

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Application of)	DOCKET TG-120033
)	
WASTE MANAGEMENT OF)	
WASHINGTON, INC. D/B/A WM)	ORDER 03
HEALTHCARE SOLUTIONS OF)	
WASHINGTON)	
)	ORDER OVERRULING
For an Extension of Certificate G-237)	OBJECTIONS TO PREHEARING
for a Certificate of Public Convenience)	CONFERENCE ORDER AND
and Necessity to Operate Motor)	DENYING PETITIONS FOR
Vehicles in Furnishing Solid Waste)	INTERLOCUTORY REVIEW
Collection Service)	
.....)	

BACKGROUND

- 1 On December 30, 2011, Waste Management of Washington, Inc. (Waste Management or Company), filed with the Washington Utilities and Transportation Commission (Commission) an application for an extension of authority under Certificate G-237, standing in the name of Waste Management of Washington, Inc., d/b/a WM Healthcare Solutions of Washington (Waste Management), for authority to provide solid waste collection service consisting of bio-hazardous waste in the state of Washington. On February 17, 2012, a protest against Waste Management’s application was filed jointly by Washington Refuse & Recycling Association, Rubatino Refuse Removal, Inc., Consolidated Disposal Services, Inc., Murrey’s Disposal, Inc., and Pullman Disposal Service, Inc. (collectively WRRRA). On February 21, 2012, Stericycle of Washington, Inc. (Stericycle) filed a protest against Waste Management’s application.

- 2 The Commission convened a prehearing conference in this docket on April 10, 2012, and issued Order 01, Prehearing Conference Order (Order 01) on April 16, 2012.

- 3 On April 24, 2012, WRRRA filed objections to Order 01 pursuant to WAC 480-07-430 and WAC 480-07-810. Specifically, WRRRA objects to paragraph 6 in the order establishing briefing on a preliminary legal issue and paragraph 8 limiting discovery.

- 4 On April 26, 2012, Stericycle also filed an objection to paragraph 8 in Order 01, “request[ing] that the Order be withdrawn and an appropriate order issued in its place” or that the presiding officer issue factual findings clarifying what Stericycle claims is “the implicit decision to decide the applicant’s fitness on the current record and without a hearing.”¹ Stericycle petitions the Commission for interlocutory review of Order 01 if “the presiding officer decline[s] to withdraw the Order or enter necessary factual findings.”²
- 5 On April 30, 2012, the Commission issued a Notice of Opportunity to File Answer to Objections, requiring any answers to the pleadings WRRRA and Stericycle filed by May 4, 2012.
- 6 On May 4, 2012, Commission Staff (Staff) filed an answer stating that it will provide briefing on the legal issue to which WRRRA objects but takes no position on the objections to paragraph 8 in Order 01.
- 7 On May 4, 2012, Waste Management filed an answer opposing both the WRRRA and Stericycle filings.
- 8 On May 8, 2012, Stericycle filed a Reply in Support of Objection to Prehearing Conference Order and Request for Clarification (Reply). Neither WAC 480-07-430 nor WAC 480-07-810 authorize a reply to answers to objections to prehearing conference orders or to petitions for interlocutory review of such orders, and Stericycle did not seek leave from the Commission to file the Reply. Accordingly, the Reply is improper, and the Commission will not consider it in rendering its decision.

DISCUSSION AND DECISION

Preliminary Briefing

- 9 Order 01 requires the parties to brief the legal issue of the meaning of the provision in RCW 81.77.040 that the Commission may issue a certificate for a service territory served by another certificate holder “only if the existing solid waste collection

¹ Stericycle Objection at 1:17-21. This pleading does not comply with the requirement in WAC 480-07-395(1)(a) that paragraphs in pleadings be numbered. Accordingly, pin citations to this document are to page and approximate line numbers.

