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BEFORE THE WASHINGTON STATE

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UTILITIES AND TRANSPORTATION COMMISSION

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STERICYCLE OF WASHINGTON, INC., ) Docket TG-121597

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Complainant, )

6

v. ) Pages 37-72

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WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a )

8

WM HEALTHCARE SOLUTIONS OF WASHINGTON, )

9

Respondent. )

10

STATUS CONFERENCE, VOLUME II

11

Pages 37-72

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ADMINISTRATIVE LAW JUDGE ADAM E. TOREM

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10:00 A.M.

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FEBRUARY 8, 2013

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Washington Utilities and Transportation Commission

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A P P E A R A N C E S

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OLYMPIA, WASHINGTON, FEBRUARY 8, 2013

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10:00 A.M.

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P R O C E E D I N G S

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JUDGE TOREM: We'll be on the record in Docket

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TG-121597. Today is Friday, February the 8th, 2013. It's ten

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o'clock in the morning, and we have a scheduled status

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conference in this matter. We've had a little bit of changes of

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faces around the table, particularly from the AG's office for

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Commission Staff.

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So let's take appearances quickly to see who's here

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today, and then we'll kind of recount what's happened since

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November.

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MR. SMITH: Your Honor, my name is Steven W. Smith,

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Assistant Attorney General, for the Commission Staff.

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JUDGE TOREM: All right. And for the Complainant?

18

For Stericycle?

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MR. VAN KIRK: Jared Van Kirk, Garvey Schubert Barer,

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for Stericycle.

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JUDGE TOREM: Okay. And for the Respondent, Waste

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Management?

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MS. GOLDMAN: Good morning, Your Honor. Jessica

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Goldman from the Summit Law Group on behalf of Waste Management.

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JUDGE TOREM: All right. Thank you, all.

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1                   My understanding is we issued Order 01, our  
2 prehearing conference order back in late November, and we set up  
3 a series of filing deadlines from dispositive motions. And I  
4 did not dispose of the case. There was some question as to  
5 whether the Commissioners would then, on a motion for  
6 interlocutory review, do that job for one or both of the  
7 parties. They also declined to do that, so that brings us back  
8 to, I think, the last time we were here, Ms. Goldman, and you  
9 indicated if the first motion wasn't it, the second motion  
10 certainly would be the charm from Waste Management's  
11 perspective.

12                   I don't know if the factual record and the  
13 inadequacies with -- that I pointed out changed Waste  
14 Management's mind, if they have more procedural motions or where  
15 we might go, but I wanted to start there and see what your  
16 client's intent was at that point, and then come back to Mr. Van  
17 Kirk and see if you may have additional motions that you didn't  
18 disclose last time that have come up since.

19                   MS. GOLDMAN: Thank you, Your Honor. We don't have  
20 any other procedural motions in mind. Your order did suggest to  
21 us that it would simply be more efficient to proceed to the  
22 hearing on both claims, so that's our decision not to file our  
23 motion on the second cause of action.

24                   JUDGE TOREM: Okay. Mr. Van Kirk?

25                   MR. VAN KIRK: We have no other planned motions

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1 either. I think we took the best shot we can at this point.

2 JUDGE TOREM: Okay. And, you know, there was some  
3 question as to whether I could read more into the record than  
4 was there, but I took the conservative approach, and I almost  
5 feel like saying I'm sorry I couldn't resolve it one way or the  
6 other for you to go out and do battle on this. It's an  
7 important issue. The Commission recognizes we've been trying to  
8 resolve this for years to have a clear demarcation. Whether  
9 this is the right case to force the Commission's hand or not  
10 remains to be seen.

11 I know that Mr. Smith's predecessor, and probably the  
12 office in general, feels as though the numeric standard that  
13 we're all looking for shouldn't come out of this case, but out  
14 of a more generalized proceeding. So we'll just go toward the  
15 hearing and sort that out.

16 We're talking about only one of the causes of action  
17 that Stericycle brought, though, and I think if we're going to  
18 go to hearing, we should talk about both of the pending causes  
19 of action and see what other evidence needs to be developed  
20 prior to a hearing or presented at the hearing.

21 Mr. Van Kirk, you're going to carry the burden of  
22 proof as the Complainant on both of those.

23 Are you prepared to suggest what Stericycle wants to  
24 do to get ready for a hearing, or are we going to talk about  
25 setting a hearing date?

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1                   MR. VAN KIRK: I'm happy to tell you what I think  
2 needs to be done in the way of discovery to prepare for a  
3 hearing on both those counts.

4                   As you may or may not remember, both of these issues  
5 were initially raised in the parallel application proceeding,  
6 and the ALJ in that case declined to consider them in that  
7 hearing and as part of that, also declined to allow discovery on  
8 those issues as well. So now that they're -- now that they've  
9 found a home where they're going to be considered, we think that  
10 the discovery that didn't occur before now needs to go forward  
11 on the rebating issue. There was some limited written discovery  
12 going to that issue in the application case before. I think the  
13 judge came around to the opinion that it should no longer be a  
14 part of that case. Certainly, that shouldn't be repeated.

15                   We believe there will be some -- there will be some  
16 written discovery from Stericycle to Waste Management avoiding  
17 repetition of what's been done before. But some time has  
18 passed, and there were also some issues that just were not  
19 addressed in the written discovery before.

