

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.

POST-HEARING REPLY BRIEF OF BASIN DISPOSAL, INC.

February 21, 2023

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I. PRELIMINARY STATEMENT

A. Introduction

- 1 State law broadly defines “solid waste collection company” as “every person... owning, controlling, operating, or managing vehicles used in the business of transporting solid waste for collection or disposal, or both, for compensation...over any public highway in this state as a "common carrier" or as a "contract carrier.”¹ Advancing the legislature’s intent, the Commission consistently construes this common sense definition to require *any* company providing solid waste collection services on more than an occasional basis to comply with state law by obtaining a certificate of public convenience and necessity from the Commission (“G-Certificate”). Because Jammie’s Environmental, Inc. (“JEI” or “Jammie’s”) collects and transports municipal solid waste (“MSW”) for disposal for compensation from Packaging Corporation of America’s (“PCA”) paper mill on a regular basis it both qualifies as a solid waste collection company and cannot be found exempt from state regulation. Further, because JEI failed to meet its burden of proof on any element of the statutory criteria for an overlapping application, its certificate application should be denied.
- 2 In a strained effort to avoid these results, Jammie’s ignores all Commission precedent and instead proposes a series of inconsistent and legally unsupported alternatives, buttressed by evolving but inaccurate facts formulated to facilitate its latest arguments. First, JEI proposes to rewrite statute unilaterally in its favor so that JEI and any other company with other non-regulated revenue sources may avoid the Commission’s oversight and economic regulation.
- 3 Alternatively, Jammie’s proposes that if its solid waste collection service must be subject to regulation, its ongoing illegal conduct should be condoned and a G-certificate granted so that it can cream skim a large industrial MSW generator from a highly functioning, customer-oriented and professional common carrier to the detriment of the generating public. To accomplish this, JEI requests the Commission ignore traditional factors for evaluating overlapping applications in

¹ RCW 81.77.010(9).

order to dilute its burden of proof, and instead treat Packaging Corporation of America (“PCA”) and similarly-situated large industrial customers as a separate class of customers that are free to pick and choose their solid waste collection company simply because PCA inherently has greater aggregate bargaining power than smaller industrial generators, commercial generators and residential customers.

- 4 As a final alternative, JEI and PCA request that the Commission ignore their initial testimony and arguments that OCC Rejects are too wet for Basin Disposal, Inc. (“Basin Disposal” or “BDI”) to transport in its equipment,² and accept their *new* substitute testimony and arguments wholly unsupported by documentary evidence (or even their initial testimony) that alleged BDI was providing poor service in failing to collect properly processed and suitably dry solid waste in a timely fashion. On this tenuous and heavily disputed basis, and in the face of clear record evidence that BDI proactively and repeatedly sought to work with PCA to improve on its fully satisfactory service, JEI requests that the Commission here find BDI’s service to be unsatisfactory as a matter of law.
- 5 Despite the fact BDI was denied due process through even an offer of proof to rebut PCA’s untimely shipper support testimony, JEI and PCA’s transparent attempt to shift legal theories and distort the facts in their favor must fail. Under Washington law, JEI is a solid waste collection company. It operates without a Commission-issued certificate, and has done so repeatedly and flagrantly. As addressed in BDI’s Initial Post-Hearing Brief, and more fully in response to JEI’s novel and contrived theories below, JEI failed to meet its burden of proof or persuasion to establish its financial or regulatory fitness and that BDI failed to provide satisfactory service. Jammie’s further failed to demonstrate that large industrial generator’s MSW be given preferential treatment under the law. Thus, the Commission should order JEI to cease and desist its solid waste collection activities and deny its application.

² JEI also asks that the Commission ignore JEI’s burden of proof to establish its financial and regulatory fitness.

II. ARGUMENT

A. Jammie's and PCA once again support JEI's application through unsupported claims and misstatements

- 6 As addressed in great detail in BDI's Initial Brief, both Jammie's and PCA have gone to great lengths in these consolidated proceedings to stretch the truth and exaggerate PCA's newly fashioned complaints regarding BDI's service in order to obtain their desired outcome. Even if the Commission ultimately does not find due process violations in the allowance of PCA to testify out of sequence with BDI denied a response or an offer of proof,³ there is nevertheless ample evidence by which the Commission can conclude that JEI and PCA's claims lack any credibility. BDI will not address all of the panoply of misstatements, exaggerations and inaccuracies here which were previously noted in its Opening Brief, but and asks the Commission to carefully consider the entire record and find that PCA and JEI's contentions regarding BDI's service are meritless.
- 7 As one example, in addition to its transparent attempts to blame BDI for its own conduct in PCA's Opening Brief, it now contends that PCA requested that BDI provide a new method of hauling its OCC Rejects and that it received nothing in response.⁴ Yet BDI's testimony and email exhibits demonstrate conclusively that BDI was given just days' notice that PCA was even interested in alternatives. When there were chronic and recurring moisture problems and BDI reached out to PCA to discuss potential alternatives weeks later, PCA preferred to continue with its initial plan and handle the moisture problems internally. PCA now claims that its own self-inflicted wounds and refusal to consider or accept BDI's proposals for were in fact unsatisfactory solid waste collection activity by Basin. But solving PCA's moisture problems prior to collection and transportation is not solid waste collection activity, and, despite BDI repeatedly and proactively offering its assistance, PCA rejected its help.

³ TR. 464: 16 – 465: 7.

⁴ PCA's Opening Brief, ¶ 2.

- 8 JEI makes similarly unfounded claims. For example, it contends that BDI misled PCA about its tariff services.⁵ This is a perfect example of the type of gamesmanship employed by JEI in this proceeding because it relies on a deliberately one-sided rendition of the facts. Had BDI been permitted a response to PCA's testimony, it could readily have explained the email on which PCA relies. But once again, the record nevertheless adequately portrays the true intention behind Mr. Dietrich's modest misstatement. BDI clearly did not intend to trick PCA into believing that BDI could not provide the very service it repeatedly offered both orally and by written proposal under its existing tariff.⁶ JEI's interpretation is illogical because BDI had nothing to gain by suggesting it could not provide the very service it offered. Instead, consistent with Commission ratemaking practices, Mr. Dietrich merely meant that a new tariff rate could not be approved until sufficient data had been developed.
- 9 Jammie's also conveniently contends that on-site processing of OCC Rejects cannot be separated from the subsequent haul and that it constitutes an all-or-nothing service.⁷ But like PCA operated before JEI's involvement, Ms. Scott's own testimony demonstrates that processing, loading and transportation can all be offered and performed independently. At the hearing she testified that on occasion JEI's drivers would load a truck and leave it overnight before transporting the load to the landfill for disposal.⁸ Moreover, she freely admitted that those services could be offered by different providers.⁹ While JEI also claims that providing the services together provides greater efficiency, it failed to demonstrate that this justifies the harm caused to the greater public interest by cream skimming a single lucrative industrial generator after over one year plus of unauthorized transportation of solid waste.

