**BEFORE THE WASHINGTON STATE**

**UTILITIES AND TRANSPORTATION COMMISSION**

| | |
|---|---|
| STERICYCLE OF WASHINGTON, INC.,<br><br>Complainant,<br><br>v.<br><br>WASTE MANAGEMENT OF WASHINGTON, INC.,<br><br>Respondent.<br><br>. . . . . | DOCKET TG-110553<br><br>[PROPOSED] REPLY IN SUPPORT OF STERICYCLE'S MOTION FOR SUMMARY DETERMINATION |

Stephen B. Johnson
Jared Van Kirk
GARVEY SCHUBERT BARER
1191 Second Avenue, Suite 1800
Seattle, WA 98101
Phone: (206) 464-3939
Facsimile: (206) 464-0125

1. Waste Management of Washington, Inc. ("Waste Management"), the Washington Refuse and Recycling Association ("WRRA"), and the Commission Staff (collectively, the "opposing parties") have submitted responses opposing Stericycle of Washington, Inc.'s ("Stericycle") Motion for Summary Determination that Waste Management has abandoned its authority to provide biomedical waste collection and transportation services and that G-237 should therefore be amended to delete the abandoned authority. This Reply corrects the repeated misrepresentations by the opposing parties of Stericycle's arguments and the applicable legal standards and addresses new arguments and new factual claims raised in opposition to Stericycle's Motion for Summary Determination.

2. There are four issues before the Commission on Stericycle's Motion for Summary Determination: (1) Does the Commission have authority to find that a certificated solid waste collection company has abandoned a particular service type and to amend the carrier's G-certificate to delete its authority to provide the abandoned services?[1] (2) What evidentiary showing is required to support a finding of abandonment? (3) Does the evidence in the record satisfy the required showing that Waste Management has abandoned its biomedical waste collection authority? (4) In light of applicable precedent and in consideration of the public interest, should the Commission exercise its discretion to

[1] Only this first issue is before the Commission on Waste Management's Motion to Dismiss. Waste Management has not moved for summary determinations concerning the applicable evidentiary standard, the application of this standard to the facts in evidence, or the public interest issues that must inform the exercise of the Commission's discretion.

amend Waste Management's G-certificate to delete the abandoned biomedical waste collection authority?

**A. The Commission's Authority to Find Abandonment of Biomedical Waste Authority and to Amend a G-Certificate to Delete Abandoned Authority is Well Established.**

3. With respect to the first issue, the Commission has already concluded that it has the authority to find abandonment of a particular service type and to amend a G-certificate to remove the abandoned service. Although both Waste Management and WRRA contend that the Commission should now adopt a different rule, neither contests that RCW 81.77.030(6) contains express language allowing partial "amendment" of a G-certificate upon a finding of abandonment or that the Commission's decision in Order M. V. G. No. 1403, Mason County Garbage Co. v. Harold LeMay Enter., Cause No. TG-2163 (August 1989), provides authority that is both directly on point and directly contrary to their arguments. The Commission Staff, in its opposition to Waste Management's Motion to Dismiss, has recognized the Commission's authority to amend the Waste Management G-certificate under RCW 81.77.030 and Mason County Garbage. Commission Staff Response to Waste Management Motion to Dismiss, pp.3-5, ¶¶5-12.

4. Stericycle relied on RCW 81.77.030(6) and controlling Commission precedent in its Motion for Summary Determination. *See, e.g.*, Motion for Summary Determination, pp. 15-20, ¶¶ 26-32. In addition, Stericycle presented two other sources of authority to support application of the Commission's prior decision in Mason County Garbage to the circumstances presented by this case, one of which no opposing party has

contested. First, Stericycle demonstrated that the Commission has consistently considered biomedical waste authority under different standards than general solid waste – notwithstanding that the two are governed by the same statutory provisions – for the self-evident reason that biomedical waste is by its nature "highly toxic" because of its potential to spread infectious diseases and therefore poses special public health and safety risks. *See id.*, pp.21-25, ¶¶33-41; Medical Resource Recycling Sys., Inc. Cause No. GA-76820, *3-4 (May 1994); Order M. V. G. No. 1452, In re Am. Env. Mgmt., Hearing No. GA-874 (November 1990); Ryder Dist. Resources, Inc., Cause No. GA-75154, *22 (January 1993). Because of the special public health risks associated with biomedical waste, the Commission must be particularly cautious with respect to attempts to revive abandoned biomedical waste collection authority without the type of Commission oversight and scrutiny inherent in an application for new authority.