20                   I think, again, on the rebating, the next important  
21 element of discovery will be third-party discovery with certain  
22 of the customers that -- that we have information were the  
23 subjects of rebating offers or actually accepted rebating deals.  
24 And that, again, was discovery that was asked for and not  
25 granted in the previous proceeding. And because of the nature

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1 of the claim of rebating, it being a conversation and agreement  
2 between the provider and a customer, we think those third-party  
3 witnesses will have info -- information very significant to our  
4 case.

5 I think our initial thought was that those two things  
6 could happen in sequence with written discovery among -- between  
7 parties coming first, and it may or may not have some influence  
8 on how far out, who we need to speak to outside of the  
9 proceeding.

10 And, you know, we understand that there's some  
11 reluctance to incorporate third parties too much, and I think it  
12 would be most efficient to go in that order so that we can be  
13 really clear about what's absolutely necessary in terms of  
14 third-party discovery.

15 So the way I have envisioned, is a period of time for  
16 written discovery, then a period of time for third-party  
17 discovery. And that could be discussed in a hearing or it could  
18 be a request to be brought on motion or -- or something of that  
19 nature.

20 JUDGE TOREM: There's not a possibility of agreement  
21 as to who could be...

22 MR. VAN KIRK: Well, I don't know if the -- I don't  
23 know. Yes. I think it might -- it might may well be agreed  
24 it's --

25 JUDGE TOREM: Mr. Van Kirk, when you're referring to

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1 written discovery, are we talking about using data requests --

2 MR. VAN KIRK: Yes.

3 JUDGE TOREM: -- or more formal interrogatories?

4 MR. VAN KIRK: Data requests. I think we've used the  
5 data request process in the previous proceeding, and it  
6 worked -- and it works fine.

7 I don't know yet with respect to -- with respect to  
8 third parties. It may be necessary to ask for documents, as  
9 well as testimony. It's a little hard to say at this point what  
10 exactly we'd be looking for. That could be accomplished by  
11 subpoena, if necessary, if not by -- if not by agreement.

12 JUDGE TOREM: Okay. So that's on the rebating issue?

13 MR. VAN KIRK: That's on the rebate side.

14 On the ecoFinity recycling side -- I mean, your order  
15 set out some of the information that we would want to get. I  
16 think at the top of that list again -- and this was information  
17 that was requested and not provided in the earlier proceeding --  
18 would be information about the relationships among the parties  
19 to Waste Management's program -- Waste Management and Becton  
20 Dickinson and Talco Plastics -- both in terms of what their  
21 contractual relationships are, their relative responsibilities,  
22 and who's paying whom for what in that program. So that's one I  
23 envisioned. That seems like it should be able to be dealt with  
24 just between the parties, between Stericycle and Waste  
25 Management. Waste Management, I would -- think would have



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1 access through its relationships to information. And if for  
2 some reason they weren't to provide that information, it may  
3 necessitate going directly toward to -- to the third-party  
4 companies.

5 JUDGE TOREM: Okay. So it sounds like --

6 MR. VAN KIRK: Again, that's why I think a two-stage  
7 process might work well there, because then we would know what  
8 we can and can't get by the time we get to the external  
9 discovery.

10 A Waste Management's employee, Jeff Norton, gave a  
11 deposition in the application proceeding. He did not answer  
12 questions as to either rebating or ecoFinity in that proceeding,  
13 and at that point it was clear that it wasn't going to part of  
14 it.

15 JUDGE TOREM: So those questions, were they ever  
16 posed to Mr. Norton?

17 MR. VAN KIRK: Yes, and then they were objected to  
18 and...

19 JUDGE TOREM: And it was reduced from the scope of  
20 that previous docket; is that right?

21 MR. VAN KIRK: I'm sorry. What?

22 JUDGE TOREM: Judge Kopta later excluded those  
23 topics, so the questions were never answered?

24 MR. VAN KIRK: Yes; yes, that's right.

25 JUDGE TOREM: And so it would be your position now,

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1 given this docket and the complaint, that those are back and  
2 relevant again?

3 MR. VAN KIRK: I think it is relevant again. Again,  
4 I think it would be most efficient to -- to put that into the  
5 second phase, because the written discovery will shape what  
6 information -- whatever information we want.

7 I think that's the primary -- the primary sources of  
8 unknowns that we -- that we would be targeting. There might be  
9 a little something here and there that's relevant. But, again,  
10 I think our initial thought is two stages: essentially the  
11 first between the parties to this proceeding; the second,  
12 reaching externally to the extent necessary is what seems most  
13 efficient to us.

14 And we believe -- and Waste Management may agree --  
15 that there's a good chance that at the end, that summary  
16 determination could be used again in this case. I think we  
17 probably should set a hearing date, but I think we should make  
18 sure we save time for a summary determination round on the -- in  
19 the hopes that we could --

20 JUDGE TOREM: Yeah. If the record's further  
21 developed, then it may make sense to take a look at one or both  
22 causes of action for summary determination.

23 MR. VAN KIRK: Yeah.

24 JUDGE TOREM: All right. Ms. Goldman, you've been  
25 listening intently.

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1 MS. GOLDMAN: Yes.

2 JUDGE TOREM: What's Waste Management's thought on  
3 the next steps?

4 MS. GOLDMAN: Well, several. I think if I -- I'll  
5 deal with them in the order that Mr. Van Kirk addressed them  
6 with the rebating coming first. The rebating is a claim that  
7 you have not yet addressed because we haven't filed any motions.  
8 It's our position, based on the bruising discovery which I have  
9 alluded to in our previous hearing with you, that discovery  
10 should be allowed here only in very limited and controlled  
11 fashion.