⁵ JEI's Opening Brief, ¶ 41.

⁶ Exh. CD-1Tr. 13: 15 – 14: 18; 15: 3 – 16: 11; Exh. CD-02, p. 96-107.

⁷ JEI's Opening Brief, ¶ 91.

⁸ Scott, TR. 106: 12 – 20.

⁹ *Id.* 133: 19 – 135: 23.

B. Washington law determines what constitutes a “solid waste collection company” by analyzing solid-waste related services, not other unrelated accessorial services

10 Jammie’s Initial Brief opens with the contention that it is not a solid waste company and does not seek to become one.¹⁰ Instead, the applicant apparently asserts that its core business is industrial cleaning and environmental services and therefore it is not a solid waste collection company and should not be regulated as one. These assertions lack merit. Jammie’s applied for authority to operate as a solid waste collection company and therefore obviously seeks to become one. Moreover, its conduct qualifies it under state law as a solid waste collection company.¹¹ As noted, the legislature defined “solid waste collection company” broadly and it covers every company providing solid waste collection service, not just those who call themselves “solid waste collection companies” or those whose core business is collecting, transporting and disposing of solid waste. JEI plainly meets the statutory definition.

11 Rather than “*every person*” providing solid waste collection service, Jammie’s contends that only those companies whose core business is solid waste collection are subject to regulation regardless of the regularity or volume of collections. To adopt Jammie’s position, the Commission would be required to reach an absurd result by which literally any existing company with another business could begin hauling solid waste for disposal without a Commission-issued certificate. This impermissible and misguided reading of Chapter 81.77 RCW would extend its plain meaning beyond any logical or rational bounds by inserting new words to regulation of only those persons who *exclusively* provide solid waste collection.

12 In so doing, the Commission would also be required to ignore its own rules for determining whether a common carrier like JEI must also obtain a G-certificate. That rule is set forth in WAC 480-70-016, and provides in pertinent part:

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

¹⁰ JEI’s Opening Brief, ¶ 2.

¹¹ RCW 81.77.010(9) and RCW 81.77.040.

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.¹²

JEI holds a recent Commission-issued common carrier permit under Title 81.80 and plainly transports solid waste from PCA on a more than occasional basis. Indeed, it does so on nearly a daily basis, transporting approximately 80 tons of OCC Rejects to a landfill for disposal each weekday. Thus, under state statute and Commission rule, JEI's operations require a solid waste certificate.

13 Although the Commission rarely reaches the final order stage in classification proceedings initiated by Staff under RCW 81.04.510, it recently had the opportunity to consider whether a common carrier that hauled just 16 loads of solid waste constituted a solid waste collection company under Washington law. The Administrative Law Judge concluded in an initial order that under those facts, the hauler's conduct indeed violated RCW 81.77.040, stating:

In this case, the evidence shows that Cascade Recycling transported loads of solid waste to the Cowlitz County Solid Waste Facility on at least 16 occasions. Cascade Recycling does not dispute that this conduct occurred. Regardless of whether Cascade Recycling intended to operate as a solid waste collection company, the evidence shows that the Company transported solid waste on more than an occasional basis. We therefore conclude that Cascade Recycling meets the statutory definition of hauling of solid waste for compensation as a solid waste collection company. Because Cascade Recycling does not have authority to conduct business as a solid waste collection company, we find that Cascade Recycling's conduct violates RCW 81.77.040.¹³

14 Moreover, in a complaint proceeding brought against multiple motor carriers engaged in regular unlicensed transportation of OCC Rejects for ultimate landfill disposal under contract from two paper mills in Jefferson and Clallam Counties, the full Commission reached a similar conclusion:

These facts establish that Respondents are providing solid waste collection services under Washington law without the required certificate of authority from the Commission. Respondents collect solid waste in the form of OCC Rejects from Port Townsend Paper and McKinley Paper for compensation and transport it via motor vehicle over Washington's public highways for collection and disposal.¹⁴

¹² WAC 480-70-016(1).

¹³ *In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against Cascade Recycling Inc.*, Dkt. TG-210102, Initial Order 02, ¶ 12 (Dec. 16, 2021).

¹⁴ *Murrey's Disposal Co., Inc. v. Waste Mgmt. of Wash, Inc. et al*, Dkts. TG-200650 and TG-200651 (consolidated), Order 06, ¶ 25 (May 3, 2021).

15 That final order was appealed under the Washington Administrative Procedures Act and the Washington Court of Appeals recently affirmed. In *Waste Mgmt. of Washington, Inc. v. Washington Utilities & Transp. Comm'n*, __ Wn. App. 2d __, 519 P.3d 963 (2022), the Court of Appeals concluded:

[The OCC Rejects haulers] did not have WUTC certificates of authority to operate as solid waste collection companies in [the subject territory]. Therefore, their solid waste collection activities violated Washington law.¹⁵

Consequently, there should be no doubt that despite its other business enterprises, JEI's conduct qualifies it as a solid waste collection company under Washington law.

C. JEI qualifies as a contract carrier, not a private carrier

16 Jammie's further argues it is a private carrier and its operations should be deemed exempt from regulation. The pertinent exemption, WAC 480-07-011(g), permits "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." This rule adopts the statutory definition of "private carrier" set forth in RCW 81.77.010. Jammies makes multiple arguments as to why this standard should apply to exempt the solid waste collection service it provides to PCA, primarily that its solid waste collection service is just a small portion of the myriad of industrial cleaning services it provides to PCA, but its claims are unsupported by fact nor law.

17 First, JEI misstates the facts about its business to support its arguments. In its Opening Brief, JEI claims that "if Jammie's performs an industrial cleaning or cleanup service for a customer, Jammie's may be asked by the customer to also dispose of the waste associated with that service."¹⁶ Jammie's later implies that its OCC Rejects collection relates to its "industrial cleaning services for PCA's OCC processing equipment,"¹⁷ and adds, "[t]he fact that OCC Rejects hauling services were derived from industrial cleaning services at the Mill shows that

¹⁵ *Waste Mgmt.*, 519 P.3d at 966.

¹⁶ JEI's Opening Brief, ¶ 23.

¹⁷ *Id.*, ¶ 59.

they should not be considered in isolation.”¹⁸ These statements completely ignore the facts at issue in this proceeding. Jammie Scott admitted at the hearing that JEI does not generate or take part in the generation of OCC Rejects at PCA’s mill.¹⁹ PCA runs its own mill and generates its own OCC Rejects.²⁰ JEI occasionally cleans the OCC Plant and then removes only a small portion of the overall OCC Rejects waste generated by the mill. It adds that small volume of OCC Rejects to the much larger volume of OCC Rejects that are generated by PCA’s operations and removed from the mill by PCA’s employees.²¹ JEI then hauls all of the OCC Rejects under a contract a purchase order that compensate JEI for transporting and disposing of OCC Rejects.

