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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re Application of
WASTE MANAGEMENT OF
WASHINGTON, INC.
d/b/a WM Healthcare Solutions
of Washington
720 4th Ave. Ste 400
Kirkland, WA 98033-8136

Docket No. TG-120033

STERICYCLE'S OPPOSITION TO WASTE
MANAGEMENT'S MOTION FOR
SUMMARY DETERMINATION AND
MOTION FOR CONTINUANCE

STERICYCLE'S OPPOSITION TO WASTE MANAGEMENT'S
MOTION FOR SUMMARY DETERMINATION AND MOTION
FOR CONTINUANCE

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1 1. Protestant Stericycle of Washington, Inc. (“Stericycle”), through its undersigned
2 attorneys, respectfully requests that the Commission deny Applicant Waste Management’s
3 Motion for Summary Determination as to Financial and Operational Fitness. In the alternative,
4 Stericycle moves the Commission for an Order continuing this matter to permit Stericycle a
5 reasonable opportunity to conduct discovery on these issues; or, if such discovery is denied,
6 until the hearing on the Application at which time Applicant’s witnesses will be subject to
7 cross-examination by both Commission Staff and protestants on these issues.

8 I. Summary of Argument

9 2. There is insufficient evidence in the record to support a ruling as a matter of law
10 on Waste Management’s financial and operational fitness at this early stage in the proceeding.
11 Counsel for Waste Management seeks to make up for this lack of evidentiary support with bald
12 assertions in her brief, coupled with the claim that only “perfunctory” consideration of these
13 issues is necessary prior to a ruling anointing her client.¹

14 3. The assertions of counsel are not evidence and the minimal record presently
15 before the Commission will not support the requested summary determinations. Neither
16 financial nor operational fitness can be determined in a vacuum; i.e., without evidence of the
17 resources, transportation equipment, personnel and facilities required for the proposed service.
18 It is only in relation to what will be required to provide the service that financial or operational
19 fitness can be determined. “[T]he Commission cannot assume evidence not in the record.”²
20 Accordingly, Waste Management’s Motion for Summary Determination must be denied.

21 4. Even if by some stretch of the imagination the record could be said to contain
22 prima facie evidence of Waste Management’s financial or operational fitness, the Commission
23 should defer decision on the present motion at this early stage in this proceeding to permit
24 Stericycle a reasonable opportunity to conduct discovery;³ or, if discovery on these issues is

25 ¹ Motion for Summary Determination at ¶8.

26 ² *Sureway Medical Services, Inc.*, Order M.V.G. No. 1663, p. 15 (Nov. 19, 1993).

³ See Civil Rule 56(f) and WAC 480-07-380(2)(a).

1 denied, until hearing to allow Commission Staff, Stericycle and the other protestants to cross-
2 examine Waste Management's witnesses and to present evidence on these issues.

3 5. Finally, the issues of financial and operational fitness are so closely bound up
4 with other issues affecting the public interest, such as the financial feasibility of the proposed
5 operations and the potential for harm to protestants and the impact of an additional statewide
6 carrier on rate and service levels, that any determination that the Commission might make on
7 these issues now could prevent protestants from bringing legitimate issues relevant to the
8 public interest and the public convenience and necessity to the Commission's attention. A
9 ruling on these issues now will guarantee useless and protracted prehearing squabbles between
10 the parties about what is or is not encompassed by the Commission's rulings. For all these
11 reasons, Waste Management's Motion for Summary Determination should be denied.

12 **II. Facts Relied Upon**

13 6. Stericycle relies upon the Declaration of Christopher Dunn in Opposition to
14 Waste Management's Motion for Summary Determination, filed herewith, and the other files
15 and records herein.

16 **III. Issues Presented**

17 7. Does Stericycle have standing to oppose Waste Management's Motion for
18 Summary Determination in light of the Commission's suggestion in Order 03 that protestants
19 may not have a "legitimate interest"⁴ in Waste Management's financial or operational fitness?

20 8. Has Waste Management offered evidence of its financial fitness sufficient to
21 entitle it to judgment as a matter of law on that issue?

22 9. Has Waste Management offered evidence of its operational fitness sufficient to
23 entitle it to judgment as a matter of law on that issue?

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⁴ Order 03, Docket TG-120033, at ¶17.

1 10. Even if Waste Management is deemed to have offered evidence sufficient to
2 make a prima facie case that it is financially or operationally fit to provide the services covered
3 by its Application,

4 (a) Are there issues of material fact that must be resolved at hearing?

5 (b) Should the Commission postpone decision on Waste Management's Motion for
6 Summary Determination until either (i) Stericycle and the other protestants (the "other
7 protestants" referred to hereinafter as the "WRRRA Protestants") have had a reasonable
8 opportunity to conduct discovery on these issues, or (ii) Waste Management has presented
9 witness testimony at the hearing on these issues, subject to cross-examination by Commission
10 Staff and protestants?

11 (c) Are the issues of financial and operational fitness so closely intertwined with other
12 issues relevant to the financial feasibility of the proposed service, the public interest and public
13 convenience and necessity that a ruling on them should be deferred at this time to avoid
14 prehearing confusion about what is or is not covered by the Commission's ruling and to
15 facilitate the development of a complete record for decision?

