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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 No. TG-120033

**WASTE MANAGEMENT'S OPENING  
BRIEF ON PRELIMINARY LEGAL  
ISSUE**

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## I. RELIEF REQUESTED

1. Applicant Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington (“Waste Management”) submits this brief in response to the question posed by the Administrative Law Judge in the April 16, 2012 Prehearing Conference Order (“Prehearing Conference Order”):

Whether [RCW 81.77.040] authorizes the Commission to grant a certificate [authorizing biomedical waste collection services] 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.

The answer is: RCW 81.77.040 does *not* stand for this limited proposition in the context of biomedical waste where the Commission has repeatedly held that competition is in the public interest.<sup>1</sup> Especially in the context of the application before it, the Commission has ample authority to find that an extension of Waste Management’s biomedical waste collection services beyond its existing territory is in the public interest because many Washington waste generators, including those with statewide facilities, currently have no meaningful competition available and it is therefore functionally impossible for the services of the incumbent certificate holders to satisfy the Commission.

## II. STATEMENT OF FACTS

2. In November 1990, the Commission approved American Environmental Management Corp.’s (“AEMC”) application for statewide authority to transport biomedical waste.<sup>2</sup> AEMC was later acquired by BFI.<sup>3</sup> Despite statewide biomedical waste collection services provided by BFI, along with biomedical waste collection services offered by other haulers in more limited territories in Washington,<sup>4</sup> Stericycle applied for statewide authority to perform these same services. In 1995, following four years of administrative litigation by Stericycle and its affiliates to obtain such authority, the Commission

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<sup>1</sup> Of course, an application will not be granted if the applicant is not *also* fit to perform the requested service. RCW 81.77.040.

<sup>2</sup> *In re Am. Envntl. Mgmt. Corp.*, App. No. GA-874, Order M.V.G. No. 1452 (Wash. Utils. & Transp. Comm’n, Nov. 30, 1990).

<sup>3</sup> *In re Ryder Distrib. Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1761 at 20 (Wash. Utils. & Transp. Comm’n, Aug. 11, 1995).

<sup>4</sup> *Id.* at 4.

1 granted Stericycle authority to serve as the second, overlapping statewide hauler.<sup>5</sup> Since then, Stericycle  
2 has acquired control of all other certificates specifically authorizing specialized biomedical waste  
3 collection in Washington.<sup>6</sup>

4 3. Waste Management is the largest regulated hauler of solid waste in Washington. It holds  
5 general solid waste authority under Certificate No. G-237, and has provided solid waste collection  
6 services subject to the Commission's oversight and approval for decades.<sup>7</sup> Waste Management's  
7 authorized service area under Certificate No. G-237 covers major portions of the State of Washington in  
8 King, Pierce, Snohomish, Island, Kitsap, Mason, Whatcom, Benton, Chelan, Douglas, Grant, Okanogan,  
9 Lincoln, Kittitas, Spokane and Skagit Counties.<sup>8</sup> Pursuant to Certificate No. G-237 and the tariff filed in  
10 April 2011,<sup>9</sup> Waste Management provides biomedical waste collection service throughout the Certificate  
11 No. G-237 territory.<sup>10</sup> According to Stericycle, Waste Management's territory encompasses sources for  
12 80% of Washington's generated biomedical waste.<sup>11</sup> In all of this territory, Waste Management is  
13 presently in competition with Stericycle and, additionally, it competes with Protestant Murrey's  
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17 <sup>5</sup> *Id.*; see also *In re Waste Mgmt. of Wash., Inc.*, Docket TG-110552, Tariff No. 2 (Wash. Utils. & Transp. Comm'n, Apr. 14,  
18 2011); *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Final Order on Cross-Mot. for Dismissal  
19 & Summ. Determination ¶ 37 (Wash. Utils. & Transp. Comm'n, July 13, 2011) (ruling that Waste Management's existing  
authority allowed for biomedical waste collection).

20 <sup>6</sup> *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Final Order on Cross-Mot. for Dismissal &  
Summ. Determination at 16-17 n.32 (Wash. Utils. & Transp. Comm'n, July 13, 2011).

21 <sup>7</sup> Declaration of Jessica L. Goldman in Support of Waste Management's Opening Brief on Preliminary Legal Issue  
("Goldman Decl."), Ex. 1.

22 <sup>8</sup> *Id.*

23 <sup>9</sup> *Stericycle of Wash., Inc. v. Waste Management of Wash., Inc.*, Docket TG-110553, Final Order on Cross-Mot. for Dismissal  
& Summ. Determination (Wash. Utils. & Transp. Comm'n, July 13, 2011).