18 These details matter because to adopt JEI’s novel private carrier theory excludes any limiting principle. Under JEI’s theory, literally any vendor to a solid waste generator, from janitorial service vendors to CPA firms, could acquire equipment and qualify as exempt private carriers because their solid waste collection would derive from their existing relationship with the generator. The fact that one service gave rise to the opportunity to provide the other is an artificial and meaningless connection. To conclude otherwise would effectively extinguish the Commission’s jurisdiction to regulate non-residential solid waste collection services.

19 Jammie’s arguments also clearly misinterpret the concept of a “private carrier” under Washington’s regulatory system. The Washington Supreme Court addressed the differences between a private carrier exempt from regulation as an incidental adjunct to another established business and contract carrier in *Elkins v. Schaaf*, 4 Wn.2d 12, 102 P.2d 230 (1940). That case involved the state regulation of “auto transportation companies” under Chapter 184, Laws of 1935 and Chapter 166 of the Laws of 1937, and at issue was whether logging companies that contracted for a combination of logging and transportation services were subject to state

¹⁸ *Id.*, ¶ 61.

¹⁹ Scott, TR. 115: 2 -116: 13; 120: 8-9 (“We’re not generating the rejects; we’re removing the rejects from the areas that we’re cleaning.”)

²⁰ Scott, TR. 115: 2 – 117: 5; 120: 6-9.

²¹ Scott, TR. 116: 7 – 13 (Jammie’s does not operate the equipment that generates the vast majority of OCC Rejects at PCA).

regulation as common carriers or contract carriers, or were instead exempt as private carriers providing transportation as an incidental adjunct to their logging contractor business. The Washington Supreme Court concluded the haulers were contract carriers, not exempt private carriers, because the definition of private carrier restricted private carriage to persons who transport property owned, bought or sold by them in good faith, while a person who transported for others under a contract was considered a contract carrier. Specifically, Chapter 166 of the Laws of 1937, defined a “private carrier” as:

a person who in his own vehicle transports only property owned, or being bought or sold by him in good faith, and only when such transportation is purely incidental to some other established private business owned or operated by him in good faith.²²

In concluding that the logging companies were contract carriers rather than private carriers, the Supreme Court reasoned:

...there is a fundamental distinction between an owner hauling his own products, such as timber, over the highways of this state and a contractor who hauls the timber of others for compensation over the highways even if such hauling is only a portion of a combination of services for which he receives compensation under his contract. The highways are built primarily for use of the general public in hauling their own goods or in transportation of themselves from place to place. When one hauls passengers or the freight of others for compensation he makes the highways his place of business and therefore is subject to regulation under the statute. The appellants have by their contracts brought themselves within the classification of a carrier for compensation as distinguished from owners who transport their own goods or products.²³

20 An analogous concept applies to solid waste transportation. A person who contracts with a waste generator to collect and transport its MSW for disposal on regular basis is either a common carrier or contract carrier under RCW 81.77.010 (1) or (2), not a private carrier under subsection (5). And contrary to JEI’s repeated assertions, the Commission’s conclusion in *Ridwell* agrees. There, the Commission concluded that the material *Ridwell* collects is not by definition “solid waste.” Although the items were unwanted, the record supported that the items were donated for reuse, and that *Ridwell*’s operations were essentially a pickup and delivery service for property

²² *Elkins*, 4 Wn.2d at 18 (citing Chapter 166, Laws of 1937).

²³ *Id.* at 25.

that customers would otherwise be required to transport to third parties themselves.²⁴ Thus, any collection of recyclable materials was incidental to the “upcycling” service Ridwell provides.

21 Jammie’s completely ignores both the traditional private carrier concept and the Commission’s rationale in *Ridwell* and instead apparently applies its own rendition of the words “incidental” and “adjunct” in isolation. But as addressed by BDI’s Initial Brief, those words would require that JEI transport OCC Rejects as a small but integral part of a business unrelated to solid waste collection. In adopting the Initial Order in *Ridwell*, the Commission agreed:

The word “incidental” generally means “happening as a result of or in connection with something more important.” “Something that is an adjunct to something larger or more important is connected with it or helps to perform the same task.”²⁵

Because Jammie’s solid waste collection services are not truly connected with its cleaning services in the OCC Plant or otherwise, they cannot be “incidental” to it. And because they do not help to perform the cleaning services, they are not an “adjunct” either.

22 Undeterred, Jammie’s cites to a Commission order in *Clark County Disposal, Inc. et al v. Env’tl. Waste Sys., Inc. et al*, Cause No. TG-2915 (Oct. 19, 1989) as standing for the proposal that the Commission will examine all of a company’s businesses and revenue sources in determining whether a company is operating as a private carrier transporting solid waste as an incidental adjunct rather than considering the volume of solid waste. But that case can be readily distinguished from this case and hardly supports Jammie’s premise.

23 In that 1989 proceeding, the Commission ruled on a formal complaint filed against a Vancouver, Washington recycling facility for operating as a “garbage and refuse company.” The record reflected that customers paid the respondent to deliver mixed loads of solid waste and recycling to the facility where recyclable materials were sorted out, and the residual solid waste was then delivered by the respondent to a landfill for disposal in its own vehicles. Although the facility

²⁴ *In the Matter of Determining the Proper Carrier Classification of Ridwell Inc.*, Docket TG-200083, Order 05, ¶ 28-30 (Oct. 15, 2020).

²⁵ *Id.* Order 04, at ¶ 18, adopted by Order 05.

disposed of a significant volume of solid waste (up to 67% of the volume of materials received), the Commission concluded its operations did not meet the then-existing definition of “garbage and refuse company” and found it was otherwise a private carrier.

24 But that case record was developed before the implementation of the Waste Not Washington Act in 1989 which significantly overhauled the existing regulatory system, and more importantly, new definitional changes in WAC 480-70 by the Commission in the wake of those legislative changes which aimed to boost recycling programs statewide. At that time of *Clark County Disposal*, the Commission had adopted an interpretive rule in WAC 480-70-050(7) that provided RCW 81.77.040 applied only to a company that specialized in the business of collecting solid waste for disposal for compensation for all potential customers within a specified area. On that basis, the Commission concluded that because the respondent did not collect solid waste from customers in an area, and instead handled recyclable materials delivered to its by customers from any area or territory, the company was not a “garbage and refuse collection company.”²⁶ The current rule, WAC 480-70-016 disregards whether the company is serving customers in a specific territory and provides that if a common carrier holding a permit under RCW 81.80 transports solid waste on more than on occasional basis, its operations will require a certificate under RCW 81.77.

25 Additionally, JEI misinterprets the Commission’s conclusion as standing for the premise that volume of solid waste will not be considered when evaluating whether a company is a private carrier. Rather than disregarding it, the Commission merely concluded that the volume of solid waste is not the sole factor to be considered, stating “[w]hether or not the transportation is an ‘incidental adjunct’ to some other private business may not be wholly determined by comparing the volume of garbage as opposed to recyclables.”²⁷ Because the pertinent business was a recycling sorting facility that only disposed of solid waste removed from the mixed loads

²⁶ *Clark County Disposal*, Cause No. TG-2915, p. 2-3.

