

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of

WASTE MANAGEMENT OF
WASHINGTON, INC. D/B/A WM
HEALTHCARE SOLUTIONS OF
WASHINGTON

For an extension of Certificate G-237 for a
Certificate of Public Convenience and
Necessity to Operate Motor Vehicles in
Furnishing Solid Waste Collection Service

DOCKET TG-120033

COMMISSION STAFF'S INITIAL
BRIEF ON PRELIMINARY LEGAL
ISSUE

1 In accordance with the procedural schedule established in this docket, the Staff of the Washington Utilities and Transportation Commission (“Staff”) submits this initial brief on the preliminary legal issue posed in Paragraph 6 of the Prehearing Conference Order.

I. BACKGROUND

2 In the application that initiated this docket, Waste Management of Washington, Inc. (“Waste Management”) seeks approval to “transport Biomedical Waste for collection and disposal throughout the State of Washington.”¹ Biomedical waste is “solid waste” whose collection the Commission regulates under RCW Chapter 81.77.² Generally, a company must obtain a “G certificate” from the Commission before hauling solid waste for

¹ *In re Waste Mgmt.*, Docket TG-120033, [Application](#) at 2 (filed Dec. 30, 2011).

² *In re Biomedical Waste Carriers*, Docket TG-970532, [Declaratory Order](#) at 10 (Wash. Utils. & Transp. Comm’n, Aug. 14, 1998); *In re Rowland d/b/a Kleenwell Biohazard & Gen. Ecology Consultants*, Docket TG-920304, Final Order at 6 (Wash. Utils. & Transp. Comm’n, Jan. 25, 1993.) Copies of most of the prior Commission orders cited herein are provided with this filing.

compensation in Washington.³ The Commission has interpreted the authority conferred by a general G certificate as including the authority to collect biomedical waste.⁴

3 Waste Management holds Certificate G-237, which authorizes it to collect solid waste throughout Skagit, Snohomish, King, Pierce, and Kittitas Counties, and in portions of Whatcom, Island, Kitsap, Mason, Chelan, Douglas, Okanogan, Grant, Lincoln, Benton, and Spokane Counties.⁵ The certificate expressly restricts Waste Management from collecting biomedical waste in a few areas of King County adjacent to Redmond,⁶ but Waste Management currently has authority to collect biomedical waste everywhere else within the service territory described in Certificate G-237.

4 Waste Management offered biomedical waste collection services in the early 1990s. In 1996, Waste Management sold its biomedical waste operation, but it did not sell the biomedical waste authority in Certificate G-237.⁷ In March 2011, Waste Management sought to resume offering biomedical waste collection services in Washington, and filed a tariff for collection of biomedical waste within the service territory described in Certificate

³ [RCW 81.77.040](#). Under [RCW 81.77.020](#), a company hauling solid waste under a contract with a city or town does not need a G certificate to perform that service.

⁴ *Stericycle v. Waste Mgmt.*, Docket TG-110553, [Order 02](#) ¶¶ 30, 37 (Wash. Utils. & Transp. Comm’n, July 13, 2011); see *In re Am. Envtl. Mgmt. Corp.*, Order M. V. G. No. 1452 at 7 (Wash. Utils. & Transp. Comm’n, Nov. 30, 1990) (“The Commission agrees that the permanent authority of existing G-certificate holders includes the authority to collect infectious waste”); *In re Sureway Med. Servs.*, Order M. V. G. No. 1663 at 5 (Wash. Utils. & Transp. Comm’n, Nov. 19, 1993) (“G-12 is a general solid waste permit, and therefore includes authority to collect and transport biomedical and biohazardous waste”); [WAC 480-70-041](#) (“Unless the company’s certificate is restricted against doing so, a traditional solid waste collection company may also perform specialized solid waste collection service”).

⁵ A copy of Certificate G-237 is attached to the application for extension of authority that Waste Management filed to initiate this docket. Additional copies are attached to the Declarations of Jessica Goldman that Waste Management filed on May 4, 2012.

⁶ The restriction appears in the paragraph labeled “(PID435)” on the fourth page of Certificate G-237.

⁷ See *Stericycle v. Waste Mgmt.*, Docket TG-110553, [Order 02](#) at 4 n.3 (Wash. Utils. & Transp. Comm’n, July 13, 2011).

