

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In re Application TG-091259 of	)	DOCKET TG-091259 (<i>consolidated</i>)
)	
WEST WASTE & RECYCLING, INC.	)	ORDER 03
)	
For an Extension of Certificate No. G-251	)	INITIAL ORDER
for a Certificate of Public Convenience	)	GRANTING APPLICATION
and Necessity to Operate Motor Vehicles)	
in Furnishing Solid Waste Collection)	
Service)	
.....	)	and
)	
In re Application TG-091019 of	)	DOCKET TG-091019 (<i>consolidated</i>)
)	
MURREY’S DISPOSAL COMPANY,)	
INC., d/b/a OLYMPIC DISPOSAL	)	ORDER 03
)	
For an Extension of Certificate No. G-9	)	INITIAL ORDER
for a Certificate of Public Convenience	)	GRANTING APPLICATION
and Necessity to Operate Motor Vehicles)	
in Furnishing Solid Waste Collection)	
Service)	
.....)	

1 **Synopsis:** *This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the Notice at the end of this Order. If this Initial Order becomes final, the Commission finds that the applications of Murrey’s Disposal Company, Inc., d/b/a Olympic Disposal and West Waste & Recycling, Inc., to extend their respective existing common carrier authorities into the Hoh Quadrant of Olympic National Park are not mutually exclusive. Further, the Commission determines that the public interest is best served by allowing all qualified companies with certificated authority to compete to provide solid waste collection service in the Hoh Quadrant of Olympic National Park because there is currently no incumbent provider.*

2 **NATURE OF PROCEEDING.** This case involves two applications for certificates
to serve the same area of Olympic National Park. Presently, no common carrier has
permanent authority to provide solid waste collection service in the Hoh Quadrant.

3 **PROCEDURAL HISTORY.** On June 26, 2009, in Docket TG-091019, Murrey's
Disposal Company, Inc., d/b/a Olympic Disposal, filed with the Washington Utilities
and Transportation Commission (Commission) an application for extension of its
authority under Certificate No. G-9 for authority to provide solid waste collection
service in a portion of Section 12, Township 27N, Range 10W, within Jefferson
County. Notice of the Application was published in the Commission's weekly Docket
of July 6, 2009.¹ The Commission did not receive any protests in Docket TG-091019.

4 On August 5, 2009, within thirty days of the notice issued in Docket TG-091019,
West Waste & Recycling, Inc. (West Waste) filed with the Commission in Docket
TG-091259, an application for extension of its authority under Certificate No. G-251
for authority to provide solid waste collection service in a portion of Section 12,
T27N R10W, within Jefferson County. Notice of the Application was published in
the Commission's weekly Docket of August 7, 2009. On August 17, 2009, Olympic
Disposal timely filed a protest to West Waste's application.

5 On August 27, 2009, the Washington Refuse and Recycling Association (WRRRA)
filed a petition to intervene in Docket TG-091259. On September 16, 2009, the
Commission consolidated these matters for purposes of hearing and determination.
Order 01. At a prehearing conference held before Administrative Law Judge (ALJ)
Dennis J. Moss on October 12, 2009, West Waste sought to intervene in Docket
TG-091019. Judge Moss granted both pending petitions to intervene, adopted a
procedural schedule, and set the matter for hearing on February 2, 2010. *Order 02.*

6 In mid-January 2010, the parties represented to the Commission that settlement
negotiations were proving fruitful and would likely resolve all issues in the dockets.
On January 27, 2010, the Commission substituted ALJ Adam E. Torem as the
presiding officer in these consolidated matters; Judge Torem suspended the
procedural schedule and scheduled a status conference for February 22, 2010.

¹ On July 6, 2009, the Commission granted Olympic Disposal temporary authority under
Certificate No. TCG-63635 to provide solid waste collection service in a portion of Section 12,
T27N R10W, within Jefferson County. *See* Docket TG-091018; *see also* Exh. 3A.