²⁷ *Id.* at p. 3.

delivered to it, the Commission concluded the respondent was a recycling company that subsequently transported solid waste in private carriage and was not charging to collect, transport and dispose of solid waste.

26 The facts of that case contrast starkly with these here. OCC Rejects are not delivered to JEI for a purpose other than disposal; it collects them from PCA under a contract/purchase order that calls for transportation and disposal. And there are no other services JEI performs to which its solid waste collection is incidental. At best, the other services it provides to PCA are merely “coincidental”. Thus, even if the Commission’s reasoning there were applied to JEI, it should conclude that Jammie’s is a solid waste collection company subject to regulation.

27 Moreover, more recent Commission orders applying more contemporary rules would seemingly overrule the conclusions of *Clark County Disposal*. In *In re the Matter of Determining the Proper Carrier Classification of Glacier Recycle, LLC et al.*, Dkt. TG-072226, Order 08 (Jul. 9, 2010) the Commission Staff brought classification proceedings against multiple companies operating recyclable material recovery facilities. Each company provided drop boxes for the collection of mixed solid waste and recyclable materials, sorted delivered loads of mixed materials at their material recovery facilities (“MRF”) to remove recyclable materials, and then transported the residual solid waste to a landfill for disposal using its own trucks. Because the material delivered to the landfill was considered solid waste and not recyclable material, an interlocutory order concluded that the respondents were not engaged in transportation of recyclable materials.²⁸ The parties in that adjudication then entered into a conditional settlement that included a provision requiring the respondents to cease transporting residual solid waste for disposal from their MRFs unless it represented a small portion of the overall material received. But multiple intervenors objected to that provision on the basis that it would still permit daily

²⁸ *In re the Matter of Determining the Proper Carrier Classification of Glacier Recycle, LLC et al.*, Dkt. TG-072226, Order 08 (Jul. 9, 2010).

transportation of solid waste for landfill disposal. And in its order partially approving the settlement, the Commission shared their concern, concluding:

The Commission shares the objecting intervenors' concern with whether or not this aspect of the Settlement is contrary to or violates provisions of WAC 480-70. "Occasional" is defined in WAC 480-70-041 to mean "occurring at irregular and infrequent intervals." The rule goes on to explain that the term "occasional" is "qualitative, not quantitative, in that the term applies to services that are only performed from time-to-time, not that the solid waste hauling is only a small part of services offered."²⁹

28 Thus, in those more recent proceedings, the Commission has directly rejected Jammie's premise that it may regularly transport solid waste for disposal because "Jammie's disposal of OCC Rejects is a miniscule part of its overall business."³⁰ Consequently, the Commission should readily conclude that Jammie's solid waste collection services require a certificate under RCW 81.77 regardless of the number of other services it provides to PCA.

D. Collection of OCC Rejects is traditional solid waste collection service for which the Superior Refuse "satisfactory service" standards apply and for which "cream skimming" is prohibited

29 Alternatively, and negating its contention that it does not seek to be a solid waste collection company, JEI requests the Commission treat its MSW collection as specialized service akin to biomedical waste to overcome the high bar for overlapping applications under RCW 81.77.040. Jammie's arguments here transparently seek to distort the law in order to artificially lower the bar for its overlapping application and open the door to cream skimming of lucrative large industrial MSW generators. But historically (and unfortunately for Jammie's argument), the Commission has "look[ed] to the nature of the proposed operation rather than the label applicants applies to it."³¹ Thus, the Commission should disregard Jammie's subjective contentions and consider the actual service provided and conclude that the standards for contested applications in *Superior Refuse*³² certainly apply to Jammie's certificate application.

²⁹ *Id.*, Order 08, ¶ 34.

³⁰ JEI's Opening Brief, ¶ 64.

³¹ *In re Application GA-75154 of Ryder Distribution, Inc.*, Order M. V. G. No. 1596 (Jan. 25, 1993).

³² *In re Application GA-896 of Superior Refuse Removal Corp for a Certificate of Public Convenience and Necessity to Operate Motor Vehicles in Furnishing Solid Waste Collection Service*, Order M. V. G. No. 1639 (Jun. 28, 1993).

30 To start, JEI assumes incorrectly and without analysis that its service does not qualify as “traditional residential or commercial solid waste operations.”³³ A “Traditional solid waste collection company” is defined by rule in WAC 480-70-041 as: “a company engaged in collecting and removing solid waste and recyclable materials from private homes, and/or removing solid waste from commercial establishments, industrial facilities, and other sites. Solid waste is normally picked up on a daily, weekly, or other regular basis.” The hearing record demonstrates this is precisely the service JEI illegally provides and for which it reluctantly and belatedly seeks authority. As noted in BDI’s Initial Brief, the hearing record demonstrates that JEI collects solid waste in the form of OCC Rejects, a form of MSW, from PCA’s industrial facility on a regular basis. Thus, its unlawful services qualify as “traditional solid waste collection.” The fact that OCC Rejects require pre-loading processing in order to be safely transported without leaking water cannot convert its collection to a specialized service. Whether it be bagging or source-separating recyclables, most solid waste requires some pre-collection processing.

31 As an applicant for traditional solid waste collection service, JEI’s application is indeed a classic attempt at cream skimming. JEI contends it cannot cream-skim because it does not seek to compete with BDI as a solid waste provider.³⁴ This is yet another example of JEI’s double-speak because shortly thereafter, JEI relies on the benefits of competition to justify its overlapping application.³⁵

32 Jammie’s further argues there is no empirical proof that its attempt to poach a single large new industrial generator without providing universal service to the surrounding community harms BDI or the public interest.³⁶ But the Commission has never required a detailed financial showing to establish the harm that is obvious based on cream-skimming the relatively higher volume

³³ JEI’s Opening Brief, ¶ 70.

³⁴ *Id.* ¶ 67.

³⁵ *Id.* ¶ 73.

³⁶ *Id.* ¶ 68.

produced in one geographic area or by one generator versus the surrounding areas.³⁷ Instead, contrary to JEI's premise that cream-skimming cannot occur for new customers, the Commission previously concluded:

A certificate holder is a public service company, and as such is required to provide universal service without discrimination. RCW 81.77.070; 81.28.020; 81.28.180. Service to outlying areas; *soliciting new customers at lower rates than the regulated company*, which has to serve the entire territory, can offer; charging special rates to preferred customers; and abandoning customers in order to take on new customers. The cream-skimming in urban areas diminishes the ability of certificated companies to continue subsidizing service to rural areas. In order to survive, regulated companies must raise their rates, which makes them vulnerable to further cream skimming. Regulated carriers cannot long survive in such an environment.³⁸

Consequently, because JEI seeks to serve only a single lucrative customer rather than provide universal service to the public, its proposed service is decidedly not in the public interest.