16 **IV. Argument**

17 **A. Stericycle and the WRRRA Protestants Have Standing to Oppose Waste**
18 **Management's Motion for Summary Determination.**

19 11. RCW 81.77.040 requires an applicant for a certificate of public convenience and
20 necessity to operate as a solid waste collection company to present evidence on certain factual
21 issues in support of its application, including issues relevant to the applicant's financial and
22 operational fitness.

23 12. Where an applicant seeks a certificate to operate in a territory already served by
24 another certificate holder, RCW 81.77.040 provides that the Commission may only grant such
25 authority "after notice and an opportunity for a hearing . . . only if the existing solid waste
26 collection company or companies serving the territory will not provide service to the

1 satisfaction of the Commission or if the existing solid waste collection company does not
2 object.” Here, Waste Management has applied for a certificate of public convenience and
3 necessity to operate in a territory already served by Stericycle and the WRRRA Protestants.
4 Stericycle and the WRRRA Protestants have filed protests under WAC 480-07-305(3)(g)
5 objecting to Waste Management’s application. Stericycle has challenged Waste Management’s
6 application on all grounds relevant to the public convenience and necessity, including fitness.
7 As a party to this proceeding with a right to “object” under RCW 81.77.040, Stericycle is
8 entitled address all issues relevant to the Commission’s decision on the application, including
9 the applicant’s fitness.⁵ The Commission has allowed protestants to contest an applicant’s
10 financial and operational fitness in all of its prior medical waste application cases.⁶
11 Accordingly, Stericycle has standing to contest Waste Management’s financial and operational
12 fitness and to oppose its Motion for Summary Determination.

13 13. Some further explanation of Stericycle’s interest in this proceeding may be in
14 order in light of the Commission’s suggestion in Order 03 that Stericycle and the WRRRA
15 Protestants have not identified “any legitimate interest” in challenging Waste Management on
16 its financial or operational fitness.⁷ Of course, underlying Stericycle’s position in this case is
17 Stericycle’s concern that the entry of a new carrier with authority overlapping Stericycle’s

19 ⁵ See *American Environmental Management Corp.*, Order M.V.G. No 1452, pp. 8-9 (recognizing the
20 protestant’s argument regarding the applicant’s fitness). See also *West Waste & Recycling, Inc.*, Docket
TG-091259, pp. 9-13 (analyzing the fitness of competing applicants for authority based on evidence and
argument offered by protestant).

21 ⁶ See *Ryder Distribution Resources*, Order M.V.G. No. 1761, pp. 5, 9-10 (addressing contested fitness
22 of applicant that had been providing services under a temporary certificate); *Sureway Medical Services*,
Order M.V.G. No. 1663, pp. 4, 17 (addressing fitness of applicant currently providing service under an
23 existing permanent certificate); See also, *Sure-Way Incineration*, Order M.V.G. No. 1451, pp. 5, 8-10;
American Environmental Management, Order M.V.G. No. 1452, pp. 4-5.

24 ⁷ Order 03, Docket TG-120033, at ¶17. The suggestion that Stericycle’s interest in this proceeding
25 might not be “legitimate” is echoed by Waste Management’s accusation that Stericycle’s “intended
26 goal” is to make it “more expensive and more burdensome for Waste Management to pursue this
Application.” Motion for Summary Determination at ¶14. This accusation is not only insulting and
unprofessional -- it is silly. The cost of this proceeding to Waste Management will be insignificant to
Waste Management by any measure and certainly less as a percentage of income, revenues or assets
than the cost to Stericycle.

1 could harm Stericycle's business. This is a perfectly "legitimate" interest, as RCW 81.77.040's
2 hearing requirement in cases involving applications for overlapping authority makes clear and
3 as should be obvious to the Commission without any special demonstration.

4 14. Nonetheless, in light of the concerns expressed in Order 03, Stericycle offers the
5 following additional explanation for its opposition to the present motion. While Stericycle
6 continues to evaluate the potential impacts of Waste Management's entry into the biomedical
7 waste collection business in Washington, Stericycle's present view is that Washington
8 generators cannot support two carriers with statewide biomedical waste collection authority at
9 the current rate and service levels currently offered by Stericycle and that a grant of statewide
10 authority to Waste Management will ultimately result in increased rates or a reduction in
11 service levels (or both) to generators throughout the state but particularly to small quantity
12 generators in rural and less populated areas distant from major transportation corridors.

13 15. The history of biomedical collection in Washington over the past 20 years is not
14 the history of Stericycle gobbling up or elbowing aside its competitors, as Waste Management
15 likes to suggest; rather, it is the history of Stericycle's expansion to respond to the needs of
16 Washington generators in the wake of abandonment of this market by much larger general solid
17 waste collection companies, such as Waste Management and Browning-Ferris Industries.
18 These companies abandoned their Washington biomedical waste collection operations because
19 the Washington market for biomedical waste collection services was not large enough or
20 lucrative enough to support them following Stericycle's entry into the market. This history
21 should give the Commission pause about assuming that this market can support two statewide
22 carriers without adverse effects on rates or service levels.