G-237. The Commission permitted the tariff to go into effect by operation of law.⁸ Stericycle filed a complaint, alleging that Waste Management had abandoned its biomedical waste authority under Certificate G-237, and urging that Waste Management must get new authority from the Commission before collecting biomedical waste. The Commission rejected those arguments and dismissed the complaint.⁹

5 On December 30, 2011, Waste Management initiated this docket by applying for an extension of authority to enable it to provide biomedical waste collection service in the remainder of the State of Washington outside the territory described in Certificate G-237. The Commission received protests from Stericycle and four other companies that already serve all or part of the territory into which Waste Management proposes to expand.

6 Protestant Stericycle holds Certificate G-244, which authorizes it to collect biomedical waste throughout the State of Washington.¹⁰ Protestant Rubatino Refuse Removal holds Certificate G-58, which authorizes it to collect solid waste in most of Snohomish County. Protestant Consolidated Disposal Services holds Certificate G-190, which authorizes it to collect solid waste in portions of Grant and Adams Counties. Protestant Murrey's Disposal holds Certificate G-9, which authorizes it to collect solid waste in portions of Pierce, Jefferson, Clallam, and Grays Harbor Counties. Protestant Pullman Disposal holds Certificate G-42, which authorizes it to collect solid waste in part of Whitman County. Each protestant has a biomedical waste tariff on file with the

⁸ WM Healthcare Solutions of WA – [Tariff No. 2](#) (effective April 6, 2011), Docket TG-110552; see [WAC 480-70-262\(2\)](#).

⁹ *Stericycle v. Waste Mgmt.*, Docket TG-110553, [Order 02](#) (Wash. Utils. & Transp. Comm'n, July 13, 2011).

¹⁰ See *In re Ryder Distrib. Res., Inc.*, Order M. V. G. No. 1761 (Wash. Utils. & Transp. Comm'n, Aug. 11, 1995) (granting Stericycle's application for a certificate of public convenience and necessity under RCW 81.77.040).

Commission.¹¹

7 At one time, two companies, Stericycle and BFI Medical Waste Systems, had
statewide authority to collect biomedical waste in Washington.¹² Stericycle acquired BFI in
2000 and is the only statewide provider at this time.¹³ Waste Management now seeks
statewide authority as well.

II. ARGUMENT

8 The Commission must consider Waste Management's application under the
standards of RCW 81.77.040, which provides, in part:

A solid waste collection company shall not operate for the hauling of solid
waste for compensation without first having obtained from the commission a
certificate declaring that public convenience and necessity require such
operation. . . .

Issuance of the certificate of necessity must be determined on, but not limited
to, the following factors: . . . sentiment in the community contemplated to be
served as to the necessity for such a service.

When an applicant requests a certificate to operate in a territory already
served by a certificate holder under this chapter, the commission may, after
notice and an opportunity for a hearing, issue the certificate only if the
existing solid waste collection company or companies serving the territory
will not provide service to the satisfaction of the commission or if the
existing solid waste collection company does not object.

9 In the Prehearing Conference Order in this docket, the Commission directed the
parties:¹⁴

to brief the legal issue of the interpretation of the provision in RCW

¹¹ Stericycle of Washington, Inc. – [Tariff No. 1](#); Rubatino Refuse Removal – Tariff No. 7, [Docket TG-031057](#); Consolidated Disposal Services – [Medical Waste Tariff No. 1](#), Docket TG-910840; Murrey's Disposal Co. – Medical Waste Tariff No. 3, [Docket TG-072119](#); Pullman Disposal Service, [Medical Waste Tariff No. 1](#).

¹² *In re Biomedical Waste Carriers*, Docket TG-970532, [Declaratory Order](#) at 5, 10-11 n.1 (Wash. Utils. & Transp. Comm'n, Aug. 14, 1998).

¹³ *See In re Stericycle*, Docket TG-001559 (tariff revisions following Stericycle's acquisition of BFI Medical Waste Systems of Washington, Inc.).

¹⁴ *In re Waste Mgmt.*, Docket TG-120033, [Order 01](#) ¶ 6 (Wash. Utils. & Transp. Comm'n, April 16, 2012).

81.77.040 that the Commission may issue a certificate for a service territory served by another certificate holder “only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission.” Specifically, parties must address whether the statute authorizes the Commission to grant a certificate only if the applicant demonstrates that the service it proposes to provide is different than, or superior to, the services the incumbent provider offers or that the incumbent provider is otherwise unwilling or unable to provide the service the applicant proposes to offer.