7 On February 22, 2010, the parties informed the Commission that settlement talks were continuing, but no agreement had yet been reached. Judge Torem set a deadline of March 29, 2010, for the parties to submit a Settlement Agreement and supporting Narrative. Judge Torem also re-scheduled the evidentiary hearing for April 15, 2010.

8 The parties did not file a settlement proposal. Therefore, on due and proper notice, the Commission convened a hearing on April 15, 2010, in Olympia, Washington, before ALJ Torem. Both applicants presented evidence of their knowledge, experience, and fitness to provide the services as well as a joint witness from the Park Service providing sworn written testimony of the public need for the services. Both applicants stipulated that public convenience and necessity require issuance of the requested extensions of their existing authorities and that if the Commission found the competing applications non-exclusive, then both companies could and should be granted overlapping authority for the Hoh Quadrant of Olympic National Park.

9 **PARTY REPRESENTATIVES.** George Kargianis, Attorney at Law, Seattle, Washington, represents West Waste. David W. Wiley, Williams, Kastner & Gibbs, PLLC, Seattle, Washington, represents Olympic Disposal. James K. Sells, Ryan Sells Uptegraft, Inc. P.S., Silverdale, Washington, represents the WRRRA.

10 **INITIAL ORDER.** Finding that both applicants have satisfied the statutory criteria for extending the authority of their existing certificates of public convenience and necessity under Revised Code of Washington (RCW) 81.77.040 and the provisions of WAC 480-70-091, and further finding the applications not to be mutually exclusive, this Order recommends the Commission grant the applications of both Murrey's Disposal Company, Inc., d/b/a Olympic Disposal and West Waste & Recycling, Inc. to extend their respective existing G-certificates to provide solid waste collection services in a portion of Section 12, T27N R10W, within Jefferson County, an area of Olympia National Park known as the Hoh Quadrant.

MEMORANDUM

I. Governing Law

11 The Commission regulates solid waste collection companies under Chapter 81.77 of the Revised Code of Washington (RCW). Under RCW 81.77.040, no solid waste

collection company may “operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation.”² Prior to issuance of such a certificate, RCW 81.77.040 directs the Commission to investigate and make factual determinations regarding :

the present service and the cost thereof for the contemplated area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal, set out in an affidavit or declaration; a statement of the assets on hand of the person, firm, association, or corporation that will be expended on the purported plant for solid waste collection and disposal, set out in an affidavit or declaration; a statement of prior experience, if any, in such field by the petitioner, set out in an affidavit or declaration; and sentiment in the community contemplated to be served as to the necessity for such a service.

12 The Commission’s rules implementing RCW 81.77.040 are found in Chapter 480-70 of the Washington Administrative Code (WAC). WAC 480-70-091(3) provides that a certificate application must include at least the following eight items:

- (a) A complete description of the proposed service and the line, route, or service territory using boundaries such as streets, avenues, roads, highways, townships, ranges, city limits, county boundaries, or other geographic descriptions;
- (b) A map of the proposed line, route, or service territory that meets the standards described in WAC 480-70-056;
- (c) If contract carrier authority is requested, a copy of each contract under which service will be performed;
- (d) A statement of the applicant's assets and liabilities;
- (e) A proposed tariff;
- (f) A statement of conditions that justify the proposed service;

² See also Washington Administrative Code (WAC) 480-70-081.

(g) An equipment list; and

(h) A statement of the applicant's transportation or solid waste industry experience, including knowledge of motor carrier driver and equipment safety requirements.

As explained below, both applicants presented sufficient evidence of each of these required items, individually demonstrating their knowledge, experience, and fitness to provide the services. Further, Phaedra Fuller of the National Park Service testified regarding the community's need for solid waste collection services.