² Stericycle Objection at 1:22.

company or companies serving the territory will not provide service to the satisfaction of the commission.” WRRRA contends that the statute and case law are “clear and presently open to very little, if any, legal integration or dissection.”³ According to WRRRA, Order 01 “calls for briefing with no relevant purpose, other than to seek interpretation of a law which is firmly in place, and has been interpreted by the Commission and the Courts time and again.”⁴ Waste Management counters that “the parties here have dramatically different views of what the law is and all parties would benefit from having this issue of law resolved early on.”⁵

- 10 Contrary to WRRRA’s contentions, the parties’ statements at the prehearing conference demonstrate a lack of uniformity on the interpretation of RCW 81.77.040. Commission Staff stated that “in prior orders, the Commission has indicated favoring a policy of competition in the biomedical waste area.”⁶ Waste Management concurred, taking the position that “clearly the Commission has stated its preference for competition.”⁷ Stericycle, on the other hand, “vehemently” disagreed,⁸ asserting that the Commission’s decided cases require a showing of “a difference in service that is sufficient to warrant the grant of an application because there’s a public need for that difference in service.”⁹ WRRRA appears to take the same view of the law as Stericycle.
- 11 These disparate legal positions affect the evidentiary hearings. The nature and amount of evidence will vary substantially depending on whether the Commission concludes that Waste Management must demonstrate that its proposed service differs from the services that are currently available from other providers. Resolution of this issue now will better enable the parties to focus their hearing preparation on the relevant statutory inquiry. The Commission, therefore, overrules WRRRA’s objection to the briefing required under paragraph 6 in Order 01.

³ WRRRA Objections at 1:25. This pleading also does not comply with the requirement in WAC 480-07-395(1)(a) that paragraphs in pleadings be numbered. Accordingly, pin citations to this document are to page and approximate line numbers.

⁴ WRRRA Objections at 3:5-7.

⁵ Waste Management Answer ¶ 10 at 4:4-6.

⁶ TR. at 12:22-24.

⁷ TR. at 14:2-3.

⁸ TR. at 14:13.

⁹ TR. at 15:6-9.

Limitations on Scope of Discovery

- 12 The Commission in Order 01 “exercise[d] its discretion to determine that the needs of the case require the methods of discovery specified in the Commission’s discovery rules, WAC 480-07-400 – 425, with the limitations set forth in this order.”¹⁰ Those limitations include the determination that “the protesting parties do not have a significant interest in, and may not conduct discovery on, issues related to Waste Management’s financial or operational fitness to provide service under the extended authority for which it has applied.”¹¹ WRRRA and Stericycle object to this limitation on several grounds, none of which have merit.
- 13 First, WRRRA and Stericycle contend that Order 01 implicitly determines that Waste Management has satisfied the statutory factors of financial and operational fitness to provide the proposed service without the requisite factual findings.¹² Order 01 is not reasonably susceptible to this interpretation. The order expressly limits *discovery* on these issues. Order 01 neither states nor suggests that Waste Management has satisfied or been relieved of its burden to provide its financial and operational fitness at this point in the proceedings. The Commission is well aware of its statutory obligations and will evaluate and make appropriate findings and conclusions on the Company’s fitness based on the evidence presented.
- 14 Second, Stericycle and WRRRA contend that discovery on fitness is relevant to the statutory factors the Commission must consider when determining whether to grant Waste Management’s application. Stericycle quotes portions of the statute¹³ and professes to be “astound[ed]” that Order 01 acknowledges these factors while at the same time denying protestants the right to conduct discovery on these issues.¹⁴ WRRRA and Stericycle fundamentally misunderstand the nature of discovery in administrative adjudicative proceedings in general, and in the context of the fitness issues in this docket in particular.
- 15 Unlike civil litigation in state superior court, the availability of discovery in Commission adjudicative proceedings is discretionary except in certain specified

¹⁰ Order 01 ¶ 7.

¹¹ *Id.* ¶ 8.

¹² WRRRA Objections at 3-4; Stericycle Objection at 4-6.

¹³ Stericycle Objection at 4:5-9.

¹⁴ *Id.* at 5:20-24.

cases.¹⁵ This is not one of those cases. The Commission often conducts adjudicative proceedings in which no discovery is authorized, relying solely on the evidence the parties have developed independently. Consistent with RCW 34.05.446 and WAC 480-07-400, therefore, the Commission could have precluded any and all discovery in this case. The presiding officer exercised discretion to permit discovery but that permission was conditioned on certain limitations.¹⁶ No party, including protestants, has a right to discovery at all in this docket, much less on any specific issues.