33 Jammie's also assumes without justification that its service is not "neighborhood solid waste collection" but is instead service of a specialized waste hauler. Once again, JEI misinterprets the law to serve its own purposes. The term "neighborhood solid waste collection" is not intended to be limited to residential service, but universal MSW collection provided by traditional solid waste collection companies to all customers in their given territories. This class of service is contrasted with specialized haulers of hazardous or biohazardous waste that cannot be collected in traditional solid waste equipment, and which must be handled with special care and/or disposed of in specialized facilities.

34 As addressed by the Commission in *In the matter of Application GA-76820 of Medical Resource Recycling System, Inc.*, Order M. V. G. No. 1707 (May 23, 1994), the Commission applies different standards to applications for specialized collection of hazardous and biohazardous wastes because there are hazards involved that could lead to serious health problems. In the

³⁷ See, e.g., *In re Application No. GA-849 of Superior Refuse Removal Corp.*, Order M. V. G. No. 1357 (Sep. 19, 1989).

³⁸ *In the Matter of Determining the Proper Carrier Classification of: Enoch Rowland, d/b/a Kleenwell Biohazard & Gen. Ecology Consultants*, Dkt. TG-920304, Commission Decision and Order Denying Administrative Review; Affirming Initial Order; Directing Company to Cease and Desist (Jan. 25, 1993) (emphasis added).

context of biomedical waste, the shippers are professionals in the medical field and thus their perspectives on factual matters such as the appropriate methods for handling and disposing of biomedical waste are given considerable weight. This explanation was expanded in *Ryder*, where the Commission reasoned that grants of specialized authority are based in part on the generator's continuing liability for damage caused by the disposal of hazardous substances that cannot be collected as part of the neighborhood solid waste collection model and ultimately disposed of in a Subtitle-D MSW landfill.³⁹ Because generators of hazardous waste are primarily responsible parties under the Washington Model Toxics Control Act ("MTCA"), RCW 70A.305, and CERCLA, 42 U.S.C. § 9607, they have a heightened responsibility to determine the method of disposal and their needs for collection and disposal are different from those for universal waste collection.⁴⁰

35 Similarly, in *In the Matter of the Application of Waste Mgmt. of Washington, Inc.*, Dkt. TG-120033, Order 10 (Jul. 10, 2013), the Commission noted that it originally encouraged competition in the context of biomedical waste collection because the service more closely resembled statewide motor freight common carriage than typical solid waste collection service. The Commission further reasoned that the incumbent provider and applicant competed across the state for approximately 80 percent of generators in the state, which resulted in demonstrated benefits to consumers without detriment to the incumbent's revenues.⁴¹

36 Here, solid waste collection from PCA closely resembles universal "neighborhood solid waste collection." Despite being derived from a water-intensive industrial process, the OCC Rejects Jammie's illegally hauls remain ordinary MSW. Traditional solid waste collection companies can collect this waste stream in ordinary solid waste receptacles, either drop boxes or trailers, and then transport the material for disposal like any other solid waste.⁴² This waste carries no

³⁹ *Ryder*, Order M. V. G. No. 1596 (Jan. 25, 1993).

⁴⁰ *Id.*

⁴¹ *In the Matter of the Application of Waste Mgmt. of Washington, Inc.*, Dkt. TG-120033, Order 10, ¶ 13 (Jul. 10, 2013).

⁴² Scott, TR. 103: 22 – 104: 2; Exh. CD-1T. 3: 20 – 4: 3.

heightened concerns regarding MTCA or CERCLA liability, and as Ms. Scott confirmed at the hearing, it is taken to an ordinary MSW landfill without any special considerations beyond ensuring the loads are not dripping water onto the roadway in violation of state law.

37 Further, unlike with biomedical waste, the shipper has no greater knowledge of any concerns with differing methods of collection, transportation or a selection of disposal sites. To the contrary, PCA's witnesses vehemently asserted that they were not experts in solid waste collection.⁴³

38 Nor is it relevant that PCA generates large volumes of MSW for disposal. The volume disposed of raises no elevated human health and safety concerns. Instead, it purely impacts the choice of vehicle used for efficiency's sake. And as the Commission has addressed in the past, purely economic considerations are not factors for evaluating satisfactory service.⁴⁴

39 Unlike OCC Rejects, biomedical waste presents risks to human health and therefore must be collected, handled and processed in truly specialized equipment. As addressed by the Commission's order in *Sure-Way*, the parties agreed that health and safety concerns make the landfill disposal of medical waste an unacceptable practice.⁴⁵ That waste stream is instead collected in specialized boxes and bags that are transported for further processing, which may involve incineration or sterilization.⁴⁶

40 Nor do the other application orders and certificates that Jammie's cites throughout its brief support its premise. For example, JEI claims that certificates issued to a variety of contract

⁴³ See Exh. BW-1T, p. 8 ("PCA is not an expert on hauling waste and was open to any idea that would help solve the OCC Reject problem and more efficiently dispose of the OCC Rejects.")

⁴⁴ See, e.g., *of Superior Refuse*, Order M. V. G. No. 1639 (Jun. 28, 1993)(addressing that satisfactory service is evaluated based upon the quality of service, as measured by "the nature, seriousness, and pervasiveness of complaints about service, the carrier's response to customer complaints and its demonstrated ability to resolve them to the Commission's satisfaction, 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."); *Application of R.S.T. Disposal Co., Inc.*, Order M. V. G. No. 1402 (Jul. 28, 1989)(The Commission concluded that the rates to be charged, as opposed to the cost of service, is not a factor to be evaluated in an application proceeding.)

⁴⁵ *In the matter of application GA-868 of Sure-Way Incineration, Inc.*, Order M.V.G. No. 1451 (Nov. 30, 1990).

⁴⁶ *Id.*

carriers establishes the premise that generators of specialized waste streams should be free to negotiate for rates from solid waste collection companies free from the legislature's preference for exclusive providers.⁴⁷ But JEI fails to cite to a single final Commission order supporting its premise. The lone order Jammie's cites there is merely an initial order that by Commission rule and a specific docket notice JEI failed to address is expressly non-precedential.⁴⁸ That ultimately unprotested proceeding involved an application to transport liquid waste via vacuum tanker.⁴⁹ The applicant sought to provide service the incumbent provider was unwilling or uninterested in providing, and thus after the applicant agreed to a restrictive amendment to its application, the incumbent withdrew its protest and the certificate was granted. That the ultimately unopposed certificate was granted can hardly establish the standards for overlapping applications. Moreover, that application involved the transportation of liquid waste in vacuum tankers. EPA regulation prohibits disposing of liquid waste in an MSW landfill except under special circumstances.⁵⁰ Thus, the collection and transportation liquid waste is significantly different from the ordinary MSW JEI seeks authority to transport for disposal.