II. Hoh Quadrant of Olympic National Park – Need for Proposed Service

13 At some point in 2009, the National Park Service discovered that the Commission had not issued any G-certificate with a service territory covering the Hoh Quadrant of Olympic National Park.³ According to Ms. Phaedra Fuller, a contract specialist with the National Park Service, the Hoh Quadrant is not a heavily utilized section of Olympic National Park, but it produces approximately 10 percent of the overall solid waste collection service volume generated in the Park.⁴

14 On behalf of the National Park Service, Ms. Fuller wishes to have at least one regulated and certificated carrier for the Hoh Quadrant of the Park.⁵ If the Commission grants certificated authority to both competing applications, the Park Service will be able to select a service provider based on competitive contract bids.⁶

³ TR. at 53:24 – 56:1; *see also* Fuller, Exh. 8A at 2:19 – 3:5 and Exh. 5B at page 2; *see also* Exh. 2A listing the various certificated common carriers for all areas of Olympic National Park.

⁴ Fuller, Exh. 8A at 2:7-14.

⁵ *Id.* at 3:6-10; *see also* Fuller, Exh. 5B at pages 1-2. According to Ms. Fuller, the Park Service might prefer that the Commission issue a certificate to only a single carrier, but she sees it as “imperative that a certificated carrier be authorized to provide solid waste collection service in the Hoh Quadrant” of Olympic National Park. *See* Fuller, Exh. 5B at page 2.

⁶ TR. at 47:6-23, 105:6 – 112:2, 121:1-4, and 123:3-7.

III. Olympic Disposal's Application and Supporting Evidence.

- 15 Olympic Disposal holds Certificate No. G-9 providing authority to operate as a motor carrier in various territories, including portions of Clallam, Jefferson, and Grays Harbor Counties that encompass the majority of Olympic National Park. *Exh. 1A*. Kent Kovalenko is Olympic Disposal's district manager in Port Angeles, Washington, and has held that position since approximately March 2004.⁷
- 16 When Mr. Kovalenko learned that no carrier held certificated authority in the Hoh Quadrant, he prepared and filed an application for a temporary certificate to serve that portion of the Park.⁸ The Commission granted Olympic Disposal temporary authority to provide solid waste collection service in the Hoh Quadrant. *Exh. 3A*.
- 17 *Financial Fitness.* Jason Pratt is Murrey's Disposal Company's division controller; he oversees all monthly financials for the company, to include billing and auditing activities for all of Murrey's subdivisions, including Olympic Disposal.⁹ Mr. Pratt reviewed Olympic Disposal's 2009 income statement (assets and liabilities) and consolidated balance sheets for both Olympic Disposal and Murrey's parent corporation, Waste Connections, Inc. *Exhs. 5A, 6A, and 7A*. There is no dispute that Olympic Disposal has the financial wherewithal to provide the subject services.
- 18 *Operational Fitness.* Olympic Disposal plans to use front-load container service in the Hoh Quadrant.¹⁰ The company provided a detailed equipment list recording the entirety of the company's vehicles and supporting equipment; Mr. Kovalenko testified about the specific equipment Olympic Disposal proposes to use in servicing the subject area of the Park.¹¹ *See Exh. 4A*. Mr. Kovalenko confirmed that Olympic

⁷ *Id.* at 51:3-21.

⁸ *Id.* at 53:24 – 54:25.

⁹ *Id.* at 66:1-6 and 67:1-11.

¹⁰ *Id.* at 57:3-5 and 57:16 – 58:11.

¹¹ *Id.* at 57:3 – 59:23. Olympic Disposal intends to use a 1998 Volvo front-load truck as well as a 2009 Peterbilt front-load truck. At this time, under its temporary authority, Olympic Disposal is relying on rear-load trucks and equipment.

Disposal plans to dispatch all of its trucks and equipment from the Port Angeles area, approximately 75 miles from the Hoh Quadrant of the Park.¹²

IV. West Waste's Application and Supporting Evidence.

19 West Waste holds Certificate No. G-251 providing authority to operate as a motor carrier in various portions of Jefferson and Clallam Counties, including portions of Olympic National Park. *Exh. 1B; see also Exh. 2A.* Mr. Brent Gagnon is the president of West Waste and is assisted by Robin Ostlund with bookkeeping and other administrative tasks, including timekeeping for company employees.¹³ The company is located in Forks, Washington. *Exh. 2B.*

20 *Financial Fitness.* West Waste submitted a statement of assets, liabilities and equity showing over \$1.25 million in total revenues for 2009. *Exh. 3B.* Although West Waste's financial statements indicated a net income of only \$58,401 for the year, the company also had retained income of \$260,931. No evidence was offered to dispute West Waste's financial wherewithal to provide the subject services.

