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7 BEFORE THE WASHINGTON STATE
8 UTILITIES AND TRANSPORTATION COMMISSION

9 In Re Application of Waste
10 Management of Washington,
11 Inc. d/b/a WM Healthcare
12 Solutions of Washington

Docket TG-120033

13 REPLY OF WASHINGTON
14 REFUSE & RECYCLING ASSOCIATION;
15 RUBATINO REFUSE REMOVAL, INC.;
16 CONSOLIDATED DISPOSAL SERVICES,
17 INC.; MURREY'S DISPOSAL, INC.; AND
18 PULLMAN DISPOSAL SERVICE, INC. TO
19 MOTION FOR SUMMARY DETERMINATION

20 **COME NOW** Protestants Washington Refuse and Recycling Association;
21 Rubatino Refuse Removal, Inc.; Consolidated Disposal Services, Inc; Murrey's
22 Disposal, Inc.; and Pullman Disposal Service, Inc. (hereafter "the WRRR
23 Companies") and respectfully submit the following in opposition to Applicant
24 Waste Management's Motion for Summary Determination as to Financial and
25 Operational Fitness:
26

I.

POSITION OF PROTESTANTS

The WRRR Companies obviously oppose this Motion as, we expect, the
other Protestant Stericycle of Washington, Inc. will do as well. The Motion
should be denied because it is premature, in conflict with the Commission's

1 previous Order No. 03 (para. 13), not consistent with Commission practice
2 regarding solid waste applications and, in general, is inappropriate under the
3 controlling law; i.e. WAC 480-07-380(2) and CR 56, particularly CR 56(f).

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II.
ARGUMENT

(1) A Motion for Summary Determination is essentially the administrative equivalent of a Summary Judgment Motion in Superior Court pursuant to CR 56. (WAC 480-07-380). Thus, it is instructive to consider a brief overview of the law of summary judgment in Washington which is well settled and familiar. The purpose of the rule is to allow for just, speedy and inexpensive (if there is such a thing) resolution of disputes by avoiding unnecessary trials. **Olympic Fish Products, Inc. v. Lloyd**, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). The granting of a summary judgment motion is appropriate only when it is shown that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. **Hartley v. State**, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). A “material fact” is one upon which the outcome of the litigation depends. **Jacobson v. State**, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The deciding judicial officer must consider all the facts and all reasonable inferences therefrom in the light most favorable to the non moving party, in order to determine whether “reasonable persons could reach only one conclusion.” **In re Bellanich**, 43 Wn. App. 345, 350, 717 P.2d 307 (1986). (Emphasis added). Summary judgment may not be granted when different inferences could be drawn from evidentiary facts as to “ultimate facts such as intent, knowledge, good faith or negligence.” **Johnson v. Schafer**, 47 Wn. App. 405, 407, 735 P.2d 419 (1987).¹

Simply put, there must be no doubt in the mind of the judicial officer that not only are the facts argued “material” but that there is no reasonable basis upon which to dispute that no agreement exists. The “classic” examples

¹ The “ultimate fact” here being whether Applicant has the “financial and operational fitness” to perform the requested service.

1 are a “rear end collision,” or a clause in a contract that is plain on its face and
2 not open to any serious dispute as to its meaning. That clearly is not the case
3 here. As will be discussed below, Applicant wants the Commission to find
4 without discovery or examination at hearing, that, because it is a large,
5 ostensibly well-financed solid waste company, it is “financially and
6 operationally” fit to perform the requested service. That is not (without
7 exploration at hearing) proof of a “material fact.” It is a quantum leap of faith
8 the Commission should not take.

8 2) Other than submission of its 2010 “Annual Report,” sponsored by
9 one of its attorneys, Applicant submits nothing in support of this Motion,
10 other than stating what we all know to be the case. From all appearances,
11 Waste Management is a big, successful company. It has indeed provided
12 “traditional” solid waste service within its certificated territory for many years;
13 and apparently has added medical waste service for the last year or so, within
14 that territory.² The Annual Report from 2010 does not appear to reflect
15 medical waste service costs, profit/loss or, for that matter, anything else
16 involving medical waste. One would hope that such information will be
17 provided at hearing, as it is a “material fact” which the Commission may well
18 have expected to be included in support of this Motion. Its non-inclusion in
19 the Motion, alone, is a reasonable basis for denial. *see* CR 56(f).

18 3) Applicant seems to rely somewhat, if not disproportionately, on
19 previous orders in this docket which limit discovery on the very issues the
20 Commission must consider here. Specifically, paragraph 17 (Order 03, pg. 6)
21 would seem to limit discovery regarding Applicant’s “financial or operational
22 wherewithal to provide service.” That certainly was a disappointment to all
23 Protestants, but it is not, in any manner, determinative here. Indeed, Judge
24 Kopta clearly stated in paragraph 13, p. 4 that:

24 ² As the WRRRA Companies have clearly stated in previous dockets, Waste Management has
25 the right to provide complete solid waste service, including medical waste within its current
26 certificated territory. WRRRA has defended that right and will continue to do so. This
application, however, is a different circumstance. Despite Waste Management’s description of
it as an “extension,” it is, practically speaking, an application for a new service in new
territory and should be treated as such.