16 The controlling statute also does not appear to contemplate a need for party discovery on the specified fitness factors the Commission is required to consider. The relevant language (including and emphasizing the language Stericycle redacted when it quoted the statute) provides:

Issuance of the certificate of necessity must be determined on, but not limited to, the following factors: The present service and the cost thereof for the contemplated area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal, **set out in an affidavit or declaration**; 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.¹⁷

The legislature expressly requires that information on the applicant's finances and experience be "set out in an affidavit or declaration." No discovery is needed to satisfy this statutory showing. The other factors in RCW 81.77.040 – the existing service and its cost and the sentiment of the community – have no such requirement, a distinction the Commission must consider to be intentional. We do not interpret the statute to preclude further Commission inquiry into whether an applicant has satisfactorily demonstrated its financial and operational fitness, but at a minimum, the

¹⁵ WAC 480-07-400(b).

¹⁶ The law is well-established that "[t]he power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval." *State v. Crown Zellerbach*, 92 Wn.2d 894, 899, 602 P.2d 1172 (1979) (quoting *Southern Pac. Co. v. Olympian Dredging Co.*, 260 U.S. 205, 208 (1922)).

¹⁷ RCW 81.77.040 (emphasis added); *see* Stericycle Objection at 4:5-9.

language suggests that such an inquiry may be reserved for the Commission or its Staff.

- 17 Even if discovery by other parties on this issue were appropriate, neither Stericycle nor WRRRA identifies any legitimate interest either party has in whether Waste Management is fit to provide the requested service. The protestants simply assert that “Waste Management’s financial and operational fitness are necessary elements of this Application, and protestants have a very strong interest in the litigation of those issues before the Commission.”¹⁸ None of the protestants identifies the nature of that “very strong interest” or how any of them would be directly and substantially impacted by whether Waste Management has the financial or operational wherewithal to provide service. An interest in examining fitness as one of the “necessary elements of this Application” is not sufficient. That is the responsibility of the Commission, not private parties, particularly when those private parties are competing service providers. Protestants are not entitled to engage in discovery on issues that do not affect them.
- 18 Stericycle’s third claim is that the Commission’s discovery rules are either available in total or not at all. Stericycle contends that having found that the needs of the case require the methods of discovery specified in WAC 480-07-400(1)(c)(iii) through (vi), all of those methods must be available without limitation. According to Stericycle, “Preemptive limitation of discovery not by rule but by sua sponte order of the presiding officer is not allowed under the Commission’s rules and, therefore, is in violation of the Administrative Procedure Act.”¹⁹ Stericycle misreads the Commission rule and the statute.
- 19 The statute provides, “An agency may by rule determine whether or not discovery is to be available in adjudicative proceedings and, if so, which *forms* of discovery may be used.”²⁰ The Commission promulgated just such a rule, establishing the circumstances under which specified *methods* of discovery will be available in adjudicative proceedings.²¹ Nothing in Order 01 eliminates any of the available methods or forms of discovery. Rather, the order adopts limits on the *scope* of

¹⁸ Stericycle Objection at 5:15-17.

¹⁹ Stericycle Objection at 7:8-10.

²⁰ RCW 34.05.446(2) (emphasis added).

²¹ WAC 480-07-400(2)(b).

discovery. Both the legislature and the Commission have authorized the exercise of just such discretion.²²

- 20 Stericycle nevertheless argues, “There is no need for, and the Commission’s discovery rules do not authorize, a presiding officer to make a preemptive strike on improper discovery where no improper discovery has taken place.”²³ Stericycle offers no support for this novel theory, and the language of the rule is not reasonably susceptible to that interpretation.
- 21 To the contrary, the applicable rule provides in relevant part, “A discovery request is inappropriate when . . . the discovery is unduly burdensome or expensive, taking into account the needs of the adjudicative proceeding, limitations on the parties’ resources, scope of the responding party’s interest in the proceeding, and the importance of the issues at stake in the adjudicative proceeding.”²⁴ This language does not expressly or impliedly require the Commission to wait until a party challenges or seeks to compel a response to a discovery request to determine the propriety of such requests. Indeed, such delay would only increase the burden and expense on the parties and the Commission if all such discovery is inappropriate.
- 22 Finally, Stericycle contends that paragraph 8 is inconsistent with WAC 480-07-430 because limitations on discovery were not included in the Notice of Prehearing Conference or discussed during the prehearing conference itself. Stericycle maintains that “basic fairness requires that protestants must be given an opportunity to address the proposed discovery limitations before they were imposed.”²⁵ Again, Stericycle’s objection is not well-taken.
- 23 The Commission customarily addresses the availability of discovery in all initial prehearing conferences as referenced in the prehearing conference notice issued in this docket and WAC 480-07-430(1). Stericycle had adequate notice that discovery would be a matter addressed during the prehearing conference in this docket. As Waste Management observes, moreover, Stericycle has had an adequate opportunity to present its position on this issue to the Commission through its objections. The rule affords an opportunity for parties to object to prehearing conference orders, in