21 *Operational Fitness.* West Waste's G-certificate allows it to operate in areas immediately adjacent to the Hoh Quadrant; Mr. Gagnon estimates that his drivers currently collect solid waste from clients within five miles of the campgrounds to be serviced in the Park.¹⁴ West Waste currently has rear-load containers and trucks but plans to consider making use of whatever specific equipment the Park Service might require (i.e., front-load trucks) for this service. *Exh. 4B; see also TR. 87:15 – 88:15.*

22 *Objection from Existing Solid Waste Collection Companies.* Olympic Disposal filed a protest in Docket TG-091259. However, at hearing, Olympic Disposal made clear that its opposition to West Waste's application would be mooted if, after the Commission performed a comparative analysis under the Ashbacker Doctrine, the competing applications were determined not to be mutually exclusive. As discussed below, Olympic Disposal's protest is now rendered moot.

¹² *Id.* at 63:20 – 64:8.

¹³ *Id.* at 78:12 – 79:10.

¹⁴ *Id.* at 86:5-24; *see also TR. 79:17-24.*

V. Applicability of Ashbacker Doctrine

23 The Commission issues certificates of public convenience and necessity for solid waste collection services in accordance with RCW 81.77.040 and WAC 480-70. In cases where two bona fide applications are mutually exclusive, the United States Supreme Court has required reviewing Commissions to hold a hearing to compare the applicants prior to making any decision on which applicant should receive the license.¹⁵

24 The question of whether the Commission should conduct a comparative analysis of competing applications arises only if the Commission may consider granting the same or overlapping authority to two or more qualified applicants.¹⁶ Comparative review is required when competing applications for authority may be mutually exclusive.¹⁷ In general, competing applications for common carrier authority are not mutually exclusive because subsequent grants of authority are made upon a sufficient showing of need.¹⁸

VI. Discussion and Decision

25 In this case, there is no question as to the need for the proposed service: there is currently no incumbent certificated carrier in the Hoh Quadrant of Olympic National Park. The only a debate is over which of these competing companies will ultimately

¹⁵ See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333, 66 S.Ct. 148 (1945). *Ashbacker* involved two applications for broadcasting authority that were actually exclusive in the sense that the broadcast signals would interfere with each other. Only one of the two applications could be granted. The FCC granted one and set the other for hearing. The Court held that as a practical matter, this required the second applicant to justify displacement of an established licensee and made the second applicant's right to a hearing before denial an "empty thing."

¹⁶ *In the Matter of Application GA-868 of Sure-Way Incineration, Inc.*, Order M.V.G. No. 1451 (November 30, 1990), at 16.

¹⁷ *In re Application No. B-313 of Belairco, Inc.*, Order S.B.C. No. 468 (May 14, 1990), at 8. In essence, the Commission must inquire whether the service proposed by any of the applicants would preclude the service proposed by any other and, if it would, then the Commission must conduct a comparative hearing. In the *Belairco* case, the Commission concluded that the applications were *not* mutually exclusive.

¹⁸ *In re Application P-72643 of Yakima Valley Disposal, Inc.*, Order M.V. No. 140746 (January 17, 1990), at 4.

be chosen to provide solid waste collection service to the Hoh Quadrant campgrounds and perhaps for the entirety of Olympic National Park.

26 Olympic Disposal and West Waste are both financially fit, suitably experienced in the collection of solid waste, and operationally fit to provide the required service. The applications filed by both companies meet the requirements of WAC 480-70-091(3).

27 In comparing both applications, we conclude that they are not necessarily mutually exclusive. Olympic Disposal's temporary authority does not place it any legally advantageous position so as to preclude the Commission granting authority to West Waste. Further, neither company's qualifications so outshine the other's so as to make the decision of financial and operational fitness an obvious selection.