23 16. The Commission has determined that Waste Management may re-enter the
24 biomedical waste collection business in the territory covered by its certificate G-237 and Waste
25 Management now seeks authority in this proceeding to serve the rest of the state. Waste
26 Management is a huge company. It owns and operates landfills and conducts universal solid

1 waste collection and recycling operations in major population centers in Washington. If
2 allowed to do so, a company like Waste Management could support an unprofitable biomedical
3 waste collection business in Washington indefinitely with subsidies from its other businesses.
4 Because biomedical waste collection is Stericycle's only business, Stericycle cannot do the
5 same. Accordingly, Stericycle has an interest in ensuring that the service proposed by Waste
6 Management is financially feasible on its own terms without subsidies from its other businesses
7 and, if competition is allowed, that Stericycle will be able to compete with Waste Management
8 on a level playing field. For this reason, Stericycle seeks to address in this proceeding Waste
9 Management's operational and financial arrangements for the support of the proposed service,
10 including the degree to which Waste Management's biomedical waste collection service will be
11 operated as a separate business (with its own budgets and financial accountability), the
12 relationship between Waste Management's biomedical waste collection business and Waste
13 Management's other businesses and related issues intertwined with the issues of Waste
14 Management's financial and operational fitness.

15 **B. The Applicable Standard for Decision on a Motion for Summary**
16 **Determination.**

17 17. Under RCW 81.77.040 and the Commission's prior cases, the Applicant must
18 present evidence of its financial and operational fitness to sustain its Application.⁸ WAC 480-
19 07-380(2)(a) provides that a motion for summary determination may be granted

20 if the pleadings filed in the proceeding, together with any properly admissible
21 evidentiary support (e.g., affidavits, fact stipulations, matters of which official
22 notice may be taken), show that there is no genuine issue as to any material fact
23 and that the moving party is entitled to judgment as a matter of law.

24 WAC 480-07-380(2)(a) provides further that "in considering a motion [for summary
25 determination], the commission will consider the standards applicable to a motion made under
26 CR 56 of the Washington superior court's civil rules."

⁸ See *R.S.T. Disposal Company, Inc.*, Order M.V.G. No. 1402, at 65-66.

1 18. A party moving for summary judgment under CR 56 bears the burden of
2 proving that there is “no genuine issue as to any material fact and that the moving party is
3 entitled to judgment as a matter of law.”⁹ The Commission must consider all evidence
4 submitted and all reasonable inferences from the evidence in the light most favorable to the
5 non-moving party.¹⁰ The burden is first on the moving party to demonstrate that the evidence
6 of record establishes a prima facie case that the moving party is entitled to judgment as a matter
7 of law.¹¹ Then, and only then, does the burden shift to the non-moving party to present
8 evidence that material facts are in dispute.¹² Any doubts as to the sufficiency of the evidence to
9 warrant judgment for the moving party as a matter of law or as to the existence of a genuine
10 issue of material fact must be resolved against the moving party.¹³ The Commission must deny
11 a motion for summary determination “if the record shows any reasonable hypothesis which
12 entitles the nonmoving party to relief.”¹⁴

13 **C. Waste Management Has Not Provided Evidence of the Factors Necessary to**
14 **Support a Determination of its Financial or Operational Fitness.**

15 19. Financial and operational fitness are statutory prerequisites to any award of new
16 authority. Like other aspects of fitness, financial and operational fitness are ultimately
17 conclusions of law that must be based on evidence in the record. RCW 81.77.040 and the
18 Commission’s prior cases applying RCW 81.77.040 identify the factors necessary to establish
19 these aspects of fitness.

20 Issuance of the certificate of necessity must be determined on, but not limited to
21 the following factors: The present service and the cost thereof for the
22 contemplated area to be served; an estimate of the cost of the facilities to be
23 utilized in the plant for solid waste collection and disposal, set out in an
24 affidavit or declaration; a statement of the assets on hand of the person, firm,
25 association, or corporation that will be expended on the purported plant for solid
26 waste collection and disposal, set out in an affidavit or declaration; a statement

⁹ CR 56(c); *Goad v. Hambridge*, 85 Wn. App. 98, 102, 931 P.2d 200 (1997).

¹⁰ *Goad*, 85 Wn. App. at 102.

¹¹ *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992).

¹² *Atherton Condominium Ass’n v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

¹³ *Id.*

¹⁴ *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980).