12 Our experience in the last proceeding was that the  
13 lack of direction upfront, which I certainly do not fault the  
14 ALJ for, because who knew what would happen, but the lack of  
15 very clear and circumscribed direction led to many rounds of  
16 data requests, including very lengthy interrogatories --

17 JUDGE TOREM: Well, that's not my question yet,  
18 because I understand from perusing the record briefly and the  
19 tone of some orders that have come out suggesting that this  
20 discovery process has to be limited between these parties for  
21 whatever reason, whether it's the attorneys, the relationship  
22 between the parties, I get it. And that's why we didn't allow  
23 discovery to start with. I'd rather not have it devolve into  
24 that in this docket.

25 MS. GOLDMAN: Right. And I --

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1                   JUDGE TOREM: I just want to know from Waste  
2 Management, what do you think should happen next.

3                   MS. GOLDMAN: Yes. And so --

4                   JUDGE TOREM: We'll put appropriate limits.

5                   MS. GOLDMAN: -- I'm sorry to have editorialized  
6 unduly.

7                   My point was that we think at this point, if you were  
8 going to authorize discovery, it should be very circumscribed,  
9 and it should be very specific. It should not be a broad  
10 authorization to conduct discovery on any issue that Stericycle  
11 deems possibly within the realm of the universe of rebating;  
12 that they should present to you a specific request for  
13 discovery; and it should be specific and it should be limited to  
14 that; to what you deem necessary. So that's what we think  
15 should happen on the rebating.

16                   And, obviously, if they want to go ahead and subpoena  
17 their customers, we'll stand by and watch and certainly  
18 participate as observers in that process.

19                   The ecoFinity, I think, is actually very  
20 straightforward. You have laid out -- I have identified six  
21 very precise questions that you set forth in your order that you  
22 felt needed to be answered, and we would ask that those six  
23 questions be the scope of the discovery necessary. You have  
24 effectively agreed with the parties that there are no other  
25 issues of fact raised by that claim, so that should be the road

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1 map for discovery on that second claim.

2 In the prior -- in the application proceeding, Judge  
3 Kopta ordered that there would be no depositions without  
4 approval -- absent agreement between the parties as to party  
5 depositions, that there would be no depositions without his  
6 approval, and we would, again, ask for that to be the case here.

7 JUDGE TOREM: Okay. Let me hear from Commission  
8 Staff. I know Mr. Smith is just diving into this proceeding now  
9 and getting to know these parties.

10 What is the position of Commission Staff's thoughts  
11 on the process going forward?

12 MR. SMITH: Well, Your Honor, I'm not sure I really  
13 have any input at this stage on discovery issues. I think it's  
14 for the parties to determine what they need, and the ALJ.

15 Certainly I don't want -- I guess our position was --  
16 or we wouldn't want the discovery to get far, far flung, and I  
17 guess I'd like to keep -- confine the issues. I'm not sure the  
18 six questions you raised in your last order are necessarily the  
19 ones that should limit discovery. I think it's just a little  
20 premature for me to have a view on that right now.

21 JUDGE TOREM: And I'm not certain. I'm flattered  
22 that there's any thought that the six questions of however many  
23 there were that I raised would be the end-all and be-all of the  
24 discovery. There's got to be more creativity than I could  
25 possibly have expressed in that order, but I do recognize the

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1 need to rein in discovery.

2           Again, I'm just trying to sort out how involved I  
3 should be from the Commission's perspective on focusing the  
4 issues, whether I should now shift from being the ALJ to the  
5 discovery master and baby-sit the case, or if the parties can  
6 present something that's going to stay within expected bounds of  
7 civility, expected bounds of relevance, and not make a nuisance  
8 of yourselves to each other and to the parties that are out  
9 there -- the actual companies that not only you're representing,  
10 but that do business with your companies -- that want to go  
11 about their business, not go about solving all the legal issues  
12 of recycling and solid waste collection. So I want to find a  
13 balance there that works so we don't have the experience that I  
14 understand occurred in the other docket. But I think there's  
15 more that has to be dug up. We have to find the way right to go  
16 about doing it.

17           I like, Mr. Van Kirk, your suggestion of moving it in  
18 two phases so that we don't get to the depositions that Judge  
19 Kopta said would have to be individually approved, but I do  
20 think that invoking the discovery rules would be necessary now.

21           And, Ms. Goldman, I agree in a limited fashion we'll  
22 make sure we don't get out too far out ahead of ourselves, but I  
23 don't want to set something that's such a short leash that  
24 weekly we have to get on the phone and I'm wasting your time and  
25 running up your client bills by having you check in with the

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1 Commission every Friday as to what's going to happen next week.

2 I wonder if it's overly specific to have each party  
3 write up a discovery plan, or perhaps try to work on an agreed  
4 discovery plan on the topics that they agree require some sort  
5 of investigation, not only on the rebating issue, but also on  
6 the recycling questions.

7 Ms. Goldman, you've identified those six questions,  
8 and I don't know if that's the same count that you had, Mr. Van  
9 Kirk. I didn't actually go back and tabulate how many inquiries  
10 I might be sending you out for. I knew that I had said get me  
11 some more rocks and try to identify which rocks they were, but I  
12 don't remember what the count was.