E. Basin Disposal provided satisfactory service

41 Considering the extensive backdrop set forth above, the Commission should reject Jammie's advocacy for facilitating and proliferating competition for large industrial generators of MSW, and unequivocally apply the standards set forth in *Superior Refuse* for evaluating whether Basin Disposal will provide satisfactory service. As set out in a footnote above, those standards require that the Commission consider the following factors evaluating the quality of service:

- a. the nature, seriousness, and pervasiveness of complaints about service;

⁴⁷ JEI's Opening Brief, at p. 8.

⁴⁸ See Notice of Finality, ¶4, Dkt. TG-091026 (Sep. 30, 2009) ("In allowing this order to become final, the Commission does not endorse the order's reasoning and conclusions. If cited in the future, the order must be identified as an Administrative Law Judge's order.")

⁴⁹ *In re Application of Northwest Liquid Transport I, Inc. For a Certificate of Public Convenience and Necessity to Operate Motor Vehicles in Furnishing Solid Waste Collection Service*, Dockets TG-091026 (Jul. 9, 2009)(initial order).

⁵⁰ 40 C.F.R. § 264.314(e).

- b. the carrier's response to customer complaints and its demonstrated ability to resolve them to the Commission's satisfaction; and
- c. 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.⁵¹
 - i. ***The genesis for PCA's sole complaint was its own conduct, thus there were no serious complaints that BDI failed to provide high quality service.***

42 Addressing the nature, seriousness, and pervasiveness of the complaints about service, clear distinctions must first be drawn between what is and is not solid waste collection service. Solid waste management, environmental consulting, and pre-collection processing are not by themselves solid waste collection, and they are the legal responsibility of the generator pursuant to WAC 173-350-025. BDI previously comprehensively resolved that the overwhelming majority of PCA's complaints relate to management and processing activities performed by PCA rather than Basin Disposal.⁵² It should be further noted that there is no record evidence that these concocted complaints were ever even relayed to BDI. Thus, despite the fact that BDI proactively sought to help PCA with its de-watering and loading processes, all related complaints should be disregarded as irrelevant to the inquiry the Legislature has charged the Commission with performing under RCW 81.77.040.

43 As to complaints about solid waste collection services, PCA originally made it quite clear that its complaint was about the competitiveness of BDI's (Commission-established) rates.⁵³ PCA's set forth its sole written complaint about service quality to BDI in an email written April 27, 2021. There Sam Holm wrote to Charlie Dietrich and Kris May that PCA needed more dumpsters hauled due to increased production:

Charlie and Kris,
 Things are moving faster here at the OCC plant and we need your support to keep things running smoothly.

⁵¹ *Superior Refuse*, Order M. V. G. No. 1639 (Jun. 28, 1993)(The Commission also noted that it will not consider whether the applicant's service would be equal to or better than the incumbent service, which is apparently one of JEI's contentions here.)

⁵² See, e.g., Exh. BW-1T. p. 4 ("As a company, we do not believe BDI is able to adequately *manage* the OCC Reject waste.")

⁵³ Exh. CD-2, p. 78.

Please read the comments below and review the photo attached.

We need to have a solid plan around dumpster management. Skyler is asking to have more dumpsters emptied as a result of increased production.

Can you provide serviced to empty / replace 7-8 dumpsters per day and ensure we have 10 empty dumpsters on site before going into Sunday.⁵⁴

Although PCA now claims that it repeatedly made other complaints in phone calls, there is no contemporaneous written corroboration of these disputed facts. While BDI would surely have elaborated on its dispute of these allegations if an opportunity had been provided, as Charlie Dietrich initially testified, PCA didn't make additional complaints about BDI's service.⁵⁵ It simply started using Jammie's instead.⁵⁶

44 Yet even assuming for the sake of argument the Commission accepts that PCA's disputed uncorroborated allegation it repeatedly asked BDI to haul containers more quickly or by other methods (apparently solely over the phone), before finding that BDI failed to provide satisfactory service the Commission would be required to conclude that BDI could actually have hauled PCA's drop boxes more quickly without violating safety laws and environmental regulations. But as addressed in detail in BDI's Initial Post-Hearing Brief, the sole reason full containers of OCC Rejects were not disposed of more quickly is that PCA repeatedly loaded them full of materials that were simply too wet for safe transportation and disposal.

45 That containers were loaded wet should be not be controversial or credibly disputed. There is clear photographic evidence taken by BDI in Exhibit CD-03 of the high water content of OCC Rejects when initially removed from PCA's paper mill.

⁵⁴ Exh. CD-02., p. 44.

⁵⁵ Ex. CD-1Tr. 14: 1.

⁵⁶ *Id.* 14: 1-2.



46 BDI also documented that moisture problems, reminding PCA repeatedly that its high water content was slowing BDI's ability to dispose of full drop boxes:

EXH CD-02
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From: <charlied@basindisposal.com>
To: <SamHolm@packagingcorp.com>, <kris@basindisposal.com>
Cc: <SkylerRachford@packagingcorp.com>, <andyf@basindisposal.com>
Subject: RE: OCC Rejects BDI Dumpsters
Sent: Tue, 27 Apr 2021 15:27:18 +0000

Sam,

Thank you for your email. I will review with my folks and we will reach out.

As a reminder, there have continued to be instances where dumpsters are not able to be hauled because of their water content.

We have hired additional labor and are working to train them and move other labor around with the goal of having one truck and driver completely dedicated to this haul every evening, along with support during the day. We have also been adding additional labor on Saturday as needed.

We continue to adjust as necessary.

Thanks,
Charlie

- 47 Andy Foxx also testified that PCA made assurances that it was going to work on an internal process to remove the water content of its materials, but that there were instances in May 2021, in which BDI's drivers found every single drop box full of wet OCC Rejects that could not be hauled.⁵⁷ Thus, there is ample credible evidence that PCA continued to load overly wet OCC Rejects into BDI's drop boxes, preventing BDI from collecting them.
- 48 Although she too attempted to blame BDI for PCA's mistakes, JEI's testimony corroborates BDI's issues with how PCA tendered loads for collection. Jammie Scott stated that "BDI could not load the bins filled with wet OCC Rejects due to weight and leaking water."⁵⁸ She added that "Jammie's developed a procedure for mixing OCC Rejects to ensure that overly wet OCC Rejects were mixed with drier OCC Rejects which significantly reduced the moisture content allowing for safe transportation."
- 49 Despite the known concerns with the moisture contents of its waste stream, PCA failed to take necessary remedial steps for months, and waited until April 27, 2021 to even start the process of reducing the water content of its OCC Rejects loads.⁵⁹ Rather than searching for a permanent solution, PCA took halting, tentative steps. PCA first made minor modifications to its process for the Junk Tower grapple hook, then the effluent Sidehill screens. This work was completed by July 2021,⁶⁰ yet nearly one year later, even JEI was encountering the same problems with the moisture contents of PCA's waste:⁶¹

⁵⁷ Exh. AF-1T, 8: 22 – 9: 1.