5. Second, Stericycle placed the Commission's authority under RCW 81.77.030 and Mason County Garbage in the context of prior Commission precedent and practice with respect to common carriers. Although the correct interpretation of RCW 81.77.030 and Mason County Garbage in no way depends on this authority, it is here that Waste Management and WRRA expend the bulk of their argument.

6. In brief, both of those parties argue that common carrier precedent concerning "dormant" authority is inapplicable because those cases arose from applications to transfer authority under a unique statutory provision dissimilar to RCW 81.77.030. *See* Waste Management Response, pp.2-3, ¶¶3-5; WRRA Response, p.2. But these arguments

are beside the point here. Stericycle acknowledged in its Motion that this precedent developed in a different context. *See* Motion for Summary Determination, p.15, ¶26. However, this is not to say that it has no persuasive value, as Waste Management and WRRA would have the Commission believe. These cases demonstrate the well-established principle that authority for a particular service type or commodity can be abandoned, although the specific legal context in which a determination of abandonment arises may vary. For this proposition ("partial abandonment"), contested by WRRA and Waste Management (but not the Commission Staff), the Commission's prior common carrier practice is authoritative.[2]

7. In viewing earlier common carrier law as persuasive background for the Commission's authority to find partial abandonment of solid waste authority, Stericycle is not alone. In Mason County Garbage the Commission itself specifically invoked the common carrier cases to support its finding of partial abandonment of solid waste authority, citing Order M. V. No. 132877, In re Paffile Truck Lines, Inc., Hearing Nos. P-68392; P-68434 (December 1985).

8. Waste Management raises one additional argument against the Commission's established authority to amend a G-certificate to delete abandoned

[2] Waste Management and WRRA also contend that the Commission's decision in *In re SnoKing Garbage Co. Inc.*, Order M.V.G. No 1185, *3 (November 1984) demonstrates that common carrier transfer cases do not support partial abandonment under RCW 81.77.030. But this is not what *SnoKing Garbage* says. That case stands only for the proposition that dormancy is not a valid consideration in solid waste certificate *transfer* cases, because the solid waste transfer statute differs from the common carrier transfer statute. But Waste Management is not seeking to transfer its authority and this is not a transfer case. Rather, Waste Management is seeking to revive abandoned authority and RCW 81.77.030 *does* provide express authority to consider abandonment, just like the common carrier transfer statute provided that authority in the common carrier transfer cases.

biomedical waste authority. Waste Management argues that the Commission only recognizes particular subtypes of solid waste – not including biomedical waste, according to Waste Management – and, therefore, that the Commission is limited to finding abandonment of only those recognized subtypes. *See* Waste Management Response, pp.5-6. ¶¶9-12. This argument must be rejected for several reasons.

9. First, it is patently not true that the Commission has not recognized biomedical waste as a unique subtype of solid waste. Quite to the contrary, the Commission has enacted a suite of unique and specialized regulations for the sole purpose of regulating biomedical waste as a unique subtype. *See* WAC 480-70-426 *et seq.* In addition, the Commission grants specific authority for biomedical waste services – as in the case of Stericycle's limited G-certificate – and restricts authority to provide biomedical waste services – as noted by Waste Management with respect to its own G-certificate. Waste Management Response, p.15, ¶39 (noting a territory in which G-237 bars collection and transportation of "biohazardous" waste).[3]

10. Second, Waste Management bases its argument on the categories of solid waste identified in RCW 81.77.040. This statute is inapplicable to finding abandonment under RCW 81.77.030 by its own terms. RCW 81.77.040 names particular categories of solid waste that may be used "[f]or the purposes of issuing certificates . . . ." (emphasis added). When abandonment is asserted under RCW 81.77.030, however, the Commission