13 Would it be agreeable for the two main parties, and  
14 maybe Commission Staff could weigh in as well as I don't want to  
15 say "an objective third-party point of view." Commission Staff  
16 certainly has its role in this proceeding, but not as a  
17 complainant and not as a respondent, to take a look and maybe  
18 listen in to what Mr. Smith has to say, as to what he thinks --  
19 Yes. That's within the bounds of what we should start with, not  
20 too far afield -- because the Commission Staff can at least  
21 weigh in and then present something back for my approval in a  
22 couple of weeks.

23 And then we'll open the discovery, perhaps, for the  
24 month of March and April to do the written discovery and maybe  
25 be ready to start any depositions as necessary like toward the

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1 end of April.

2 Does that sound like a reasonable ballpark, or is  
3 that slow rolling it too much?

4 MR. VAN KIRK: Well, if I can make a couple comments?

5 JUDGE TOREM: Please.

6 MR. VAN KIRK: First of all, I frankly don't  
7 necessarily agree with the characterization of the discovery in  
8 the last process. I mean --

9 JUDGE TOREM: That's why I didn't want to get into  
10 it, Mr. Van Kirk.

11 MR. VAN KIRK: -- that proceeding was very different  
12 from this proceeding. It was a big proceeding. It encompassed  
13 many issues. It was an application proceeding between two of  
14 the largest providers here. And, sure, we did have disputes.  
15 There were a couple of rounds. There were two sets of motions  
16 to compel. I didn't actually find that too out of the ordinary.  
17 The decisions were made. The case moved forward.

18 I see this case as not being different. I don't  
19 think there's -- the point of this: I don't think there's  
20 grounds to preconceive that there is going to be disastrous  
21 problems in this discovery. I think -- you know, for example,  
22 when I sort of gave my little spiel here at the beginning, I  
23 hope nobody thought I was really reaching too far afield in what  
24 we were targeting.

25 So I don't think we need to go overboard, and -- and



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1 I think the default in the rules, of course, is -- is in a case  
2 like this, especially where there's been complaints of  
3 anticompetitive conduct, discovery is the norm. Parties  
4 objecting to discovery can -- can so object. I think that  
5 should be the basis for going forward.

6 I'm not necessarily opposed to writing up a discovery  
7 plan, but I don't -- it depends on what kind of specificity  
8 we're going to try to get down to before we've actually  
9 conducted any discovery whatsoever. I mean, if we're getting  
10 down to sort of basically writing the questions and saying,  
11 "That's all we'll ask and no more," I don't think I can agree to  
12 that.

13 If it's --

14 JUDGE TOREM: No. I don't want that degree of  
15 specificity. I guess I'm looking for the lower general topics  
16 into which interrogatories or data requests would be crafted.

17 MR. VAN KIRK: Yeah.

18 JUDGE TOREM: And it may be a very simple plan at  
19 that point, but then giving yourself an idea how many data  
20 requests. And we have the basic rules that indicate how long it  
21 takes for the turnaround, and whether we want to change the  
22 response times. We can shorten response times, if necessary,  
23 but, typically, we do that only in the last few weeks  
24 approaching the hearing so that there's more of a sense of  
25 urgency, and everybody can prepare for the proceeding.

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1           MR. VAN KIRK: Yeah. And I'm fine writing out ahead  
2 of time the subjects that we're going to -- that we're going to  
3 pose data requests on. I don't think they'll find it, though.  
4 My thought is that the data requests aren't going to be --  
5 aren't going to be particularly -- particularly large or out of  
6 the ordinary. But if we want to put them down on paper in  
7 advance, I have no problem doing that.

8           Yeah. As far as -- I'm assuming that most of -- in  
9 this case, it's going to be mostly data requests from Stericycle  
10 to Waste Management, because there's really no issues going the  
11 other way in this case.

12           So, you know, it's sort of -- I would understand if  
13 Waste Management wanted more than the -- the usual response  
14 times tends to be somewhat shorter, and in the past, we've  
15 agreed to longer time. I would do that again, but that's the  
16 most -- I think that's probably mostly a Waste Management issue  
17 in this proceeding given the nature of the case.

18           And on a --

19           JUDGE TOREM: One other question I have.

20           MR. VAN KIRK: Yeah.

21           JUDGE TOREM: From Stericycle's point of view, a lot  
22 of the allegations, if I recall in the rebating issue, suggests  
23 that Waste Management approached your client's -- your client's  
24 clients, if you will -- and sought to siphon off some of that  
25 business unlawfully to Waste Management's own business plan, and

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1 so these are third parties that you could contact -- I would  
2 imagine Stericycle could contact on their own informally without  
3 a need for a formal deposition or otherwise or permission from  
4 the Commission, if Stericycle had their waste collection clients  
5 for biomedical waste who are in contact on a billing basis, on a  
6 customer service basis, on a regular, maybe, daily basis.

7           And I wonder if Stericycle has already availed  
8 themselves of the ability to pick up the phone or send a letter  
9 saying, "Can you tell us more about your contacts with Waste  
10 Management," because that wouldn't require invoking the formal  
11 discovery here.

12           MR. VAN KIRK: Well, some of the -- I mean, some of  
13 the reasons this whole issue came up is we were getting  
14 communications from clients. I think the question is, is  
15 reducing that to evidence that can be presented at the hearing.  
16 I think clients are -- I think clients are understandably  
17 reluctant to participate, to put themselves into a proceeding  
18 especially where -- where there may be some specter of  
19 wrongdoing going on without having some sort of formal process  
20 to compel them to do so.

