⁴³ This is not what occurred here. There is no evidence that Jammie’s sought out the OCC Rejects work while avoiding less profitable accounts. To the contrary, this is a case of a sophisticated industrial customer identifying a single waste stream among many that its incumbent waste hauler was unable to service. PCA’s decision

¹⁴¹ BDI Initial Brief ¶ 40 (emphasis added).

¹⁴² *Ryder Distribution Resources, Inc.*, Order M. V. G. No. 1596, Hearing No. GA-75154 (“[i]t is irrelevant whether [the party] is or is not cream skimming ... If it is not subject to regulation, it may serve anyone it chooses at any rate it chooses.”) (citing RCW 81.28.010).

¹⁴³ *Id.*

to move one of its many waste streams to Jammie’s after BDI failed to perform is not cream skimming.

60. The concerns with cream-skimming are not implicated here either. The concern with cream-skimming is that without the more lucrative business, less lucrative customers will be harmed via an increase in rates, or that incumbent waste haulers will go out of business, harming both themselves and customers that rely on their services. As explained in Jammie’s Opening Brief, BDI has provided no evidence that its loss of the OCC Rejects work has or will have any material impact on its rates and indeed, to this day, BDI has a *greater* volume of business than it had before PCA’s OCC Rejects operations began in spring 2021 as BDI continues to haul the OCC Rejects from the Ragger and Sedimator, which are reliably dry without the need for additional handling,¹⁴⁴ in addition to all other solid waste from the Mill. Absent evidence of any net loss of business, the only plausible harm to BDI is if BDI needed to obtain the new OCC Rejects business in order to maintain its current rates for all other customers. BDI has not suggested that this is true, and regardless, if BDI was unable to maintain its rates without PCA’s new waste stream to subsidize the rest of BDI’s customers, this is impermissible and in fact viewed as one of the *harms* of cream skimming.¹⁴⁵ BDI and WRRRA’s hypothetical concern that Jammie’s disposing of the OCC Rejects somehow disrupt BDI’s ability to serve its other customers is simply unsupported by any evidence.

61. The impacts of cream-skimming that WRRRA and BDI assert here would apply in nearly every application for a Class C Company servicing an industrial generator, especially those cases involving a competing application from an incumbent certificate holder, and WRRRA and BDI cite to no case involving cream skimming concerns in the case of specific wastes generated by industrial customers. To the contrary, there is ample evidence that the Class C Company permitting regime does not result in the harms to ratepayers that WRRRA foresees, especially

¹⁴⁴ Rachford, Exh. SR-1T at 29.

¹⁴⁵ *See id.* (protestants argued that applicant’s alleged cream skimming could cause, among other harms, “other customers [to] subsidize them”).

where, as here, the incumbent retains the majority of business.¹⁴⁶ The Commission is being asked to disregard the evidence of harm to the only member of the public here—PCA—if Jammie’s were not allowed to continue to service PCA’s Rejects.

2. Consideration of PCA’s testimony does not undermine Commission authority.

62. WRRRA and BDI claim that allowing PCA to assert a preference is the equivalent to allowing industrial generators to replace Commission authority.¹⁴⁷ This is antithetical to Commission rules, which *require* the Commission to consider customer sentiment in assessing an application.¹⁴⁸ As BDI pointed out in its unsuccessful motion to dismiss, under RCW 81.77.40, “[i]ssuance of the certificate of necessity *must* be determined on ... “sentiment in the community contemplated to be served as to the necessity for such a service.” BDI moved to dismiss on the grounds that it (incorrectly) believed Jammie’s had not provided a shipper statement. Having made its motion and reiterated that point in its brief, BDI cannot credibly dispute the importance of shipper perspective.

63. Indeed, as held in *Stericycle*, there are cases where shipper testimony should be given “considerable weight” with regard to “need-related sufficiency of service considerations,” *i.e.*, unique attributes of a waste and special service requirements.¹⁴⁹ This is such a case, where the public consists of a single customer. It is eminently appropriate that the Commission would want to hear from this customer on the unique qualities of the waste, any special handling or processing required, why it considered the incumbent’s service dissatisfactory, and why it views an applicant as fit. If WRRRA and BDI were right, it would also be true that Commission

¹⁴⁶ See *e.g.*, Jammie’s Opening Brief ¶ 20 (collecting examples).

¹⁴⁷ See *e.g.*, WRRRA Opening Brief at 13-14 (section header reads: “Authorizing Large Generators of Municipal Solid Waste to Set their own Service Standards Erodes Commission Authority”); BDI Opening Brief at ¶ 7 (“to allow Jammie’s ... 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”).

¹⁴⁸ See RCW 81.77.040 (directing the Commission to consider “sentiment in the community contemplated to be serviced as to the necessity for such a service”).

¹⁴⁹ *Stericycle of Washington Inc. v. Washington Utilities & Transp. Comm’n*, 190 Wash. App. 74, 79-80, 359 P.3d 894 (2015).

authority would be eroded in *every* case where the “public need” and “sentiment of the community” is represented by a single generator. It would be true for every case involving a contract carrier and many (if not most) cases involving Class C companies. That is empirically not the case.