1 of prior experience, if any, in such field by the petitioner, set out in an affidavit
2 or declaration; and sentiment in the community contemplated to be served as to
the necessity for such a service.¹⁵

3 Thus, RCW 81.77.040 explicitly requires the applicant to make a showing of -- and the
4 Commission to determine whether to issue a certificate based on -- “the cost” of the proposed
5 service; “the cost of the facilities to be utilized in the plant for solid waste collection and
6 disposal;” and “the assets on hand of the [applicant] that will be expended on the purported
7 plant for solid waste collection and disposal.” While each of these statutory requirements
8 stands alone, each is also a necessary part of the evidence required to establish an applicant’s
9 financial and operational fitness. Thus, it is not possible to determine an applicant’s financial
10 fitness before evidence has been presented to show the cost of the proposed service, including
11 the cost of necessary equipment, personnel and facilities. Similarly, it is not possible to
12 determine an applicant’s operational fitness until evidence has been presented that the applicant
13 has the specialized equipment, personnel and facilities necessary to provide the proposed
14 service. None of this evidence necessary to support a finding of financial or operational fitness
15 is found in the present record. The required evidentiary showing has never been waived merely
16 because the applicant for new authority has existing authority for service in another territory or
17 a history of past operations¹⁶ or is a large or profitable company.¹⁷ The Commission’s Order
18 03 makes clear that the Commission will require Waste Management to establish its fitness
19 through evidence in the record.¹⁸

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21 ¹⁵ RCW 81.77.040 (emphasis added).

22 ¹⁶ *American Environmental Management*, Order M.V.G. No. 1452, pp. 4-5; *R.S.T. Disposal Company, Inc.*, M.V.G. No. 1402.

23 ¹⁷ *See, e.g., Sureway Medical Services*, Order M.V.G. No. 1663, pp. 4, 17 (requiring fitness to be
24 demonstrated by a subsidiary of the Rabanco Companies); *American Environmental Management*,
Order M.V.G. No. 1452, pp. 4-5 (evaluating contested fitness of applicant with existing, profitable
25 operations and a parent entity with substantial earnings). *See also R.S.T. Disposal Company, Inc.*,
M.V.G. No. 1402 (evaluating and rejecting fitness of a large certificated carrier seeking new authority).

26 ¹⁸ “Order 01 neither states nor suggests that Waste Management has satisfied or been relieved of its
burden to provide its financial and operational fitness at this point in the proceeding. The 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.” Order 03 at ¶13.

1 20. The “evidence” on which Waste Management relies is described in the
2 “Statement of Facts” in its Motion for Summary Determination and consists entirely of certain
3 “public records” attached to the Declaration of Jessica L. Goldman in support of the motion,
4 coupled with the following assertions in Ms. Goldman’s brief:¹⁹

- 5 (a) “Waste Management is the largest regulated hauler of solid waste in
6 Washington.”
- 7 (b) Waste Management “holds general solid waste collection authority under
8 Certificate No. G-237.”
- 9 (c) Waste Management “has provided solid waste collection services subject to the
10 Commission’s oversight and approval for decades.”
- 11 (d) “Waste Management’s authorized service area under Certificate No. G-237
12 covers major portions of the State of Washington and includes densely
13 populated cities and vast, sparsely-populated unincorporated territories” in
14 various counties.²⁰
- 15 (e) “Waste Management operates solid waste collection services, including
16 biomedical waste collection service, throughout the Certificate No. G-237
17 territory.”

18 While Stericycle acknowledges that Waste Management holds Certificate No. G-237 and that
19 G-237 encompasses a significant geographical area, these facts are insufficient as a matter of
20 law to support a finding of financial or operational fitness. None of the other assertions Waste
21 Management’s “Statement of Facts” is supported by evidence in this record.

22 21. Waste Management’s legal argument on operational fitness seems to be that,
23 because it holds general solid waste collection authority in certain areas of the State, it is *ipso*
24 *facto* operationally fit to obtain biomedical waste collection authority in the additional territory

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26 ¹⁹ See Waste Management’s Motion for Summary Determination at pp. 1-2 (“Evidence Relied Upon”
and “Statement of Facts”); Declaration of Jessica L. Goldman in Support of Waste Management’s
Motion for Summary Determination.

²⁰ Waste Management supplements this claim by a citation to a brief filed by Stericycle in another
proceeding to the effect that the Certificate No. G-237 service territory encompasses the sources of 80%
of Washington’s biomedical waste. Whatever the facts may be as to this particular detail, the argument
of Stericycle’s counsel is clearly “properly admissible” evidence of nothing. WAC 480-07-380(2)(a).

1 covered by its Application. However, there is no authority for this argument; and, in fact, it is
2 inconsistent with the RCW 81.77.040 and Commission precedent.

3 22. RCW 81.77.040 does not distinguish between applications for entirely new solid
4 waste collection authority and applications by existing carriers for authority in a new service
5 territory. The same factual showing is required under RCW 81.77.040 for any application for a
6 certificate of public convenience and necessity.

7 23. The Commission has never held that a grant of general solid waste collection
8 authority to a carrier within one service territory automatically establishes the carrier's fitness
9 (financial, operational or otherwise) to receive authority for service in a new service territory.
10 To the contrary, the Commission has required applicants with existing authority who seek
11 broader authority to establish their fitness.²¹ The logical implication of Waste Management's
12 argument is that any general solid waste collection company with authority in one territory is
13 operationally fit as a matter of law to provide biomedical waste collection services throughout
14 the State. There is no authority for this argument.