21           I don't know about recent communications, but I do  
22 know in the past there were communications with the sales folks,  
23 which is how this whole issue came up in the first place.

24           JUDGE TOREM: And I can see adding that level of  
25 formality for sworn statements can put the layperson off and

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1 wonder if they want to get involved in such a thing. And  
2 whether that requires a subpoena or an order from the Commission  
3 to say, Yes, we really want to hear this to see if there is any  
4 violation of our regulations or statutes not by them. I don't  
5 want to have to be reading anybody their rights.

6 MR. VAN KIRK: Yeah.

7 JUDGE TOREM: But at the same time, it's not an  
8 allegation that says wrongdoing by Stericycle's clients. You've  
9 laid out the complaint as against Waste Management and not  
10 against the clients as being complicit or otherwise taking  
11 action.

12 MR. VAN KIRK: Yeah. Well, I think -- I mean,  
13 nevertheless, in the one instance that I can think of, that I'm  
14 thinking out there was, you know, we -- there was an issue of  
15 communication about essentially the rebating offers as we have  
16 laid out the allegation, and then after that, there was a  
17 communication that they didn't want to give any official  
18 statements and then become involved in that way.

19 So it's not -- and we haven't contacted every client  
20 that we believe to be involved or every customer that we believe  
21 to be involved. But in one case, that was sort of the outcome,  
22 which is why we started looking for a more formal approach.

23 JUDGE TOREM: Okay. Well, one question down that  
24 road: If we invoke the discovery rules and we get to the point  
25 where we're looking to issue subpoenas?

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1 MR. VAN KIRK: Mm-hm.

2 JUDGE TOREM: I'm trying to recall in the  
3 administrative practice. At the Commission I have yet to sign a  
4 subpoena. In my previous incarnation as an administrative law  
5 judge at the Office of Administrative Hearings, we did issue  
6 subpoenas on occasion, but we also had attorneys practicing  
7 before us using their Bar admission as authority to issue those  
8 subpoenas on behalf of the tribunal.

9 What would Stericycle be seeking here? Would you be  
10 looking to exercise an authority if -- assuming there is one  
11 here -- for attorneys to sign their own subpoenas, or looking  
12 for the Commission to issue a subpoena to the designated  
13 witnesses or clients of Stericycle?

14 MR. VAN KIRK: My thought was the latter was what was  
15 appropriate. I wasn't aware that the rules actually got to the  
16 point where --

17 JUDGE TOREM: I'm not sure there is.

18 MR. VAN KIRK: -- attorneys could issue their own  
19 subpoenas in this -- in the Commission. My understanding was we  
20 had to come and ask you for them, but that they were available.

21 JUDGE TOREM: And I have to delve further into that.  
22 I just want...

23 MR. VAN KIRK: Yeah.

24 JUDGE TOREM: I seem to recall the only time I've  
25 dealt with it was when we had pro se clients that wanted someone

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1 to come to a hearing, and I had to get involved as the judge  
2 previously. In these cases, I haven't been involved in a  
3 subpoena process yet. If I'm about to get into one, I just  
4 wanted to see what the parties were thinking.

5 MR. VAN KIRK: Yeah.

6 JUDGE TOREM: I can imagine it would be easier to  
7 have it coming from the Commission than from either of the  
8 companies. It keeps you in a more neutral position, but then I  
9 would need to be convinced that the evidence we're seeking is  
10 relevant and assured that there's going to be a limitation on  
11 the process.

12 MR. VAN KIRK: Yeah.

13 JUDGE TOREM: Now, the enforceability of  
14 administrative subpoenas also remains to be an issue. And once  
15 folks figure out that we're not sitting here with robes and have  
16 bailiffs or marshals at our service, there are some practical  
17 limitations to getting subpoenas enforced and honored.

18 So I want to make sure the parties are aware of once  
19 you invoke that, there's not a whole lot of magic behind the  
20 curtain here. So if they're appropriate, they'll be signed.  
21 But what we'll do if the person doesn't appear in Olympia would  
22 be another matter.

23 MR. VAN KIRK: My understanding of the rules is when  
24 it comes to depositions, however they're compelled with third  
25 parties, they have to be authorized by the Commission under a

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1 standard of whether the information would be significant to, in  
2 this case, our case.

3 So you can go that far and just do a deposition  
4 without a subpoena, if possible. And I think that would  
5 obviously be the preference -- our preference. Nobody likes to  
6 issue subpoenas if we don't have to. That may well be enough to  
7 get the corporation we need, but then, if necessary, subpoenas  
8 are available in cases, and my understanding is we'd have to go  
9 through you to get those.

10 JUDGE TOREM: Okay.

11 MR. VAN KIRK: That's how I understood the rules.

12 JUDGE TOREM: All right. Ms. Goldman, you've been  
13 listening to this. It sounds as though Mr. Van Kirk's client,  
14 through Stericycle, would be sharing the initial oral discovery  
15 as they go through and try to find the evidence needed to make  
16 their case to me and to the Commission.

17 From what you're hearing, what limitations would you  
18 be recommending on what Mr. Van Kirk has already addressed?

19 MS. GOLDMAN: Well, we like your idea of a discovery  
20 plan, and, frankly, the more specific, the better. And this  
21 is -- I agree with Mr. Van Kirk. This is not a very complicated  
22 case. The ecoFinity claim has to do with a single hospital.  
23 And everyone can double-check my question numbering, but  
24 whatever it is, the issues are very limited and are set forth in  
25 your order. That should be very straightforward.