A. Summary of Staff’s Position

10 The preliminary legal issue posed in the Prehearing Conference Order seems to assume that evidence about the applicant and the incumbent is what matters most in a determination of whether an incumbent “will not provide service to the satisfaction of the commission” under RCW 81.77.040. That is not how the Commission has approached the issue in biomedical waste cases, however. In the area of biomedical waste, the Commission has focused on the needs of *customers*, not the applicant or incumbent. Testimony from biomedical waste generators about their needs is the most persuasive evidence on the issue of “provid[ing] service to the satisfaction of the commission.” RCW 81.77.040 authorizes the Commission to grant a certificate for biomedical waste collection authority in an area already served by other providers if the applicant demonstrates, through such testimony, that incumbent providers are not meeting the specialized needs of customers.

B. The Commission Relies on Testimony from Customers to Determine Whether Incumbents will Provide Biomedical Waste Collection Service to the Satisfaction of the Commission.

11 The biomedical waste collection industry emerged as a specialized industry in Washington during the 1980s. Several companies applied to the Commission for authority to collect biomedical waste. In orders issued during the 1990s, the Commission ruled that biomedical waste collection is different from neighborhood garbage collection, requiring a

different policy approach.¹⁵ The Commission emphasized that it would rely on testimony from biomedical waste customers to determine whether existing providers “will not provide service to the satisfaction of the commission” under RCW 81.77.040:

The satisfactory nature of service by existing providers of specialized solid waste collection services will be measured according to the specialized needs of customers. The Commission will give considerable weight to the judgment of biohazardous waste generators regarding the sufficiency of existing service, because they are professionally involved in health care, and are in a unique position to evaluate the risks and benefits of collection and disposal services based upon their professional training and experience, and are best able to evaluate what type of service will best limit their potential exposure to civil liability for improper transportation and disposal. . . . [M]ere desire for a backup carrier in the event of possible discontinuance of, or deterioration in, existing service, or mere preference for competition, does not demonstrate a need for an additional carrier.¹⁶

The Commission explained that it would defer to customers because it “has reservations about substituting its judgment for that of the persons who have unique knowledge about the requirements of the service they need. It seems incongruous for this body to tell a professional in the body of knowledge at issue that a service does or does not meet her or his needs.”¹⁷ Several orders describe testimony that the Commission found persuasive to show that existing providers were not providing service meeting customers’ specialized needs.¹⁸

¹⁵ *In re Biomedical Waste Carriers*, Docket TG-970532, [Declaratory Order](#) at 10-11 (Wash. Utils. & Transp. Comm’n, Aug. 14, 1998); *In re Ryder Distrib. Res., Inc.*, Order M. V. G. No. 1761 at 11 (Wash. Utils. & Transp. Comm’n, Aug. 11, 1995); *In re Med. Res. Recycling Sys., Inc.*, Order M. V. G. No. 1707 at 2 (Wash. Utils. & Transp. Comm’n, May 25, 1994); *In re Sureway Med. Servs., Inc.*, Order M. V. G. No. 1663 at 9-11 (Wash. Utils. & Transp. Comm’n, Nov. 19, 1993); see *Stericycle v. Waste Mgmt.*, Docket TG-110553, [Order 02 ¶¶ 36-39](#) (Wash. Utils. & Transp. Comm’n, July 13, 2011).

¹⁶ *In re Sureway Med. Servs., Inc.*, Order M. V. G. No. 1674 at 4-5 (Wash. Utils. & Transp. Comm’n, Dec. 20, 1993). See also *In re Med. Res. Recycling Sys., Inc.*, Order M. V. G. No. 1707 at 2-3 (Wash. Utils. & Transp. Comm’n, May 25, 1994); *In re Ryder Distrib. Res., Inc.*, Order M. V. G. No. 1596 at 11-12 (Wash. Utils. & Transp. Comm’n, Jan. 25, 1993).

¹⁷ *In re Med. Res. Recycling Sys., Inc.*, Order M. V. G. No. 1707 at 4 (Wash. Utils. & Transp. Comm’n, May 25, 1994).

¹⁸ *In re Ryder Distrib. Res., Inc.*, Order M. V. G. No. 1596 at 23-26 (Wash. Utils. & Transp. Comm’n, Jan. 25, 1993); *In re Sureway Med. Servs., Inc.*, Order M. V. G. No. 1663 at 12-13, 26-29 (Wash. Utils. & Transp. Comm’n, Nov. 19, 1993); *In re Med. Res. Recycling Sys., Inc.*, Order M. V. G. No. 1707 at 3, 6-7 (Wash. Utils. & Transp. Comm’n, May 25, 1994); *In re Ryder Distrib. Res., Inc.*, Order M. V. G. No. 1761 at 10-12, 16-19