15 24. The Commission's medical waste cases make clear that merely holding general
16 solid waste collection authority does not alone allow the Commission to infer a carrier's ability
17 (i.e., operational fitness) to provide biomedical waste collection services. In its cases
18 evaluating the need for specialized biomedical waste collection services overlapping the service
19 territories of traditional garbage companies, the Commission has distinguished emphatically
20 between authority to serve and ability to serve. For example, in *American Environmental*
21 *Management Corp.*, the Commission reached the following conclusions:

22 [T]he [specialized biomedical waste collection] service proposed by applicant
23 was not available, in any way, shape, or form, from any of the protestants
24 [holding general solid waste authority] during the relevant time. The protestants
25 did not have the equipment, personnel, or necessary disposal site available to
26 provide the service if requested. . . . Even assuming that satisfactory service is

²¹ See, e.g., *Sureway Medical Services*, Order M.V.G. No. 1663, p. 19 (requiring applicant with existing permanent biomedical waste collection authority in one area to demonstrate fitness to extend its operations to additional areas).

1 being provided by such solid waste collection companies in their collection
2 activities of traditional solid waste, it was not shown that those companies were
3 specially equipped and trained to meet the demonstrated need for specialized,
4 infectious waste collection service. . . . This specialized service involves
5 distinct operational requirements.²²

6 Waste Management asserts that it “operates . . . biomedical waste collection service”
7 throughout the G-237 service territory. But this representation lacks even the slightest
8 evidentiary support. The record does not contain any evidence of the biomedical waste
9 collection operations that Waste Management has conducted or is presently conducting, if any.

10 25. The documents attached to the Declaration of Jessica L. Goldman in support of
11 Waste Management’s Motion provide no information about the applicant’s current biomedical
12 waste collection activities or capabilities. To establish operational fitness, Waste Management
13 must produce evidence of its plan for service in the new territory and show that it has the
14 specialized equipment, trained personnel, organization, experience and disposal arrangements
15 necessary to meet the “distinct operational requirements” of the specialized biomedical waste
16 collection service proposed in its Application. By even the most liberal standard, Waste
17 Management has failed to make the required evidentiary showings. Therefore, Waste
18 Management’s Motion for Summary Determination as to its operational fitness must be denied.

19 26. The Declaration of Christopher Dunn in Opposition to Waste Management’s
20 Motion for Summary Determination directly disputes Waste Management’s ability to serve the
21 territory covered by its Application with the vehicles described in the Equipment List attached
22 to the Application. Clearly, Mr. Dunn’s testimony creates a disputed issue of material fact
23 concerning Waste Management’s ability -- i.e., its operational fitness -- to conduct the
24 operations proposed in its Application.

25 ²² *American Environmental Management*, Order M.V.G. No. 1452, p. 8. *See also Sure-Way*
26 *Incineration* Order M.V.G. No. 1451, p. 16 (noting that existing certificated solid waste collection
companies “did not have equipment, personnel, or a disposal plan which would have enabled them to
provide the [specialized biomedical waste collection] service” proposed by the applicant).

1 27. Waste Management has provided no evidence of the following statutory factors
2 relevant to its financial and operational fitness:

- 3 • **Cost of Service:** There is no evidence in the record regarding what it will cost
4 Waste Management to start up and operate the proposed biomedical waste
5 collection service in the areas of Washington covered by its Application.²³
6 Similarly, Waste Management has not provided any cost of service information
7 for its current biomedical waste collection business in the territory covered by
8 G-237.
- 9 • **Assets on Hand:** Although Waste Management submitted its annual financial
10 report for 2010, the record does not contain any evidence concerning the
11 financial resources that Waste Management has committed to its existing
12 biomedical waste collection operations, if any, or that it intends to commit to the
13 proposed new service. Waste Management's Application indicates that Waste
14 Management will operate its biomedical waste collection business as "WM
15 Healthcare Solutions of Washington," but provides no information about
16 whether WM Healthcare Solutions of Washington will be organized and
17 managed as a separate division within Waste Management, with separate
18 budgets and accounting for its assets and liabilities, costs and revenues. Clearly,
19 the assets of the umbrella company are only relevant to the extent that they are
20 available to the operating division that will conduct biomedical waste collection
21 services. Waste Management has provided no evidence concerning its
22 organizational structure or the availability to WM Healthcare Solutions of
23 Washington of the assets shown in its 2010 annual report.

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²³ *Sure-Way Incineration, Inc.*, Order M.V.G. No. 1451 (Nov. 30, 1990) at p. 4 ("The Commission has held that the applicant must establish 'its costs of operation and facilities and demonstrate the financial feasibility of the operation.'") (citation omitted).

- 1 • **Costs of Facilities, Equipment and Personnel:** The Application indicates that
2 Waste Management will use three medical waste collection vehicles, one
3 highway tractor and seven reefer trailers in providing its proposed biomedical
4 waste collection services.²⁴ As the Declaration of Christopher Dunn makes
5 clear, this meager equipment list is insufficient for the proposed service in the
6 territory covered by the Application.²⁵ With the exception of this Equipment
7 List, Waste Management has presented no evidence concerning its operating
8 plan for the proposed service or the facilities, transportation equipment or
9 personnel that will be required and committed to its proposed operations;
10 whether distributed truck yards, storage facilities or transfer facilities will be
11 used and, if so, where they will be located; what arrangements Waste
12 Management has made for access to treatment and disposal facilities and the
13 terms and conditions of its access;²⁶ or the cost of specialized equipment,
14 facilities and personnel necessary to meet the requirements of its proposed
15 operations.²⁷
- 16 • **Prior Experience:** Waste Management has some history of providing traditional
17 solid waste collection services, but there is nothing in the record that describes
18 its experience in the specialized business of biomedical waste collection and
19 disposal. Although Waste has had authority to conduct biomedical waste
20 collection services in the territory covered by its existing G-certificate for many
21 years, there is no evidence in the record concerning Waste Management's actual

22 _____
23 ²⁴ See WM Application, Equipment List.