24 <sup>10</sup> *In re Waste Mgmt. of Wash., Inc.*, Docket TG-120034, Application for Certificate of Public Convenience § 2 & Sworn  
Statement (Dec. 30, 2011).

25 <sup>11</sup> *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Reply in Support of Stericycle's Mot. for  
26 Summ. Determination at 11 n.7 (June 1, 2011). Stericycle has been performing biomedical waste collection services  
27 statewide for over 20 years and presumably is in a position to make this calculation. Waste Management has not itself  
28 undertaken a precise computation of the percentage of biomedical waste which is generated in the Certificate No. G-237  
territory. However, there is no question that the territory is large, it encompasses many of the most densely-populated areas  
of the State where the large medical waste generators are located, and it includes a huge majority of the State's biomedical  
waste, whatever the precise percentage.

1 Disposal in a small portion of Murrey's Pierce County territory and with Protestant Rubatino Refuse  
2 Removal in annexation territories around Everett.<sup>12</sup>

3 4. Numerous biomedical waste generators in Washington have only one option for the  
4 collection of such waste: Stericycle. There are 22 counties where Stericycle is the only authorized  
5 biomedical waste hauler.<sup>13</sup> In major portions of nine other counties and the cities of Bellingham and  
6 Moses Lake, Stericycle also is the only game in town.<sup>14</sup> At least 52 Washington hospitals, large and  
7 small, have no choice of service provider other than Stericycle.<sup>15</sup> There are at least eight hospital  
8 groups with hospitals both inside the Certificate No. G-237 territory – where there presently is  
9 competition between Waste Management and Stericycle – and in the remaining territory – where only  
10 Stericycle may collect biomedical waste.<sup>16</sup> Those groups which logically wish to contract with a single  
11 Washington biomedical waste collection service currently have one choice: Stericycle.

12 5. In the pending application, Waste Management has requested permission to expand its  
13 services to provide biomedical waste collection service in the territories where the incremental  
14

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15 <sup>12</sup> Declaration of Jeff Norton in Support of Waste Management's Opening Brief on Preliminary Legal Issue ("Norton Decl.")  
16 ¶ 2.

17 <sup>13</sup> These counties are: Okanogan, Ferry, Stevens, Pend Oreille, Asotin, Garfield, Columbia, Walla Walla, Franklin, Yakima,  
18 Klickitat, Skamania, Clark, Cowlitz, Wahkiakum, Pacific, Lewis, Thurston, Grays Harbor, Jefferson, Clallam, and San Juan.  
19 See Goldman Decl. Exs. 1-2; *In re Waste Mgmt. of Wash., Inc.*, Docket TG-120033, Protest of Wash. Refuse & Recycling  
20 Ass'n, et al., Attachments (Feb. 17, 2012).

21 <sup>14</sup> These counties are: Whatcom, Chelan, Lincoln, Spokane, Whitman, Adams, Benton, Mason, and Island. See Goldman  
22 Decl. Exs. 1-2; *In re Waste Mgmt. of Wash., Inc.*, Docket TG-120033, Protest of Wash. Refuse & Recycling Ass'n, et al.,  
23 Attachments (Feb. 17, 2012).

24 <sup>15</sup> These hospitals include Lourdes Medical Center in Pasco, Madigan Army Medical Center in Fort Lewis, Grays Harbor  
25 Community Hospital in Aberdeen, Island Hospital in Anacortes, Okanogan Douglas District Hospital in Brewster, Forks  
26 Community Hospital, Mark Reed Hospital in McCleary, Morton General Hospital in Cowlitz, Garfield District Hospital in  
27 Pomeroy, Jefferson General Hospital in Port Townsend, United General Hospital in Sedro Woolley, Snoqualmie Valley  
28 Hospital, Willapa Harbor Hospital in South Bend, Sunnyside Community Hospital, Yakima Valley Memorial Hospital, Mid  
Valley Hospital in Omak, Allenmore Hospital in Tacoma, Mary Bridge Children's Hospital and Health Center in Tacoma,  
Tacoma General Hospital, US Navy Hospital in Oak Harbor, Overlake Hospital Medical Center in Bellevue, Saint Joseph  
Hospital in Bellingham, Lake Chelan Community Hospital, Whidbey General Hospital in Coupeville, Lincoln Hospital in  
Davenport, Coulee Community Hospital, Saint Joseph Medical Center in Longview, Samaritan Hospital in Moses Lake,  
Newport Community Hospital, Odessa Memorial Hospital, Quincy Valley Medical Center, Ferry County Memorial Hospital  
in Republic, East Adams Rural Hospital in Ritzville, Mason General Hospital in Shelton, North Valley Hospital in Tonasket,  
Centralia Hospital, Saint Joseph's Hospital in Chewelah, Whitman Hospital in Colfax, Mount Carmel Hospital in Colville,  
Saint Peter Hospital in Olympia, Swedish Hospital-Edmonds, Olympic Memorial Hospital in Port Angeles, Fairfax Hospital  
in Kirkland, VA Puget Sound-American Lake in Lakewood, VA Southwest Washington in Vancouver, Saint Elizabeths  
Hospital-Enumclaw, Saint Anthony Hospital in Gig Harbor, Saint Clare Hospital in Lakewood, Saint Joseph Medical Center  
in Tacoma, Capital Medical Center in Olympia, Toppenish Community Hospital, and Yakima Regional Medical Center.  
Norton Decl. ¶ 3.