[3] Waste Management has also filed, and the Commission has accepted, an entirely separate tariff for its proposed new biomedical waste service.

is not engaged in issuing a certificate and the categories of RCW 81.77.040 have no bearing on its decision.[4]

**B. Biomedical Waste Authority is Abandoned when the Evidence Demonstrates the Certificated Entity was Unable or Unwilling to Provide Those Services.**

11. All parties agree that the ultimate legal standard for determining whether Waste Management has abandoned its biomedical waste authority was articulated in Harold LeMay Enter. v. UTC, 67 Wn. App 878 (1992). Under that court of appeals decision, the Commission must find that Waste Management has abandoned its biomedical waste authority if the evidence indicates that it is *either* unable (or "unavailable," in the alternative language used by the court) *or* unwilling to provide such services. Stericycle has not argued that any other standard controls. *See* Motion for Summary Determination pp.27, 31, ¶¶44, 49.

12. The undisputed facts before the Commission amply satisfy this standard. The opposing parties' responses to Stericycle's factual arguments are addressed in the next section. However, Stericycle did make an additional argument that an evidentiary presumption established in the Commission's common carrier precedent is equally applicable in deciding whether this standard has been met in the present case. Waste Management and the Commission Staff have incorrectly characterized Stericycle's position as arguing that mere disuse or failure to hold out, without more, is sufficient to

[4] Moreover, RCW 81.77.040 is permissive; it states only that the Commission *may* adopt the categories identified, not that it must adopt those and only those categories for all purposes, as Waste Management asserts. The G-certificate issued to Stericycle clearly demonstrates the Commission's conclusion that the statutory categories are non-exclusive in any context.

establish abandonment standard. *See* Waste Management Response, pp.6-7, ¶¶13-15; Commission Staff Response, p.3-5, ¶6-8.[5] This is not the case.

13. What Stericycle actually argued is as follows: The Commission's common carrier abandonment cases employ essentially the same ultimate "unwilling or unable" standard as Harold LeMay Enterprises. *See* Motion for Summary Determination, p.28, ¶45. In these cases the Commission further held that it would *infer* unwillingness from a carrier's failure to provide services or to hold itself out to the public as available to provide services unless the carrier could demonstrate that its failure was due to market conditions or other circumstances beyond the carrier's control. *See id.*, pp.28-30, ¶¶45-48 (*citing* Order M. V. No. 144753, In re R.C. Kercheval, Inc., Hearing No. P-74415; Order M. V. No. 143760, In re Mercer Trucking Co., Inc., Hearing No. P-74033). There is good reason to find this presumption equally applicable to abandonment of biomedical waste collection authority because the same underlying legal standard applies and because the Commission has long recognized the need for special oversight of proposed biomedical waste collection services due to the inherent risk to public safety. *See id.*, p. 30. ¶48. Waste Management has not argued that its failure to provide biomedical waste services was due to a lack of biomedical waste business or other circumstances beyond its control.

[5] Waste Management (and the Commission Staff) again asserts *In re SnoKing Garbage Co. Inc.*, Order M.V.G. No 1185, *3 (November 1984) as alleged authority demonstrating that the Commission's common carrier precedent is inapplicable. Waste Management Response, p.7, ¶15; Commission Staff Response, p.4, ¶7. Once again, however, Waste Management blatantly skips over the fact that that case involved a *transfer* of solid waste authority, in which the applicable rules did not raise "dormancy" or abandonment as a relevant consideration, whereas this cases arises under RCW 81.77.030(6), which *does* expressly address abandonment. Waste Management's misapplication *SnoKing Garbage* must be rejected.

14. The opposing parties dispute the applicability of this evidentiary presumption, and their arguments are addressed below, but it is important to note that these arguments do not affect the agreement of all parties that the "unable *or* unwilling" standard applies. Nor do these arguments affect the conclusion that the undisputed facts of record satisfy this standard *even without* resort to the presumption.