28 Given that both companies meet the Commission's threshold qualifications, it seems that the Commission need not make a choice of provider on behalf of the Park Service. In fact, both companies concur that although the Commission doesn't typically favor issuing certificates with concurrent jurisdictional authority, the Hoh Quadrant of the Park can tolerate such an arrangement.¹⁹ We find that this is the most appropriate outcome in this matter and conclude that both applications to extend the existing authority of certificates G-9 and G-251 should be granted to include the territory known as the Hoh Quadrant of Olympic National Park.

FINDINGS OF FACT

29 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

30 (1) The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate rates, rules,

¹⁹ TR. 107:8 – 114:8. *See also* Exhibit 2A, which shows that multiple areas of Olympic National Park currently have overlapping certificates of authority from competing carriers. Under the circumstances of this case, there is no reason not to allow these carriers to compete for the federal government contract to determine who is best suited to serve the Hoh Quadrant.

regulations, practices, and accounts of public service companies, including solid waste collection companies.

- 31 (2) The Commission has not issued a certificate of public convenience and necessity to any solid waste collection company for the Hoh Quadrant of Olympic National Park, a region more formally designated as the portion of Section 12, T27N R10W, within Jefferson County.
- 32 (3) On June 26, 2009, Murrey's Disposal Company, Inc., d/b/a Olympic Disposal filed an application for an extension of its authority under Certificate No. G-9 for authority to provide solid waste collection service in a portion of Section 12, Township 27N, Range 10W, within Jefferson County.
- 33 (4) On August 5, 2009, West Waste and Recycling, Inc. filed an application for extension of its authority under Certificate No. G-251 for authority to provide solid waste collection service in a portion of Section 12, Township 27N, Range 10W, within Jefferson County.
- 34 (5) Olympic Disposal and West Waste are both operationally and financially fit to provide the proposed service.
- 35 (6) There is an unmet need for the proposed service in the Hoh Quadrant of Olympic National Park.

CONCLUSIONS OF LAW

- 36 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:
- 37 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and parties to these proceedings. *Title 81 RCW.*
- 38 (2) Olympic Disposal has sufficient experience, equipment, and financial assets under RCW 81.77.040 and WAC 480-70-091(3) to support its application to

expand the solid waste collection service it provides pursuant to Certificate G-9 into the Hoh Quadrant of Olympic National Park.

- 39 (3) West Waste and Recycling, Inc. has sufficient experience, equipment, and financial assets under RCW 81.77.040 and WAC 480-70-091(3) to support its application to expand the solid waste collection service it provides pursuant to Certificate G-251 into the Hoh Quadrant of Olympic National Park.
- 40 (4) Where there is no incumbent provider of solid waste collection service, the Commission may grant both applications and allow overlapping concurrent authority.
- 41 (5) Granting overlapping certificated authority within the Hoh Quadrant of Olympic National Park serves the public interest by promoting competition between certificated carriers and allowing the federal government, the only entity requiring such service, to make the ultimate decision on which company should provide the required service.
- 42 (6) The Commission should retain jurisdiction to effectuate the terms of this Order.

ORDER

43 **THE COMMISSION ORDERS:**

- 44 (1) Application No. 0019031 of Murrey's Disposal Company, Inc., d/b/a Olympic Disposal for extension of its existing certificate of public convenience and necessity (G-9) to operate as a solid waste collection company in a portion of Section 12, T27N R10W, within Jefferson County is granted.
- 45 (2) Application No. 0019185 of West Waste and Recycling, Inc. for extension of its existing certificate of public convenience and necessity (G-251) to operate as a solid waste collection company in a portion of Section 12, T27N R10W, within Jefferson County is granted.
- 46 (3) Before the Commission issues the extension of these certificates, both companies must work with Commission Staff to ensure all required

documentation has been filed with the Commission, to include tariffs, time schedules, and any required certificates of insurance.

- 47 (4) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective July 15, 2010.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

NOTICE TO PARTIES:

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a Petition for Administrative Review. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an Answer to Petition for Review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final order, any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and six (6) copies of any Petition or Answer must be filed by mail delivery to:

Attn: David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250