24 ²⁵ Declaration of Christopher Dunn in Opposition to Motion for Summary Determination.

25 ²⁶ In *Sure-Way Incineration, Inc.*, Order M.V.G. 1451, at p. 13 (Nov. 30, 1990), the Commission
26 determined that an applicant's inability to ensure access to a reliable disposal facility was fatal to its
operational fitness to provide biomedical waste collection services. Waste Management has presented
no evidence concerning its arrangements for biomedical waste disposal.

²⁷ See also, *Ryder Distribution Resources, Inc.*, Order M.V.G. No. 1761, p. 9 (Aug. 11, 1995) ("An
applicant must also state its assets and establish its costs of operation and facilities.").

1 experience with biomedical waste collection.²⁸ To prevail on its present
2 Application, Waste Management must provide evidence concerning the
3 experience of its personnel in biomedical waste collection and/or related fields.

- 4 • **Financial Feasibility of the Proposed Operations:**²⁹ The Commission requires
5 an Applicant for solid waste collection authority to demonstrate the financial
6 feasibility of its proposed operations.³⁰ Typically, this requirement is addressed
7 by the submission of a plan of operation and a pro forma income statement
8 showing projected costs and revenues.³¹ Waste Management has offered no
9 evidence of the financial feasibility of its proposed operations.
- 10 • **Adequate Equipment and Personnel:** The Commission has held that “a
11 showing of adequate equipment and personnel” is necessary to show an
12 applicant’s operational ability to provide the proposed service.³² Waste
13 Management has provided no operating plan and no evidence that it has the
14 equipment, facilities or personnel necessary to implement its proposed statewide
15 services.

17 ²⁸ The 2010 Annual Report submitted with Waste’s Application and as an exhibit to the Declaration of
18 Jessica L. Goldman contains no cost or revenue figures for biomedical waste collection services; there is
19 no evidence in the record to indicate that Waste Management has provided such services.

20 ²⁹ The Commission has discussed financial feasibility both as related to financial fitness and as a
21 separate issue; however, they are typically discussed together in the cases. *See, e.g., Ryder Distribution*
22 *Resources, Inc.*, Order M.V.G. No. 1761 at 9 (“The questions of an applicant’s financial fitness and the
23 cost and feasibility of the proposed operations are separate, but they are so interrelated that they will be
24 discussed together.”).

25 ³⁰ *Ryder Distribution Resources, Inc.*, Order M.V.G. No. 1761, p. 9 (Aug. 11, 1995) (“[T]he applicant
26 must demonstrate the financial feasibility of the operation.”); *Sure-Way Incineration, Inc.*, Order
M.V.G. No. 1451 (Nov. 30, 1990) at p. 4 (“The Commission has held that the applicant must establish
‘its costs of operation and facilities and demonstrate the financial feasibility of the operation.’”) (citation
omitted).

³¹ *See, e.g., Sureway Medical Services, Inc.*, Order M.V.G. No. 1663 at p. 18 (Nov. 18, 1993).

³² *Sure-Way Incineration, supra*, at 13. *See also, American Environmental Management Corp.*, Order
M.V.G. 1452, at pp. 4-5 (Nov. 30, 1990) (reciting that the applicant “has adequate facilities, suitable
specialized equipment and supplies and qualified, trained personnel” in approving an application for
biomedical waste collection authority); *Sureway Medical Services, Inc., supra*, at p. 17 (Nov. 18, 1993)
 (“Sureway has shown that it has adequate equipment and personnel to provide the service and has a
disposal site available on a consistent, reliable basis.”)

1 Because the evidence in the record does not address, much less prove, the facts necessary to
2 support ultimate conclusions concerning Waste Management's financial or operational fitness,
3 the Commission must deny the Motion for Summary Determination.

4 **D. Stericycle Should be Permitted to Conduct Discovery and Cross-Examine**
5 **Waste Management's Witnesses on Factual Matters Relevant to Waste**
6 **Management's Financial and Operational Fitness.**

7 28. Even if the current record could be considered to provide prima facie evidence
8 of all facts necessary to permit summary determination of Waste Management's financial and
9 operational fitness, Civil Rule 56(f) would normally preclude such a determination at this early
10 stage in this adjudicative proceeding.

11 29. If permitted, Stericycle proposes to conduct discovery addressing all of the
12 factual issues detailed above with the objective of testing whether Waste Management is
13 financially and operationally fit and determining whether the service proposed by Waste
14 Management is financially feasible without extended subsidies from its other businesses.