15. The opposing parties have offered what appear to be three arguments opposing this established evidentiary presumption: (1) that it was developed in common carrier transfer cases which arose under a different statute and are, therefore, not applicable to abandonment under RCW 81.77.030; (2) that Harold LeMay Enterprises forecloses such a presumption; and (3) that the Governor's partial veto and signing statement accompanying enactment of the operative language in RCW 81.77.030 bars such a presumption. In all three cases the opposing parties stretch the authority on which they purport to rely too far.

16. The first argument is insufficient because the Commission's common carrier cases employ what is essentially an "unable or unwilling" standard. *See* former WAC 480-12-050 (". . . the permit holder will be required to produce proof that said permit holder was *ready, able and willing*, and so held himself out to the public to handle the traffic in question . . . ." (emphasis added)); In re R.C. Kercheval, Inc., Hearing No. P-74415 (noting a permit holder must have been "ready, able and willing" to handle the traffic at issue); Order M. V. No. 143760, In re Mercer Trucking Co., Inc., Hearing No. P-74033 (same). Contrary to the opposing parties' arguments, therefore, the Commission has

found the presumption discussed above applicable in applying a substantially similar abandonment standard, regardless of the fact that the cases arose in a different statutory context.

17. The second argument attempts to prove too much because Harold LeMay Enterprises did not foreclose appropriate evidentiary presumptions. After articulating the "unable or unwilling" standard, the court of appeals merely found that the Commission had not made a finding of inability or unwillingness and reversed and remanded. Harold LeMay Enter., 67 Wn. App. at 883. The appellate court said nothing about the evidence necessary to meet that standard, how circumstantial evidence should be evaluated, or the evidentiary burdens or presumptions that should apply to a factual finding of unwillingness or inability. These are matters open to the application of the Commission's expert judgment and its prior precedent.

18. The third argument stretches the Governor's partial veto too far. The veto eliminated a separate provision that would have allowed the Commission to find that part of a certificated service territory had been abandoned because a company failed to operate in that part of its territory and another service provider had established service in that territory. The Governor did not want to eliminate the possibility of competition in the situation where "a company might fail to operate in a certain territory because a competitor had all of the available customers." 1965 Wash. Laws 1st ex. Sess. Ch. 105, Note. This partial veto and the Governor's statement is entirely consistent with the Commission's practice of inferring unwillingness to provide services unless the company's failure to

provide services or hold itself out as available to provide services was due to market conditions beyond its control. Where competition was possible, but a certificate holder chose for other reasons not to pursue opportunities in that market, the Governor's concern does not apply. This is the case here, where Waste Management has not contended that there were no customers that would use its biomedical waste services had they been offered. It is also not contested that, as WRRA points out, biomedical waste was and remains a competitive sector, with local carriers actively in competition with Stericycle.[6] WRRA Response, p.7.[7] This active competition further demonstrates why the Governor's stated concern does not apply to the issue of abandonment presented here.

## C. The Undisputed Facts Demonstrate that Waste Management Was Unable and Unwilling to Provide Biomedical Waste Services in the Test Year.

19. Leaving aside the Commission's evidentiary presumption, and the opposing parties' arguments that apply only to that issue, the undisputed facts *directly* demonstrate that Waste Management was both unable and unwilling to provide biomedical waste services in the test year ending February 10, 2011.

20. The Commission Staff misconstrues this standard and asserts instead that Stericycle must demonstrate Waste Management's subjective "intent" to abandon its

---

[6] For this reason it is not true that Stericycle has "cornered" the biomedical waste market and is attempting to stifle competition by advocating that Waste Management be required to apply for authority before initiating a new biomedical waste collection service after abandoning such services for almost 15 years. *See* Commission Staff Response, p. 3, ¶5.