⁵⁸ Exh. JDS-1T. 11: 15-16.

⁵⁹ Exh. SR-12X.

⁶⁰ *Id.*

⁶¹ Exh. CD-09, p. 127.

From: Mark Lowary
Sent: Monday, May 9, 2022 11:09 AM PDT
To: Lisa Cothren; Markland, Kasey
CC: Williams, Fawn; WLL Accounts Payable; Olivo, Jaime
Subject: [EXTERNAL] RE: PO: 228666 - Jammie's Environmental Invoice 220425

Kasey,

These charges are for us using vac truck(s) to suck standing water off your lot out front. State law won't allow us or BDI to have water dripping out of the loads we haul. We have already gotten a written ticket trying to haul rejects that were too wet. We tried pushing the water off the lot with the wheel loader but Paul Gibson stopped that fast. So we held a vac hose over the pond out front and took out 7 or 8 vac trucks of water off your lot and dumped around back at the de-watering bunker.

50 As addressed in BDI's Initial Brief, it is illegal to transport leaking materials on public roads in Washington.⁶² And as noted above, Subtitle-D MSW landfills cannot accept liquid waste. More specifically, they cannot accept waste containing *any* free liquids. And the test imposed at the landfill is not simply a visual inspection of the top of the container, which is the only test Mr. Rachford could credibly have employed to inspect a full drop box.⁶³ The United States Environmental Protection Agency ("EPA") requires that loads of wet material pass the "paint filter test." That method requires that "a predetermined amount of material is placed in a paint filter. If any portion of the material passes through and drops from the filter within the 5-min test period, the EPA deems the material to contain free liquids."⁶⁴ Thus, it is entirely insufficient evidence for Mr. Rachford to offer a lay opinion that the containers were dry enough to be hauled because he wholly lacks any qualification to determine whether a container's contents may be safely transported or disposed of in a landfill.

51 Additionally, PCA also now claims that BDI's service created a panoply of issues for PCA, including piles of waste, fire hazards, traffic flow and visibility issues and broken equipment. But as addressed in BDI's Initial Brief, these circumstances resulted from solid waste

⁶² RCW 46.61.655(1) ("No vehicle shall be driven or moved on any public highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction.")

⁶³ Rachord, TR. 304: 17 - 25.

⁶⁴ SW-846 Test Method 9095B: Paint Filter Liquids Test. <https://www.epa.gov/hw-sw846/sw-846-test-method-9095b-paint-filter-liquids-test>.

management and processing decisions PCA made over which BDI had no control and which do not constitute solid waste collection. Nor significantly, does PCA claim to have ever relayed these concerns to BDI or asked BDI for help in resolving them. In fact, the only request made in Mr. Holm's email was for BDI to haul additional containers.⁶⁵ Thus, PCA cannot establish serious or material complaints about BDI's solid waste collection service.

ii. BDI responded quickly and offered repeatedly to work with PCA to improve its process for drying and more efficiently transporting OCC Rejects.

52 The second factor the Commission consider is "the carrier's response to customer complaints and its demonstrated ability to resolve them to the Commission's satisfaction." Here, once again, BDI went above and beyond in an attempt to assist PCA with its solid waste management problems to no avail. Although pursuant to Commission tariff rules, BDI could simply have permissibly refused to accept containers that were improperly tendered due to their water content,⁶⁶ it repeatedly sought to help PCA find solutions to its pre-collection waste processing issues.

53 As soon as production at its OCC Plant began, PCA started experiencing issues with the water content of its OCC Rejects. Although BDI notified PCA right away after startup, just 11 days later, Charlie Dietrich offered to meet with PCA at its mill to discuss concerns and options for resolution:

⁶⁵ Exh. CD-02., p. 44.

⁶⁶ See, e.g., Item 207, which permits a certificated solid waste collection company to reject the pickup of any drop box that would cause the company to violate load limitations or safe vehicle operation.

From: <charlied@basindisposal.com>
To: <SamHolm@packagingcorp.com>
Cc: <andyf@basindisposal.com>, <kris@basindisposal.com>
Subject: OCC - Basin Disposal
Sent: Mon, 15 Mar 2021 14:00:04 +0000

Good morning!

We wanted to provide an update on where we are at with the haul, in regards to what was originally discussed and see if we can get some help on an issue that we are having.

As of Saturday we have provided the site with 19 twenty-yard drop boxes. The two (over the requested 17) were done to assist in the current problem. The issue is that the material coming out of the plant has too much water in it. Andy, our Route Manager, has been in constant contact with Kacey about our concerns. Is it possible to get the same group of folks together that showed us around the plant a month back together this morning with Andy to go over our concerns and look at the material on site together?

I appreciate your help with this!

Thanks,

Charlie Dietrich

Andy Foxx ultimately met with PCA's representatives to discuss the problem on March 16, 2021,⁶⁷ but PCA indicated then only that it would be working on an internal solution to the problem.⁶⁸

54 When the moisture issues continued, Charlie Dietrich offered to meet with PCA representatives to discuss what was and was not working so that the overall process could be improved, but his repeated overtures in messages went unreturned for months.⁶⁹

⁶⁷ Exh. CD-1T. 7: 3 – 5; Exh. CD-02, p. 43.

⁶⁸ AF-1T. 3: 24 – 4: 2.

⁶⁹ Ex. CD-02, p. 51-54; Exh. CD-1Tr: 11: 9 – 24.

From: <charlied@basindisposal.com>
To: <KurtThorne@packagingcorp.com>
Cc: <andyf@basindisposal.com>
Subject: Meeting
Sent: Fri, 21 May 2021 23:31:02 +0000

Hi Kurt,

I hope all is well with you and your team as we head into the summer months.

Now that we have a few months of operation under our belts, I think now would be a good time to get together and talk about what is working with our service and what is not. I want to make sure the service we are providing is meeting current needs as well as the future. We are committed to our partnership together and are willing to do what it takes to have everything operate smoothly on the disposal side for years to come.

Let me know a few times that work for you in the coming weeks and we can meet onsite.

Thank you and have a great weekend!

Charlie Dietrich

From: <charlied@basindisposal.com>
To: <SamHolm@packagingcorp.com>
Cc: <andyf@basindisposal.com>, <kris@basindisposal.com>
Subject: OCC Haul
Sent: Tue, 8 Jun 2021 00:34:33 +0000

Hi Sam,

I hope all is well with you and your team as we head into the summer months.

Now that we have a few months of operation under our belts, I think now would be a good time to get together and talk about what is working with our service and what is not. I want to make sure the service we are providing is meeting current needs as well as the future. We are committed to our partnership together and are willing to do what it takes to have everything operate smoothly on the disposal side for years to come.

Let me know a few times that work for you in the coming weeks and we can meet onsite.