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1           The other claim, the rebating claim, also should be  
2 very straightforward. It's not rocket science. I think that it  
3 should be very well within Stericycle's ability, given the many,  
4 many months it's been thinking about this claim, to set forth  
5 the relatively detailed explanation of what it needs.

6           That doesn't necessarily need to be in the form of  
7 data requests or interrogatories, but -- but bullet points, I  
8 think, would be -- not service us well, given our past  
9 experience.

10           And I think that your time frame would work for us to  
11 have several weeks; that Mr. Van Kirk can prepare it, send it  
12 over to us, and we can provide comments. We can advise him if  
13 we think that it's not sufficiently detailed from our  
14 perspective, given our experience, and then be in a position for  
15 him to present it to you with revisions, if he agrees, and for  
16 us to have comment, and then to go forward in the schedule that  
17 you suggested with that time frame, that would work for us.

18           JUDGE TOREM: Mr. Smith, any input at this point?

19           MR. SMITH: It sounds like the parties are agreeable  
20 to some sort of discovery plan, and I think if they can agree  
21 between themselves on the issues, I can't see that I would be  
22 likely to come to a different conclusion. I'd be happy to chime  
23 in on behalf of the Staff in the event there's some dispute  
24 between the parties, but I think a discovery plan is a good idea  
25 at this point.



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1                   JUDGE TOREM: Mr. Van Kirk, let's talk about the  
2 discovery plan a little more. And, you know, I don't intend for  
3 it to be overly specific or overly restrictive, but what I'm  
4 hoping is that it will serve a mutual purpose for you and for  
5 Waste Management to know what are the basic items you intend to  
6 inquire into, not, though, question by question, but the bounds,  
7 if you will. Set some bounds as to these topics.

8                   On the rebating issue, it may also include not just  
9 you've got it laid out in your mind into two phases -- the  
10 written discovery, and then perhaps, if necessary, the  
11 depositions or interviewing others -- but I would think the  
12 discovery plan could at least initially identify those clients  
13 that you wanted to make contact with, and perhaps the names of  
14 the officers. And if you don't know the names of them, then  
15 that would be part of the written discovery to identify who they  
16 were.

17                   And I do think that depending on the answers you get  
18 and the follow-up questions that come along, we can't predict it  
19 all, but there would be some general -- just buckets of  
20 questions from different topics that you could pull from.

21                   If you could at least identify the buckets  
22 themselves, then put that in a discovery plan, that would be  
23 helpful for me to know what to -- how to invoke the discovery  
24 rules and what limits to put on once I see a little bit more of  
25 where your client wants to go.

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1                   MR. VAN KIRK: Yeah. Like I said, I'm happy to do a  
2 discovery plan that identifies topics of discovery. My only  
3 hesitation is that, given that no discovery has yet been  
4 conducted, that it not be imposed so strictly that developments  
5 in the discovery couldn't allow for discovery outside of those  
6 areas because we know only what we know at this point.

7                   And, again, you know, we have our own view of the  
8 past history of discovery in the other proceeding, and it has  
9 been that anything that's not in the most strictest sense on the  
10 mostly closely tied relevance to the case has been completely  
11 subject to refusal to answer. You know, that's our perspective,  
12 and so I'm hesitant to enter into any kind of discovery plan  
13 that could then be read and applied that way without looking to  
14 the normal rules of relevance to bound the discovery.

15                   So --

16                   JUDGE TOREM: Well, that's why I'm hoping --

17                   MR. VAN KIRK: -- if the discovery plan is with that  
18 intention that it be -- that it would be the guide, but with  
19 some flexibility based on developments, and that the overall  
20 guide is the rules of, you know, relevance and all the other  
21 discovery rules, I have no problem of doing that.

22                   JUDGE TOREM: Well, I think what I would like to do  
23 is have you develop the discovery plan over the course of the  
24 next week, share it with Ms. Goldman's firm and with Commission  
25 Staff, and perhaps by the -- in two weeks from today on the

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1 22nd, it could be submitted to me in one of two formats: Either  
2 with both of your signatures at the bottom saying this is an  
3 agreed discovery plan on the scope, or at least these portions  
4 are agreed, and the following portion you would like to do over  
5 Waste Management's objections, and then I could get feedback on  
6 it.

7 If I have all parties agreed that these are the  
8 relevant areas and these are the buckets of questions, if you  
9 will, that we want to inquire into, great.

10 If there's some additional things that Stericycle  
11 wants to identify that are in some way unreasonable to one of  
12 the other parties, then we'd just identify those objections, and  
13 I could have some time to look at.

14 Whether we need to get back together again, I'll  
15 leave to your discretion, or we could just try to have me just  
16 issue a discovery order adopting those portions of the plan,  
17 obviously, that are agreed, that I concur with, and then taking  
18 the position on those that are disputed.

19 I don't know if it would be helpful to get back  
20 together for a more discussion, conversation approach like we're  
21 doing today, or if it's walk out of here, make your best effort,  
22 submit something, and then wait to see what you get from the  
23 Bench a week after that.

24 How do you feel about that, Mr. Van Kirk?

25 MR. VAN KIRK: It's hard for me to say without

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1 knowing what the objections are. I think if there are  
2 substantial objections to the discovery plan, then I think we  
3 should talk about it. Maybe on the phone would suffice.