[7] WRRA's concern that small operators in territories without a "broad enough customer base" to support their participation in biomedical waste will be found to have abandoned that authority is not applicable here. *See* WRRA Response, p.7. Where that situation can be demonstrated, then the failure to participate may be shown to be due to market conditions beyond the operator's control. With respect to Waste Management, however, there is no dispute that its territory encompass 80% of the State's generated biomedical waste, more than enough to establish a viable market.

authority. *See* Commission Staff Response, p. 5, ¶¶ 8-9; *see also* WRRA Response, p.8. There is no authority for this argument and the Staff brief cites none. The Commission Staff further asserts, also without support, that Stericycle must show "unequivocal acts or conduct" demonstrating such intent, presumably an argument that the Commission cannot reach a finding based on the totality of the evidence. *See id.*, p.5, ¶9. Neither of these arguments is supported by any authority whatsoever; and, in fact, they are directly inconsistent with the standard articulated by the court of appeals in Harold LeMay Enterprises.

21. Harold LeMay Enterprises made no mention of a carrier's subjective intent as a prerequisite for determining that a carrier was "unable or unwilling" to provide the allegedly abandoned services. Indeed, requiring "intent" to abandon would entirely read out the "unable" prong of the standard since a party's ability to provide a particular service has nothing to do with their intention to provide that service. A party could wholeheartedly intend to offer a service but still be prevented, by a lack of necessary equipment for example, from being able to offer the service.

22. Even with respect to "willingness," the Commission has made clear that abandonment must be established based on objective evidence and not the subjective intent of the certificate holder. See, e.g., In re R.C. Kercheval, Inc., Hearing No. P-74415 ("The Commission uses an objective test to establish a permit holder's readiness, ability, and willingness to conduct operations."). Whether Waste Management was subjectively willing to offer biomedical waste services or subjectively intended to abandon its

biomedical waste authority is irrelevant to deciding that the evidence demonstrates abandonment.[8]

23. Even if the Commission Staff is merely attempting to argue that Waste Management's purposeful conduct, and not subjective intent, must establish its inability or unwillingness to provide services, it is not correct to assert that such acts must be "express" or "unequivocal." Even the authority cited by the Staff concerning abandonment of trade names rejects this position. In Foss v. Culbertson, 17 Wn.2d 610, 628 (1943), the court stated that "intent" to abandon a trade name ordinarily will be demonstrated "by the acts of the abandoning party and the reasonable inferences to be drawn therefrom . . . when considered in connection with the other facts . . . ." *See* Commission Staff Response, p. 5, n.15. Even under the legal standard proposed by the Commission Staff, this case demonstrates that abandonment – an inability or unwillingness to provide services – can be established by the totality of the evidence, including the abandoning party's acts, the surrounding circumstances, and reasonable inferences drawn from that evidence.[9]

24. The undisputed evidence in the record establishes voluntary acts and omissions that, when considered together with the surrounding circumstances, demonstrate that Waste Management was both unable and unwilling to provide biomedical waste collection services in the 12 months prior to the filing of Stericycle's initial petition.

---

[8] The Commission Staff cites no authority for its attempt to import the higher standard of knowing and intentional waiver of a contractual right to a finding of abandonment of certificate authority under the unable or unwilling standard. *See* Commission Staff Response, p. 5, ¶8, n.14.

[9] Of course, the Commission Staff's common law authority also further supports application of the Commission's reasonable inference of unwillingness from a failure to provide services where the decision to do so was not due to circumstances beyond the abandoning party's control.

25. The opposing parties devote a lot of discussion to just a subset of the facts establishing abandonment, including their interpretation of the asset sale and non-compete agreement. But the evidence of abandonment is far more extensive. The undisputed facts demonstrate the following:

26. Waste Management sold all of its Washington biomedical waste business to Stericycle in 1996, including all customer accounts and transportation assets, for a substantial sum. In that sale, Waste Management agreed not to compete for biomedical waste business in most of its territory for five years. These acts establish Waste Management's *initial* abandonment of biomedical waste and they establish that the abandonment was purposeful, for a substantial price, and not due to circumstances beyond Waste Management's control. As much as the opposing parties would like the Commission to believe that this is the extent of Stericycle's evidence, that is not the case.[10]

27. The undisputed facts also demonstrate Waste Management's *ongoing* abandonment when it made multiple, intentional decisions not to resume biomedical waste services when it had the opportunity to do so. First, as Waste Management points out, not all of its territory was subject to the non-compete. *See* Waste Management Response, p.16, ¶41. Yet, despite there being no dispute that customers were available in those areas,