Thanks,

Charlie Dietrich

From: <charlied@basindisposal.com>
To: <SamHolm@packagingcorp.com>, <BrianWilhelm@packagingcorp.com>, <KurtThorne@packagingcorp.com>
Cc: <andyf@basindisposal.com>
Subject: Meeting
Sent: Thu, 10 Jun 2021 18:06:07 +0000

All,

I hope all is well with you and your team as we head into summer.

Now that we have a few months of operation under our belts, I think now would be a good time to get together and talk about what is working with our service and what is not. I want to make sure the service we are providing is meeting current needs as well as the future. We are committed to our partnership together and are willing to do what it takes to have everything operate smoothly on the disposal side for years to come. Now that we know the volume and the process, there are a few potential ideas we can discuss as to how we can be as efficient as possible while also making the most sense for your bottom line.

Let me know a few times that work for you in the coming weeks and we can meet onsite.

Thanks,

Charlie Dietrich

From: <charlied@basindisposal.com>
To: <SkylerRachford@packagingcorp.com>, <KaseyMarkland@packagingcorp.com>
Cc: <andyf@basindisposal.com>
Subject: OCC
Sent: Wed, 30 Jun 2021 00:06:20 +0000

All,

I hope all is well with you and your team as we head into summer.

Now that we have a few months of operation under our belts, I think now would be a good time to get together and talk about how everything is working from the disposal side (whether with you both or with other people in your organization). I want to make sure the service we are providing is meeting current needs as well as the future. We are committed to our partnership together and are willing to do what it takes to have everything operate smoothly on the disposal side for years to come. Now that we know the volume and the process, there are a few potential ideas we can discuss as to how we can be as efficient as possible while also making the most sense for your bottom line.

Let me know a few times that work for you in the coming weeks and we can meet onsite.

Additionally, is Sam Holm still with the company? I have had his email bounce back a few times in my attempts to reach out.

Thanks,

Charlie Dietrich

55 What is now abundantly clear is that PCA didn't respond to BDI because it had other plans: it intended to install Jammie's to collect and transport its OCC Rejects rather than the certificated hauler Basin, and it no longer had any reason to accept BDI's help or proffered solutions. This form of stonewalling of opportunities for assistance does not make for a finding of unsatisfactory service.

iii. No party contends that BDI fell short of its regulatory obligations or that it failed to fully cooperate with the Commission's regulation in the public interest.

56 The final factor the Commission considers in evaluating satisfactory service is "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."⁷⁰ On this point, no party contends that BDI has any serious history of noncompliance with regulation nor that it failed to cooperate with the Commission and its staff. Consequently, and considering the lack of serious or legitimate complaints about its service and its consistent responsiveness and willingness to address PCA's persistent internal moisture control problems in its production process, BDI has unquestionably demonstrated that it has and will continue to provide more than satisfactory service.

F. JEI also misstates the standards for fitness

57 Basin Disposal's Initial Brief addressed JEI's fitness and it will not repeat those points here. Yet, JEI makes several wholly inaccurate claims in its Opening Brief that also require a brief response.

58 First, JEI claims that BDI is not authorized to address JEI's fitness, insisting that this is an issue reserved for the Commission Staff. Nothing in RCW 81.77 precludes a protesting party from challenging the applicant's fitness showing (or lack thereof), and JEI's sole supporting authority is a citation to an Interlocutory discovery order that JEI once again fails to cite as such in

⁷⁰ *Superior Refuse*, Order M. V. G. No. 1639 (Jun. 28, 1993).

violation of 480-07-825(1)(c).⁷¹ Yet the cited order cannot support JEI's premise. The administrative law judge's order there merely suggests that protestants might not be entitled to obtain discovery regarding an applicant's financial condition as one rationale for the ALJ's decision to limit the scope of discovery in that case. Nothing in that order implies or concludes that BDI is prohibited from challenging the sufficiency of the evidence supporting Jammie's financial fitness in a contested adjudication as its argument implies.

59 Indeed, JEI bears the burden of proof to establish its fitness. While Commission Staff has evaluated applicants' financial fitness and offered its opinion in other cases, the absence of such an opinion here is not a substitute for adequate supporting evidence. And because all Commission orders are subject to potential Administrative Procedures Act review under RCW Chapter 34.05, it logically must consider whether requisite evidence has been submitted in the hearing record.

60 Second, Jammie's claims it fulfilled its obligation because it supplied the financial information required in WAC 480-70-091 and the Commission's application form and further established its cost of service through the rates it charges to PCA as shown in its invoices.⁷² For support, JEI cites to certificates once again granted in unprotested application proceedings that did not reach a final order. These are not precedent and offer no guidance here. Moreover, as the Commission previously concluded, cost of service information is in fact a statutory requirement that cannot be met simply by showing an applicant's rates:

There is a distinction between rates for service and cost of service. In garbage regulation, the cost of service, based upon the cost of the equipment and facilities, is a significant element. RCW 81.77.040 requires consideration of "The present service and the cost thereof...; an estimate of the cost of facilities to be used in the plant...sworn to before a notary public... The Commission has ruled that this requires some demonstration of feasibility."⁷³

⁷¹ JEI's Opening Brief, n. 310 (citing *In the Matter of the Application of Waste Mgmt. of Washington, Inc. d/b/a Wm Healthcare Sols. of Washington for an Extension of Certificate G-237 for A Certificate of Pub. Convenience & Necessity to Operate Motor Vehicles in Furnishing Solid Waste Collection Serv.*, Dkt. TG – 120033, Order 03, (May 14, 2012)).

⁷² JEI's Opening Brief, ¶ 99-100.

⁷³ *In re Application of R.S.T.*, Order M. V. G. 1402 (Jul. 28, 1989).

Because Jammie's is not permitted to pick and choose which statutory requirements it satisfies, and it unquestionably failed to demonstrate its cost of service, the Commission should conclude that it failed to establish its financial fitness.

III. CONCLUSION

- 61 These consolidated proceedings present the Commission with a voluminous record, numerous factual disputes, and a host of novel arguments for resolution. Fortunately, the issues are ultimately quite straightforward. As exhaustively addressed by BDI in its Initial Brief and further here in its Reply, JEI has been repeatedly violating Washington law without remorse since it first began hauling OCC Rejects for disposal from PCA's paper mill in May 2022. The service it provides is traditional solid waste collection of a voluminous stream of municipal solid waste. There is no basis in law to authorize overlapping competition on these facts and there is nothing uniquely hazardous to the public about the regulated service at issue that would require a grant of specialized authority to JEI.
- 62 Now that PCA has finally found a way to properly process and appropriately tender its solid waste for collection, there is also no justification to retroactively legitimize an illegal hauler to become authorized to the detriment of the ratepaying community in which PCA operates. BDI has and will continue to provide satisfactory service and thus, respectfully, the Commission should order JEI to cease and desist its solid waste collection from PCA and deny its specialized solid waste application.

DATED this 21st day of February, 2023.

RESPECTFULLY SUBMITTED,

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