4 JUDGE TOREM: And we can do a telephonic status  
5 conference, or maybe even -- well, I'm trying to decide if we  
6 should have the court reporter take things down or not. It  
7 helps to keeps everybody on the record if we say something and  
8 we commit to it. At least we can look back to it and say, Yes.  
9 On such and such a date, it's in the record.

10 Ms. Goldman, what do you think?

11 MS. GOLDMAN: Yes. Well, as to the latter point, I  
12 would certainly vote yea in favor of a court reporter just to  
13 keep us all on track. You know, these things do tend to drag  
14 out, and month to month, who knows exactly what happens, and  
15 memory doesn't always serve us all well.

16 I think we could -- I think your proposal is fine  
17 generally. I would request that it be bumped by one week,  
18 because I am going to be out of town with my family for the  
19 midwinter break the week of February 18.

20 So if we could just bump it all up to March 1, by  
21 one week, that would give Mr. Van Kirk two weeks if he wanted to  
22 work on his plan, and then he and I could work the last couple  
23 days there of February so that we could either present -- we  
24 could present to you on the 1st where there is agreement, and if  
25 there are any points on which we disagree, we could set that

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1    forth.

2                   And then I think at that point, it would be  
3    appropriate for either one of us to ask for oral argument to the  
4    degree we felt it necessary.

5                   And, of course, it's your discretion how you proceed  
6    from there, but I don't think from our perspective, we need to  
7    necessarily resolve that as of today.  But if there were to be a  
8    status conference, or whatever you want to call it, a hearing,  
9    it would be my preference that it be reported, and I don't know  
10   if that can be done telephonically or not very effectively.

11                   JUDGE TOREM:  It can be, so that's a possibility.

12                   MS. GOLDMAN:  Okay.  Thank you.

13                   Mr. Smith?

14                   MR. SMITH:  Yeah, we have no objection to your  
15   proposal.

16                   JUDGE TOREM:  Mr. Van Kirk, if we have that plan due  
17   on March 1st and set up a date the following week, whether it's  
18   the 6th or the 7th of March --

19                   MR. VAN KIRK:  Mm-hm.

20                   JUDGE TOREM:  -- or the 8th, somewhere in the later  
21   part of that week for a telephonic status conference, we'd just  
22   reserve an hour or two either in the morning or afternoon; does  
23   that sound reasonable?

24                   MR. VAN KIRK:  Yes.  I'm just looking.  I'm trying to  
25   dig up the exact week here so that I know.

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1 Yes. In general it sounds reasonable on that week.

2 Let's see...

3 JUDGE TOREM: Do you have a preference: Wednesday,  
4 Thursday, or Friday?

5 MR. VAN KIRK: Wednesday, Thursday, or Friday?

6 JUDGE TOREM: And we would do it by phone, so it  
7 would be even more flexible.

8 MR. VAN KIRK: I think Thursday would probably be my  
9 preference.

10 JUDGE TOREM: Okay. On the 7th?

11 MR. VAN KIRK: Yeah.

12 JUDGE TOREM: Ms. Goldman, are you available that  
13 day?

14 MS. GOLDMAN: I think I have a lunch meeting, but  
15 other than that, let me just double-check. I think that --  
16 yeah. I can do it anytime other than twelve to 1:30.

17 JUDGE TOREM: Okay. And there's no Commission open  
18 meeting that day, so we're not fighting over the bridge line or  
19 other issues that I know of. I can try to confirm availability.

20 Mr. Smith, do you have an idea what your calendar  
21 looks like in four weeks?

22 MR. SMITH: I am confident it's clear on that day.

23 JUDGE TOREM: Okay. So Thursday.

24 Is there a preference for morning or afternoon?

25 MS. GOLDMAN: Not if it's by phone.

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1                   JUDGE TOREM: Okay. Let me see when the bridge line  
2 is available that day. I'm sure we'll be able to find a couple  
3 of hours.

4                   And I can draft up a notice setting a filing deadline  
5 for March 1st for a discovery plan, and I want this to be a  
6 collaborative process so that it all comes in. It may very well  
7 be that Mr. Van Kirk's able to get something to you before the  
8 break with the family next week -- or the week after next. And  
9 so that week, the last couple of days of February used to hammer  
10 out what's agreed, and then Mr. Van Kirk has the courtesy of a  
11 couple of days if there are going to be disagreements to file  
12 the agreed part of the plan, assuming there is one, and anything  
13 else that might be disputed so you can have a copy of that and  
14 enough time to get your objections filed.

15                   If for some reason the plan comes in and you still  
16 have objections to note, I'm going to say that by Monday, close  
17 of business, any objections to the plan be filed.

18                   MS. GOLDMAN: The 4th?

19                   JUDGE TOREM: The 4th, yeah.

20                   And I'm setting such a short time frame so we cannot  
21 burn another week and looking at, Oh, what do we still want to  
22 object to, but I think it should be, like as you say, not rocket  
23 science. Agree on what you can. You'll submit as much of it  
24 agreed as possible with the remainder as you couldn't reach  
25 agreement on these, but Stericycle still wants to do the

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1 inquiries as noted. And you'll have heard about all that, but  
2 you'll finally see it in its final proposal in writing by March  
3 1st. And just sometime on the 4th, if you'll note your  
4 objections and bullet points, we'll work for those. Then I'll  
5 have that all in front of me, and if we need the status  
6 conference on Thursday, I'll be able to narrow it down and  
7 approve something in writing hopefully by the 8th, issue a  
8 written order by Friday, March 8th, and discovery will go  
9 forward from there.