[10] Despite the opposing parties' lengthy misstatements to the contrary, Stericycle has never asserted that the mere fact of the non-compete establishes abandonment. It is also not the case, as Waste Management advocates, that the scope of the non-compete establishes the scope of its abandonment. *See* Waste Management Response, pp.16-17, ¶¶41-43. As discussed below, Waste Management's conduct, from the sale of its entire Washington biomedical waste collection business, customers and assets in 1996 through the test year, establishes abandonment. Finding that Waste Management has abandoned its authority would not serve to "extend and enforce the Covenant-Not-To-Compete" as the Commission Staff contends – the non-compete expired over 10 years ago and Waste Management is, of course, free to apply for new biomedical waste collection authority. Commission Staff Response, p.9, ¶19.

Waste Management chose not to establish biomedical waste collection services. Likewise, Waste Management points out that it acquired new territory that was not subject to the non-compete. *See id.*, p.17, ¶43. Yet again, however, Waste Management did not seek to establish biomedical waste services in these territories, though it was free from any contractual restraint. Finally, when the non-compete agreement expired, and Waste Management was free to resume biomedical waste services for any and all customers in its territory, including customers profitably served by Stericycle and the large customer base along the I-5 corridor, it failed to re-establish biomedical waste collection services through and including the test year. From this evidence the only reasonable inference that can be drawn is that Waste Management was unwilling to offer biomedical waste services though it could have done so.

28. The undisputed facts also demonstrate that Waste Management sold all Washington assets necessary for the collection and transportation of biomedical waste. This important fact is notable for its absence from the opposing parties' responses, yet the lack of necessary equipment goes directly to Waste Management's *inability* to perform biomedical waste services. Waste Management conclusively admits in its response that it did not have licensed biomedical waste vehicles until March, 2011, making it *impossible* to lawfully perform biomedical waste collection services in the test year. Waste Management Response, p.13, ¶30.

29. Further, Waste Management did not have a biomedical waste tariff in effect during the test year. Although this is conceded by the opposing parties, they attempt to

minimize the fact as a trivial barrier to providing services. *See*, *e.g.*, WRRA Response, p.4 (speculating that had a customer asked for service Waste Management "would have only needed to file its tariffs, obtain equipment, and provide the service"). For the entirety of the test year, however, it was a concrete legal barrier to providing biomedical waste services that Waste Management took no steps to eliminate until after the filing of Stericycle's petition. Without an effective tariff, there can be no dispute that Waste Management was unable to perform biomedical waste collection services.

30. The opposing parties argue that the sale of Waste Management's biomedical waste business is not evidence of abandonment because the sale did not include Waste Management's G-certificate authority. *See*, *e,g,*, Waste Management Response, p.15, ¶¶37-38; Commission Staff Response, p.6, ¶12. But there is no authority stating that a sale of certificated authority is necessary to demonstrate abandonment. The arguments of the opposing parties on this point demonstrate confusion about the purpose of abandonment jurisprudence, which *presupposes* existing certificate authority, but provides for deletion of that authority when a company is unable or unwilling to exercise it. Requiring an express sale of authority as a precondition to a finding of abandonment would read the Commission's authority to amend a certificate under RCW 81.77.030(6) right out of the statute. The issue here is whether Waste Management was unable or unwilling to provide biomedical waste collection services during the test year.

31. In its response, Waste Management offers new evidence that it believes demonstrates its ability and willingness to provide biomedical waste services in the test

year. This evidence fails to affect the conclusions that must be drawn from the undisputed facts discussed above.

32. First, Waste Management agues that in the test year it began soliciting prospective customers and negotiating contracts for the biomedical waste service it intended to begin in the future. Waste Management Response, p.12, ¶27. Taking this assertion as true, however, it does not establish that Waste Management held itself out as available and willing to provide services *in the test year*. It is clear from Waste Management's argument that all it was doing was advertising prospective services and, by necessary implication, Waste Management's own argument makes clear that it was not able or willing to provide biomedical services in the test year, as required by RCW 81.77.030.