15 30. Typically, motions for summary judgment are not made until each side has
16 enjoyed a full opportunity to engage in formal discovery.³³ CR 56(f) allows a court (or, here,
17 the Commission) to forestall consideration of a premature motion for summary judgment. The
18 rule provides:

19 Should it appear from the affidavits of a party opposing the motion that he
20 cannot, for reasons stated, present by affidavit facts essential to justify his
21 opposition, the court may refuse the application for judgment or may order a
22 continuance to permit affidavits to be obtained or depositions to be taken or
23 discovery to be had or may make such other order as is just.³⁴

24 This means that, when the non-moving party cannot effectively oppose a motion for summary
25 judgment because there has been inadequate opportunity to develop the facts essential to its
26

³³ 4 Wash. Prac., Rules Practice CR 56 (5th ed.).

³⁴ CR 56(f). While a court is not prevented from denying a continuance simply because the period for
discovery has not ended, *see, e.g., Lewis v. Bell*, 45 Wn. App. 192 (1986), it is very unusual for a court
to deny a continuance where, as here, the case is at a preliminary stage and discovery has not yet
commenced.

1 opposition, the Commission may delay ruling on summary judgment until the parties have
2 enjoyed a full and fair opportunity to conduct discovery.³⁵ The rule works to prevent a moving
3 party who controls information relevant to the issue to be decided from obtaining a premature
4 determination before the non-moving party has “the opportunity to discover information that is
5 essential to his opposition to the motion.”³⁶

6 31. Washington courts have taken a liberal approach to Rule 56(f) motions,
7 explaining that once a party merely identifies a “good reason” why necessary discovery cannot
8 be completed in time for summary judgment proceedings, “the court has a *duty* to accord the
9 parties a reasonable opportunity to make their record complete before ruling”³⁷ This is
10 “especially [true] where the continuance . . . would not result in a further delay of the trial.”³⁸
11 Stericycle’s proposed continuance does not threaten to delay the hearing on this matter.

12 32. The federal courts have taken a similarly liberal approach to requests for
13 continuances, explaining that “where the facts are in possession of the moving party a
14 continuance of a motion for summary judgment for purposes of discovery should be granted
15 *almost as a matter of course.*”³⁹ This is especially the case where summary judgment is sought
16 “before a party has had a realistic opportunity to pursue discovery relating to its theory of the
17

18 ³⁵ See *Garrett v. City and County of San Francisco*, 818 F.2d 1515 (9th Cir. 1987). See *Coggle v. Snow*,
19 56 Wn.App. 499, 508, 784 P.2d 554 (explaining that in considering a motion for continuance made
pursuant to CR 56(f), a trial court’s “primary consideration” should be ensuring “justice”).

20 ³⁶ *Crystalline H[2]O, Inc., NWP v. Ormiski, et al.*, 105 F. Supp. 2d 3, 8 (N.D. NY 2000). See
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986).

21 ³⁷ *Cofer v. Pierce County*, 8 Wn.App. 258, 262-63, 505 P.2d 476 (1973). The *Cofer* court only
22 considered CR 56(f)’s application to cases where a party is unable to obtain an affidavit of a material
23 witness in time for summary judgment proceedings. More recent cases have taken explained that “[a]
trial court may order a continuance . . . to provide a nonmoving party additional time to obtain
24 affidavits, take depositions, or otherwise conduct discovery.” *Mannington Carpets, Inc. v. Hazelrigg*,
94 Wn.App. 899, 902, 973 P.2d 1103 (1999) (citing *Cofer*).

24 ³⁸ *Cofer*, 8 Wn.App. at 263.

25 ³⁹ *Sames v. Gable*, 732 F.2d 48, 51 (3rd Cir. 1984) (emphasis added); *Burlington Northern Santa Fe R.*
Co. v. Assiniboine & Sioux Tribes of F. Peck Reservation, 323 F.3d 767, 773-74 (9th Cir. 2003) (citing
26 *Sames* for support). See also 10B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE
AND PROCEDURE, Civil 3d §2740 (1998 & Supp. 2001) (advising that “CR 56(f) is to be applied with a
spirit of liberality”).

1 case.”⁴⁰ And while the rule “facially gives judges the discretion to disallow discovery when the
2 non-moving party cannot yet submit evidence supporting its opposition,” the United States
3 Supreme Court “has restated the federal rule as *requiring*, rather than merely permitting,
4 discovery ‘where the non-moving party has not had the opportunity to discover information
5 that is essential to its opposition.’”⁴¹

6 33. Stericycle has clarified its “legitimate interest” in seeking discovery on issues
7 relevant to Waste Management’s financial and operational fitness. Accordingly, Stericycle
8 requests that the Commission continue Waste Management’s Motion for Summary
9 Determination either (a) until Stericycle has had a reasonable opportunity to conduct discovery
10 on these issues, as contemplated by CR 56(f) or, (b) in the alternative, until the hearing on this
11 matter at which time the Commission will receive witness testimony and Stericycle,
12 Commission Staff and the WRRR Protestants will have an opportunity to present evidence and
13 cross-examine Waste Management’s witnesses on these issues.