1 Order 01 neither states nor suggests that Waste Management has
2 satisfied or been relieved of its burden to provide its financial and
3 operational fitness at this point in the proceeding. The
4 Commission is well aware of its statutory obligations and will
evaluate and make appropriate findings and conclusions of the
Company's fitness based upon the evidence presented.

5 The "evidence presented" in this Motion is the 2010 Annual Report and the
6 assertion that Applicant is a big, international company that can well afford to
7 expand its fledgling medical waste operations statewide. That may or may not
8 be true but, for the purposes of a summary determination motion, it is
9 woefully inadequate. These things must be proven, not just asserted. Order
10 03 is not the "free pass" that Applicant seems to think it is. To the contrary,
11 it puts Applicant on notice that there must be proof at the hearing, not just
12 the "everyone knows" representations that it is financially and operationally fit
13 to perform the requested service. Those issues will be decided upon the
14 evidence, not unsupported allegations and a two year old Annual Report.
15 That is why we have the hearing process and why, to WRRRA's knowledge, an
16 Applicant's fitness has never been decided on summary determination.

17 4) Since the issue here is whether "genuine issues of material fact"
18 exist, it may be appropriate to list some, clearly not the entirety thereof
19 (considering that we have not heard testimony yet), material facts which are
20 at issue:

21 a) What funds are being earmarked for the new service, and
22 from where do they come?

23 b) What is budgeted for the service and on what assigned
24 basis; i.e. county, region, etc.?

25 c) Is there a need for new equipment/employees? If so, how
26 much and how many?

d) If there is not an immediate profit, how long is Applicant
willing to serve an area at a loss, and how much of a loss is it willing to
endure? Which class of customers will be subsidizing that loss?

1 e) If there is a loss, when does Applicant expect to “break
2 even,” or turn a profit – and upon what basis are the calculations being
3 made?

4 There certainly are other issues which will come up at hearing and/or in
5 prefiled testimony. The point is that we (Protestants and the Commission)
6 have nothing to “go on” here. All the “material facts” remain open to question
7 and simply are not addressed or even advanced in this Motion. The
8 Commission cannot simply grant this Motion because Applicant is a big,
9 successful company, any more than Protestants can ignore the applicable law,
10 for the same reasons. The Commission’s rules and the law apply universally
11 to every applicant, big, small, established or start-up. There are very good
12 reasons for that, which do not need explanation here. Suffice it to say that
13 “consistency with the public interest” and the “public convenience and
14 necessity” are not just a suggestion, they are the law and, in Protestants’ view,
15 a very good one. The public interest is the basis of what we all do, and the
16 public is entitled to a full hearing on issues such as those presented by this
17 Motion.

18 III.

19 CONCLUSION

20 There is no “free pass” for a “G Certificate.” It does not make any
21 difference if it is a brand-new application or an application for “extension.”
22 The same laws and rules apply. Any applicant for solid waste authority
23 (medical waste included):

24 . . . must show that it has the financial ability to provide the
25 proposed service. The applicant must also state its assets and
26 establish its costs of operation and facilities. Finally, the
applicant must establish the financial feasibility of the operations.
Ryder Distribution Resources, Inc. Order M.V.G. No. 1761,
Hearing No. GA-77539 and GA-75154 (1995); citing *In re*
Sureway Medical Services, Inc. Order GA-7598 (Nov. 1993).

1 No such showing has been presented in this Motion. Maybe it will be at
2 hearing, maybe not. That's why we have hearings.

3 The Motion should be denied, and the case proceed to hearing in the
4 normal course, as anticipated by Judge Kopta in paragraph (13) of Order 03.

5 Respectfully submitted this 24th day of May 2012.

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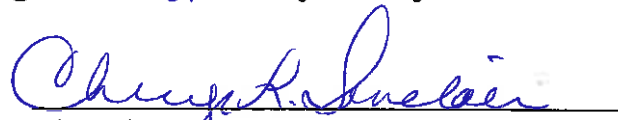
7 JAMES K. SELLS
8 WSBA No. 6040
9 Attorney for Protestants WRRRA,
10 Rubatino, Consolidated, Murrey's and
11 Pullman

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.

Washington Utilities and Transportation Commission 1300 S. Evergreen Park Dr. SW PO Box 47250 Olympia, WA 98504-7250 360.664.1160 records@utc.wa.gov	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email
Fronda Woods 1400 S. Evergreen Park Dr. SW PO Box 40128 Olympia, WA 98504-0218 fwoods@utc.wa.gov <u>BDeMarco@utc.wa.gov</u>	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email
Administrative Law Judge Gregory Kopta gkopta@utc.wa.gov	<input checked="" type="checkbox"/> Via Email
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Stephen B. Johnson Jared Van Kirk Garvey Schubert Barer 1191 Second Avenue Suite 1800 Seattle, WA 98101 sjohnson@gsblaw.com jvankirk@gsblaw.com dbarrientes@gsblaw.com	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email

1 DATED at Silverdale, Washington, this 24th day of May 2012.

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3 Cheryl L. Sinclair

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