10 MS. GOLDMAN: Your Honor --

11 MR. VAN KIRK: Oh, sorry. I was just going to ask  
12 when you're back.

13 MS. GOLDMAN: I'm sorry. I keep losing my calendar.

14 JUDGE TOREM: I think Monday, the 25th, is the next  
15 one after that midwinter break for a lot of the school kids.

16 MS. GOLDMAN: Yes.

17 MR. VAN KIRK: Okay. I'll have a draft waiting for  
18 you when you come back.

19 MS. GOLDMAN: And, Your Honor, if I may beg your help  
20 on my calendar, I am going to be out of town at a conference on  
21 March 4th.

22 So if it would be possible to give me one additional  
23 day, I wouldn't have to write it on the airplane. That would be  
24 March 5th, so that would be a Tuesday. Hopefully, that would  
25 still give it -- you know, I don't anticipate this is going to



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1 be anything voluminous. But given that I'm going to be on an  
2 airplane, it would be a little awkward to file.

3 JUDGE TOREM: Understood. So if that's the case,  
4 then, for availability, we'll push the objections out to March  
5 5th.

6 MS. GOLDMAN: Thank you.

7 JUDGE TOREM: And that would still give me time,  
8 because I don't think they'll be voluminous --

9 MS. GOLDMAN: They will not.

10 JUDGE TOREM: -- to be ready for the status  
11 conference to resolve whatever I can or rule however I need to  
12 on the 7th.

13 And, Mr. Smith, if you have recommendations for the  
14 Commission to consider on whatever is submitted by the parties,  
15 hopefully, you can turn in something on the 5th as well, whether  
16 Staff has a position on what's been agreed between these two  
17 parties that are the primary litigants in the case and other  
18 issues if Staff thinks that they have missed something or if  
19 they have gone too far afield. I appreciate any guidance that  
20 Staff -- of opinions that you can lodge that would assist the  
21 Commission.

22 All right. Well, if that's the calendar we're  
23 looking at here, I don't know if I need to have a further  
24 discussion or start reserving time for a hearing. But it sounds  
25 like if we approved discovery to start March 8th, or shortly

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1 thereafter, we'd be looking at six to eight weeks of time to run  
2 down verbal or written discovery and potentially depositions.

3 MR. VAN KIRK: Can we just have a short conversation  
4 on scheduling even if we're not making a decision today?

5 JUDGE TOREM: Yeah. Let's go off the record. We'll  
6 come back on and decide if there's anything else we want to  
7 commit to. But I'll issue a notice early next week with this  
8 March 1st filing deadline and a March 5th response and  
9 scheduling whatever time that March 7 teleconference will be.

10 Now we'll go off the record.

11 (Discussion off the record.)

12 JUDGE TOREM: Let's go back on the record. It's  
13 about 12 minutes to eleven. We have talked a little bit about  
14 the ability to schedule the hearing perhaps in June, but we're  
15 going to hold off picking any specific dates.

16 We have got our deadline for the discovery plan to  
17 come in on March 1st and objections the following Tuesday, March  
18 5th. And I will issue a notice commemorating those dates and  
19 with that, set up another status conference to discuss and  
20 hopefully approve the discovery plan.

21 If there are no objections and it's just you think  
22 that's the case, then just send me a letter saying -- when you  
23 file it electronically, let me know that this is agreed. We're  
24 just seeking the Commission to approve it and invoke discovery,  
25 and I'll just simply issue another order approving it, unless I

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1 have an issue with it.

2           If I see any issues from the Commission's  
3 perspective, then we would keep the status conference on the  
4 7th. Otherwise, we would strike it and you'd have an order and  
5 off you go.

6           What we're thinking, though, the plan is going to  
7 cover a period of March, April, and May and with that hearing  
8 date in June. At this time, we're anticipating a need for  
9 another status conference in early to mid-May to confirm and set  
10 up the hearing dates.

11           And I anticipate Counsel will probably be able to  
12 tell me in May a proposed schedule of dates that they're  
13 available, and right now the Commission's calender and my own is  
14 wide open for June.

15           And so if the parties would want to anticipate that  
16 as discovery goes along and when it might end and not have to  
17 wait too many weeks of Commission process to get back together,  
18 feel free to take the initiative and let me know the dates that  
19 you would like for a hearing, and we may be able to just  
20 shortcut that process a little bit more.

21           Anything else for the record today?

22           Well, thanks for coming down to Olympia on Friday.  
23 We'll do it all by telephone in about 3 1/2 weeks. Thank you.  
24 We're adjourned.

25           (Proceeding concluded at 10:50 a.m.)

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C E R T I F I C A T E

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3 STATE OF WASHINGTON )

) ss

4 COUNTY OF KING )

5

6 I, SHELBY KAY K. FUKUSHIMA, a Certified Shorthand Reporter  
7 and Notary Public in and for the State of Washington, do hereby  
8 certify that the foregoing transcript is true and accurate to  
9 the best of my knowledge, skill and ability.

10 IN WITNESS WHEREOF, I have hereunto set my hand and seal  
11 this 15th day of February, 2013.

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SHELBY KAY K. FUKUSHIMA, CCR

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18 My commission expires:

June 29, 2013

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