14 V. Conclusion

15 34. As noted above, ultimate determinations concerning an applicant’s financial or
16 operational fitness depend on issues of fact on which no evidence has been presented in this
17 proceeding. RCW 81.77.040 explicitly requires the Applicant to make an evidentiary showing
18 of “the cost” of the proposed service; “the cost of the facilities to be utilized in the plant for
19 solid waste collection and disposal;” and “the assets on hand of the [applicant] that will be
20 expended on the purported plant for solid waste collection and disposal.” These evidentiary
21 showings are both independent statutory requirements and necessary steps in establishing an
22 applicant’s financial and operational fitness.

23 35. An applicant’s financial and operational fitness have been contested and ruled
24 on by the Commission after hearing in all prior medical waste application proceedings. In each

25 ⁴⁰ *Burlington*, 323 F.3d at 773-775.

26 ⁴¹ *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Liberty Lobby*, 744 U.S.
at 250 n.5) (emphasis added).

1 case, the applicant has borne the burden of proof.⁴² The Commission has never denied
2 protestants the opportunity to contest the applicant's proof on any fitness issue.

3 36. An applicant with existing authority must specifically prove its financial fitness
4 to serve the new territory that is being sought in its application.⁴³ The Commission's decisions
5 show that the fitness standards apply equally to new entrants and those seeking to "extend"
6 existing authority.⁴⁴

7 37. Where a hearing on a contested application is required, an applicant must
8 present evidence at the hearing concerning the "factors" specified in RCW 81.77.040 and other
9 issues, discussed above, identified in the Commission's decided cases relevant to the
10 applicant's financial and operational fitness, and protestants are entitled to contest that
11 evidence. Since the facts relevant to Waste Management's financial and operational fitness are
12 matters on which Waste Management must present evidence and bears the burden of proof at
13 the hearing, and are essential to the Commission's decision on the Application, discovery
14 should be allowed on those issues. If discovery is denied, determination of these issues should
15 be deferred until after the hearing to allow Commission Staff, Stericycle and the other
16 protestants to test Waste Management's evidence by cross-examining its witnesses and
17 identifying and presenting contrary evidence.

18 38. The Commission should reject Waste Management's invitation to truncate this
19 proceeding and to rule prematurely on ultimate issues of law for which there is insufficient
20 support in the record. The issues of financial and operational fitness should be deferred until a
21 complete record has been made of the equipment, personnel and facilities required for the
22 proposed service, the costs thereof and the resources which the applicant has available to
23

24 ⁴² See *Ryder Distribution Resources, Inc.*, Order M.V.G. No. 1761, pp. 5, 9-10 (Aug. 11, 1995);
25 *Sureway Medical Services, Inc.*, Order M.V.G. No. 1663, pp. 4, 17 (Nov. 19 1993); *American*
Environmental Management Corp., Order M.V.G. No. 1452, p. 5 (Nov. 30, 1990); *Sure-Way*
Incineration, Inc., Order M.V.G. No. 1451, pp. 5, 8-10 (Nov. 30, 1990).

26 ⁴³ *Sureway Medical Services*, Order M.V.G. No. 1663, p. 19.

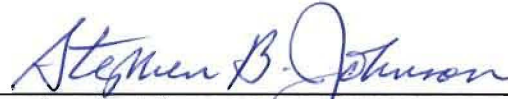
⁴⁴ *Id.*

1 devote to the proposed service. At present, there is no evidence in the record of what resources,
2 equipment, personnel and facilities will be required. An applicant's fitness can only be
3 determined in relation to the service it proposes to provide, as established by the applicant's
4 evidence. Waste Management's financial and operational fitness cannot be determined until it
5 provides evidence of its operating plan and the resources required to implement that plan.
6 Fitness cannot be determined in a vacuum.

7 DATED this 25th day of May, 2012.

8 Respectfully submitted,

9 GARVEY SCHUBERT BARER

10 By 

11 Stephen B. Johnson, WSBA #6196
12 Jared Van Kirk, WSBA #37029
13 Attorneys for Protestant Stericycle of
14 Washington, Inc.

1 **CERTIFICATE OF SERVICE**

2 I, Vickie L. Owen, certify under penalty of perjury under the laws of the State of
3 Washington that, on May 25, 2012, I caused to be served on the person(s) listed below in the
4 manner shown a copy of STERICYCLE’S OPPOSITION TO WASTE MANAGEMENT’S
5 MOTION FOR SUMMARY DETERMINATION AND MOTION FOR CONTINUANCE:

6 Washington Utilities and
7 Transportation Commission
8 1300 S. Evergreen Park Dr. SW
9 PO Box 47250
10 Olympia, WA 98504-7250
11 (360) 664-1160
12 records@utc.wa.gov

- 13 Via Legal Messenger
- 14 Via Facsimile
- 15 Via U.S. Mail, First Class,
16 Postage Prepaid
- 17 Via Email

18 Administrative Law Judge
19 Gregory Kopta
20 gkopta@utc.wa.gov

- 21 Via Email

22 Jessica Goldman
23 Polly L. McNeill
24 Summit Law Group
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- 41 Via Email

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Dated at Seattle, Washington this 25th day of May, 2012.



Vickie L. Owen
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