Second, Waste Management describes its recent arrangements for access to autoclave and incineration facilities. *Id*,. p.12, ¶¶28-29. While these arrangements are, of course, necessary to permit *processing and disposal* of biomedical waste, they do not speak to Waste Management's ability or willingness to collect and transport biomedical waste in the test year, the only activities addressed by G-237 and subject to the jurisdiction of the Commission. On this important point, Waste Management admits that it did not have any permitted vehicles for the collection and transportation of biomedical waste in the test year. *Id.*, p.13, ¶30. Despite Waste Management's asserted preparation, there is still no evidence in the record, nor could there be, that Waste Management was both able and willing to collect and transport regulated biomedical waste under G-237 in the test year.

33. As even Waste Management admits, while certain investments may be evidence of willingness to perform certificated services, the Commission will consider only investments that are made for *regulated* operations. In re R.C. Kercheval, Inc., Hearing No. P-74415 (rejecting as evidence against a finding of abandonment an investment of $150,000 "not related to the [regulated] intrastate authority"); Waste Management Response, p.13. ¶32 (citing R.C. Kercheval). Waste Management's processing capacity is not regulated by the Commission and its investment in that capacity does not establish ability or willingness to perform regulated biomedical waste services in the test year.

34. Finally, Waste Management attempts to assert that in some small measure it has already been performing biomedical waste services. It asserts, for example, that "for some time" it has been collecting medical waste from cruise ships docked in Seattle "along with other international waste that must be treated."[11] *Id.*, p.13, ¶31. However, these assertions do not refer to services under G-237 or subject to Commission regulation but, rather, international waste processing services under agreement with the United States Department of Agriculture as part of the USDA's Animal and Plant Health Inspection Service (APHIS).[12] APHIS is a federal program devoted to protecting the United States environment from international pests and contagions and specifically regulates the handling and processing of all garbage from international sources, including garbage

[11] Without evidence as to when this activity began, this assertion cannot establish that this activity even took place in the test year.

[12] Waste Management has failed to submit any documentation of these services or any manifests demonstrating the collection or transportation of biomedical waste.

generated on cruise ships.[13] Indeed, APHIS regulated garbage includes all plant or animal products or derivatives, along with any other refuse comingled with such products. 7 CFR §330.400 ("*Garbage*. All waste material that is derived in whole or in part from fruits, vegetables, meats or other plant or animal . . . material, and other refuse of any character whatsoever that has been associated with any such material." (underline emphasis added)). This would include the medical waste that Waste Management alleges it collects "along with other international waste that must be treated." Waste Management Response, p.13, ¶31 (emphasis added). Any such biomedical waste is not part of the APHIS program as such, is not regulated by the Commission, and is limited to waste generated outside the U.S., not waste generated by Washington generators. Accordingly, Waste Management's participation in the APHIS program fails to establish that Waste Management was either able or willing to serve Washington biomedical waste generators in the test year under G-237. Any investment in these unregulated services is not relevant. In re R.C. Kercheval, Inc., Hearing No. P-74415.

35. Waste Management also asserts that it "has been operating" a sharps recycling program that includes some processing of medical waste. This assertion, however, does not present the whole truth to the Commission. While Waste Management's national family of companies may have offered such a program, Waste Management itself had no tariff in Washington covering such a program in the test year

[13] *See generally* "About APHIS," USDA APHIS website, available at http://www.aphis.usda.gov/about_aphis/.

and is only now soliciting Washington generators for the program.[14] The fact that other "Waste Management" subsidiaries in other states have offered a sharps recycling program has no bearing on Waste Management's ability or willingness to provide biomedical waste collection services to Washington generators under G-237 in the test year.

**D. Public Policy Requires Amendment of G-237.**

36. The final issue before the Commission is the exercise of its discretion to amend G-237 to delete the abandoned biomedical waste authority. No opposing party contests that the Commission employs a strong presumption in favor of amendment, when abandonment has been found, to be rebutted only by compelling policy considerations. Motion for Summary Determination, pp.37-38, ¶¶58-59. No opposing party contests that the dangers to public health and safety inherent in biomedical waste collection services provide a strong public policy justification in favor of deleting abandoned authority and, thus, requiring an application for authority in which the proposed new service and its consistency with the public interest can be properly evaluated by the Commission.