12

The first company to receive statewide biomedical waste collection authority from the Commission was American Environmental Management Corporation, a predecessor to BFI Medical Waste Systems.¹⁹ In another order issued on the day that it granted BFI's application, the Commission explained that it was not foreclosing other applications for statewide authority:²⁰

The collection of medical waste is quite a different situation [from neighborhood solid waste collection]. Customers are only a small percentage of the total business in any given territory. The applicants for medical waste authority wish to serve the entire state or large portions of the state. The entire operation more closely resembles that of a motor freight common carrier with statewide authority than that of a typical garbage company. The Commission is at this point unconvinced that any single carrier presently authorized to serve in the state of Washington could provide a level of service, on its own, which would satisfy the Commission and meet the needs of the waste generators. Therefore, while sound policy and economic reasons exist in favor of exclusive authority for typical residential or commercial collection in a specific territory, those reasons are less compelling in this new, specialized area. The commission is not ready to say that a grant of one application for statewide authority would preclude a grant of others, and will consider this element in future proceedings.

13

The Commission had the opportunity to consider a second statewide application in 1995, when the Commission granted statewide authority to Stericycle. In granting Stericycle's application, the Commission relied on the testimony of witnesses from hospitals and clinics to conclude that some customers had specialized needs that were not being met by BFI and other providers.²¹ Based on that evidence, the Commission concluded that the companies protesting Stericycle's application did not provide service to the satisfaction of

(Wash. Utils. & Transp. Comm'n, Aug. 11, 1995).

¹⁹ *In re Am. Envtl. Mgmt. Corp.*, Order M. V. G. No. 1452 (Wash. Utils. & Transp. Comm'n, Nov. 30, 1990).

²⁰ *In re Sure-way Incineration, Inc.*, Order M. V. G. No. 1451 at 16-17 (Wash. Utils. & Transp. Comm'n, Nov. 30, 1990); *see In re Sureway Med. Servs., Inc.*, Order M. V. G. No. 1674 at 6 (Wash. Utils. & Transp. Comm'n, Dec. 20, 1993).

²¹ *In re Ryder Distrib. Res., Inc.*, Order M. V. G. No. 1761 at 10-12, 16-19 (Wash. Utils. & Transp. Comm'n, Aug. 11, 1995).

the Commission, and that Stericycle had established public need for its services.²² The Commission should take a similar approach in this docket when it considers Waste Management’s application to expand into areas where Waste Management does not currently have biomedical waste collection authority.

C. Staff Takes no Position at this Time on Other Issues in this Docket.

14 Whether the incumbent providers “will not provide service to the satisfaction of the commission” is only one of the issues the Commission must determine before it makes a decision on Waste Management’s application. The second paragraph of RCW 81.77.040 also requires the Commission to consider these factors:

The present service and the cost thereof for the contemplated area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal, set out in an affidavit or declaration; a statement of the assets on hand of the . . . corporation that will be expended on the purported plant for solid waste collection and disposal, set out in an affidavit or declaration; a statement of prior experience, if any, in such field by the petitioner, set out in an affidavit or declaration; and sentiment in the community contemplated to be served as to the necessity for such a service.

This Initial Brief on Preliminary Legal Issue does not address the above-quoted factors, some of which are referred to as “financial and operational fitness.”²³ As the presiding officer has previously ruled in this docket, Waste Management will have the burden of proof to demonstrate “financial and operational fitness.”²⁴ Staff takes no position on fitness at this time.

III. CONCLUSION

15 According to WAC 480-70-426, “It is a matter of statewide concern that biomedical waste be handled in a manner that protects the health, safety, and welfare of the public, the

²² *Id.* at 20.

²³ *In re Waste Mgmt.*, Docket TG-120033, [Order 04](#) ¶ 6 (Wash. Utils. & Transp. Comm’n, June 4, 2012).


²⁴ *Id.* ¶ 9.

environment, and the workers who handle the waste.” Historically, the Commission has encouraged competition in the provision of biomedical waste collection services because it promotes a higher quality of service in protecting those interests.²⁵ In this docket, the Commission should continue that practice, and should rely on testimony from the people who use biomedical waste collection services to determine whether incumbent providers “will not provide service to the satisfaction of the commission” under RCW 81.77.040.

DATED this 14th day of June, 2012.

Respectfully submitted,

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²⁵ See *Stericycle v. Waste Mgmt.*, Docket TG-110553, Order 02 ¶¶ 36-39 (Wash. Utils. & Transp. Comm’n, July 13, 2011).