²² RCW 34.05.446(3); WAC 480-07-400(3).

²³ Stericycle Objection at 8:7-9.

²⁴ WAC 480-07-400(3).

²⁵ Stericycle Objection at 9:17-18.

part, for just such purposes. Stericycle has not been deprived of basic fairness or any procedural right.

24 The Commission, therefore, overrules WRRRA's and Stericycle's objections to the limitation on the scope of discovery included in paragraph 8 of Order 01.

Unsupported Accusations

25 The Commission anticipates and welcomes vigorous debate on legal issues, but not when arguments take the form of unsupported accusations based on plain misreading of Commission rules and orders. The Stericycle Objection repeatedly crosses that line.

26 Stericycle asserts that "[p]ossible carelessness about procedural fairness can also be discerned in the grant of the Commission Staff's late-filed petition to intervene in this matter only one day after it was filed . . . without allowing time for objection."²⁶ No such "carelessness about procedural fairness" exists, as Stericycle would have known if it had read the Commission's rules.

27 There is no requirement that Staff petition to intervene in this or any Commission docket. Under WAC 480-07-340, Staff becomes a party automatically "in an adjudicative proceeding for all purposes upon entering an appearance."²⁷ The Commission could have dismissed Staff's late-filed petition to intervene on the basis that Staff was not required to file one. The Commission nevertheless granted Staff's request in appreciation for Staff informing the Commission and the parties of the reasons Staff was appearing after the prehearing conference. Such action was a courtesy, not "carelessness about procedural fairness." No other party was deprived of any right to object to Staff's participation in this docket because no such right existed.

28 Stericycle also claims, "Paragraph 8 of the Order, together with the 'reminder' issued to the protestants in Paragraph 9 to avoid improper discovery, suggests a hostility to protestants' hearing rights that is inconsistent with the neutrality that is appropriate prior to hearing and decision of this matter."²⁸ The Commission takes allegations of lack of impartiality very seriously and expects any such accusations to be supported by substantial evidence. Stericycle not only provided no such evidence, but again its

²⁶ Stericycle Objection at 9, n.4.

²⁷ WAC 480-07-340(2); *see* WAC 480-07-355(1)(a) & (b) (excluding Staff from filing a petition to intervene, either before or after the prehearing conference).

²⁸ Stericycle Objection at 8, n.3.

accusations, like many of its substantive arguments, are based on an implausible reading of Order 01.

- 29 The “reminder” in paragraph 9 to avoid improper discovery is expressly directed to *all* parties in this docket, not just “issued to the protestants” as Stericycle states. The only “hostility” to be gleaned from paragraphs 8 and 9 in Order 01 is to *any* party abusing the discovery process to burden or harass *any* other party or the Commission. Stericycle’s accusations of bias are devoid of any support in reason, fact, or law.

Petitions for Interlocutory Review

- 30 Both WRRRA and Stericycle request that the Commission exercise its discretion to accept interlocutory review of Order 01 pursuant to WAC 480-07-810. The Commission declines to do so, finding such review is not necessary at this time.

ORDER

THE COMMISSION ORDERS that

- 31 (1) The WRRRA and Stericycle objections to Order 01 are OVERRULED.
32 (2) The WRRRA and Stericycle petitions for interlocutory review of Order 01 are DENIED.

Dated at Olympia, Washington, and effective May 14, 2012.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

GREGORY J. KOPTA
Administrative Law Judge