37. The Commission Staff and WRRA's principal argument is simply that public policy favors competition and allowing abandoned authority to remain in a G-certificate would promote competition. *See* Commission Staff Response, p.9, ¶19; WRRA Response, p.7. But the Commission has not recognized competition as a paramount public policy in the context of solid waste regulation, much less in the context of biomedical waste collection. To the extent the Commission has recognized the value of competition in

[14] The entity at issue here is Waste Management of Washington, Inc., the holder of G-237. What other "Waste Management" entities have done in other jurisdictions is irrelevant here.

the biomedical waste sector, it has done so in the context of application proceedings in which a new entrant's fitness and the need for its services have been fully demonstrated and vetted. See, e.g., Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (November 1990) (cited by WM Motion to Dismiss, p. 7, ¶17). The Commission has never expressed support for unsupervised or unregulated entry into any aspect of solid waste collection, much less biomedical waste collection, nor would such a policy position be consistent with the legislative policy expressed in chapter 81.77 RCW.

38. So, the position of the Commission has been that competition may be allowed in biomedical waste collection if a prospective entrant can establish that there is a public need for its services, that its services are in the public interest, and that it is fit, willing and able to safely provide them. This is precisely what Waste Management seeks to avoid but what it will be required to do if Stericycle's Motion for Summary Determination is granted.

## VI. CONCLUSION

39. For the foregoing reasons, Stericycle respectfully requests that the Commission issue an order determining:

(1) That the Commission has the authority to amend G-237 to delete abandoned biomedical waste collection authority;

(2) That Waste Management has, on the undisputed facts, abandoned its biomedical waste collection authority under G-237; and

(3) That because Waste Management has abandoned its biomedical waste collection authority, G-237 should be amended to delete biomedical waste collection authority.

Dated this 1st day of June, 2011.

Respectfully submitted,

GARVEY SCHUBERT BARER

By _____
Stephen B. Johnson
Jared Van Kirk
Attorneys for Stericycle of Washington, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by the method as indicated below, pursuant to WAC 480-07-150.

| | |
|---|---|
| Polly L. McNeill<br>Jessica L. Goldman<br>Summit Law Group PLLC<br>315 Fifth Avenue South, Suite 1000<br>Seattle, WA 98104-2682<br>(206) 676-7000 | ☐ Via Legal Messenger<br>☐ Via Facsimile<br>☒ Via U.S. Mail<br>☒ Via Email<br><br>pollym@summitlaw.com<br>jessicag@summitlaw.com |
| Fronda Woods<br>Assistant Attorney General<br>1400 South Evergreen Park Drive S.W.<br>P. O. Box 40128<br>Olympia, WA 98504-0128<br>(360) 664-1225 | ☐ Via Legal Messenger<br>☐ Via Facsimile<br>☒ Via U.S. Mail<br>☒ Via Email<br><br>fwoods@utc.wa.gov |
| James K. Sells<br>Ryan, Uptegraft & Montgomery, Inc.<br>P.S.<br>PMB 22, 3110 Judson St.<br>Gig Harbor, WA 98335<br>(360) 981-0168 | ☐ Via Legal Messenger<br>☐ Via Facsimile<br>☒ Via U.S. Mail<br>☒ Via Email<br><br>jamessells@comcast.net |
| Washington Utilities and<br>Transportation Commission<br>1300 South Evergreen Park Drive S.W.<br>P. O. Box 47250<br>Olympia, WA 98504-7250 | ☒ Via Legal Messenger<br>☐ Via Facsimile<br>☐ Via U.S. Mail<br>☒ Via Email<br><br>records@utc.wa.gov |
| Hon. Dennis Moss<br>Administrative Law Judge | ☐ Via Legal Messenger<br>☐ Via Facsimile<br>☐ Via U.S. Mail<br>☒ Via Email<br><br>dmoss@utc.wa.gov |

Dated at Seattle, Washington, this 1st day of June, 2011.

Dominique Barrientes