64. BDI and WRRRA unfairly classify PCA’s testimony as a mere assertion of preference. For reasons already explained at length in this brief and in Jammie’s and PCA’s opening briefs, PCA is a sophisticated entity, with a huge industrial facility, which has testified not to a preference but to the qualities of one of its waste streams, the service that its incumbent solid waste carrier provided and the reason that this service was dissatisfactory (including that it ultimately resulted in huge piles of scattered, uncollected waste that posed significant health, safety, and regulatory compliance concerns), and why the applicant Jammie’s provides the services that PCA needs for this particular waste stream. As noted in Jammie’s Opening Brief, PCA’s preference was for BDI to provide the service. When BDI was unable to, it turned to Jammie’s who solved the problem.

3. Granting Jammie’s application does not require an overhaul of the regulatory scheme because the law already allows Jammie’s to provide this service.

65. Contrary to BDI’s suggestion, Jammie’s does not ask that the Commission extend *Stericycle* to develop specialized regulations for OCC Rejects or to treat them like biomedical waste.¹⁵⁰ A new, separate regulatory scheme is not necessary to grant Jammie’s application. For the reasons described at length above and in Jammie’s Opening Brief, the law already allows Jammie’s to provide this service to PCA either as a private carrier or as a Class C certificate holder.¹⁵¹ Indeed, Jammie’s submits this scenario is exactly the purpose of Class C certificates.¹⁵²

66. BDI and WRRRA contend that the need for specialized waste handling is unnecessary because OCC Rejects do not require specialized equipment and do not have any special disposal

¹⁵⁰ BDI Initial Brief ¶¶ 64-69.

¹⁵¹ Jammie’s Opening Brief, 32-48.

¹⁵² Jammie’s Opening Brief, 5-8, 32-48.

requirements like biomedical waste and thus biomedical waste cases are inapposite.¹⁵³ Ironically, BDI cites several biomedical waste cases in its brief in support of its assertions regarding standards and considerations for regulatory and financial fitness.¹⁵⁴

67. Regardless, BDI and WRRRA cannot credibly claim that OCC Rejects constitute traditional residential or commercial solid waste operations given the unique characteristics of the waste.¹⁵⁵ But even if you accept BDI's argument that the equipment used to manage and dispose of OCC Rejects are not in and of themselves unique, or even that the waste stream is not "special," Class C certificate holders are simply companies that "do[] not provide traditional residential or commercial solid waste operations" but instead "haul[] specific waste products for specific customers."¹⁵⁶ There could be many situations where this type of certificate is appropriate or necessary.

68. Where *Stericycle* is relevant, however, is the Commission need not limit its inquiry to the factors set forth in *Superior Refuse* when considering whether BDI's service relating to PCA's OCC Rejects was to the Commission's satisfaction.¹⁵⁷ *Stericycle* teaches that there are cases where an incumbent may otherwise provide satisfactory service in its capacity as a traditional residential or commercial solid waste carrier, but that the incumbent is not equipped to provide satisfactory service to a particular customer and/or a particular waste stream.¹⁵⁸ *Stericycle* demonstrates that in these cases, a monopoly system is not necessarily appropriate and that market forces serve the public's need and convenience,¹⁵⁹ and that in these cases, giving more weight to the customer's perspective is appropriate,¹⁶⁰ and prior factors in assessing specialized

¹⁵³ BDI Initial Brief ¶¶ 66-69.

¹⁵⁴ See BDI Initial Brief ¶ (citing *Sure-Way Incineration*, Order M. V. G. No. 1451 on the issue of financial fitness); ¶ (citing *Sure-Way Medical Services Inc.*, Order M.V.G. 1663, Hearing No. GA-75968 on the issue of regulatory fitness); ¶ (citing *Ryder Distribution*, Order M.V.G. 1761 (same)).

¹⁵⁵ See Jammie's Opening Brief ¶¶ 31-34.

¹⁵⁶ WAC 480-70-041.

¹⁵⁷ *Superior Refuse Removal, Inc. v. Washington Utilities & Transp. Comm'n*, 81 Wn. App. 43, 47, 913 P.2d 818, 820 (1996).

¹⁵⁸ See *Stericycle*, 190 Wn. App. at 79,

¹⁵⁹ *Id.* at 86.

¹⁶⁰ *Id.* at 95.

solid waste collection (e.g., equipment, training, disposal requirements)¹⁶¹ are not intended to limit the Commission’s assessment of a given waste stream.

69. The Commission may resolve this proceeding in Jammie’s favor, either by exempting Jammie’s from regulation or by granting Jammie’s application, without ushering an onslaught of bad actors that will deteriorate solid waste regulations or Commission authority. BDI and WRRRA have offered no cases or facts suggesting such an outcome is likely. The opposite is true: the regulations *envision* situations like this where the public—a single, sophisticated customer with a large, complex facility—has determined that while the incumbent is willing and able to provide satisfactory service for its standard solid waste, a different carrier is better equipped to meet its needs for a specific waste stream.

CONCLUSION

70. For the reasons set forth above, the Commission should dismiss BDI’s Complaint and authorize Jammie’s to provide the OCC Rejects disposal service either as a “private carrier” or as a Class C certificate holder.

¹⁶¹ See WRRRA Opening Brief at 7-8.

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