1 remainder of Washington’s biomedical waste is generated.<sup>17</sup> Approval of this Application would  
2 provide Washington biomedical waste generators two statewide collection alternatives.

3 **III. STATEMENT OF ISSUES**

4 6. Should the Commission, in keeping with its policy preference for competition within the  
5 highly specialized biomedical waste collection market, once again provide Washington generators with  
6 a meaningful statewide service choice irrespective of whether the competitive service Waste  
7 Management proposes to provide is different than, or superior to, the incumbent service, or that the  
8 incumbent provider is otherwise unwilling or unable to provide the service proposed?

9 **IV. EVIDENCE RELIED UPON**

10 7. Waste Management relies on the Declarations of Jeff Norton and Jessica L. Goldman  
11 filed herewith, and Waste Management’s Application for authority to provide extended service.

12 **V. ARGUMENT**

13 **A. The Commission Has Broad Discretion to Determine Whether Existing Solid Waste Service**  
14 **Is Satisfactory.**

15 8. RCW 81.77.040 provides that:

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

22 (Emphasis added). The statute does not set forth the specific standard or elements the Commission is to  
23 consider in determining whether it finds the incumbent service satisfactory. In considering the  
24 equivalent “satisfaction of the Commission” standard in RCW 81.68.040 governing intrastate  
25 transportation of passengers for compensation,<sup>18</sup> the Court of Appeals has recognized that “[t]he statute

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25 <sup>16</sup> These hospital groups include the US Navy, Peace Health, Providence, Swedish, Universal Health Services, Veterans  
Administration, Catholic Healthcare Initiatives, and Capella Health. *Id.* ¶ 4.

26 <sup>17</sup> Prehearing Conference Order ¶ 8 (this is an application for “extended authority”).

27 <sup>18</sup> In 1995, RCW 81.68.040 provided in relevant part: “The commission shall have power, after hearing, when the applicant  
28 requests a certificate to operate in a territory already served by a certificate holder under this chapter, only when the existing  
auto transportation company or companies serving such territory will not provide the same to the satisfaction of the  
commission ...” *Pac. Nw. Transp. Servs., Inc. v. Wash. Utils. & Transp. Comm’n*, 91 Wn. App. 589, 590, 959 P.2d 160  
(1998) (quoting RCW 81.68.040; emphasis added). Today, the language of that statute hews even closer to that found in  
WASTE MANAGEMENT’S OPENING BRIEF ON  
PRELIMINARY LEGAL ISSUE - 4

1 does not specify how the Commission is to make that determination.”<sup>19</sup> Hence, the Commission, in the  
2 exercise of its broad discretion, is to determine whether or not it is satisfied with an incumbent solid  
3 waste collection company.

4 9. The Supreme Court requires that great deference be afforded to the Commission’s  
5 determination of issues reserved to its discretion by statute. In *Arco Products Co. v. Washington*  
6 *Utilities and Transportation Commission*, the Court considered RCW 80.28.200’s provision that:

7 [T]he commission shall have the power ... to determine whether or not [a  
8 refund ordered by the Federal Energy Regulatory Commission] should be  
9 passed on, in whole or in part, to the consumers of such company and to  
10 order such company to pass such refund on to its consumers, in the  
manner and to the extent determined just and reasonable by the  
commission.<sup>20</sup>

11 The Court held that the statute “unambiguously gives the WUTC the authority and discretion to  
12 determine whether and how to allocate the refund.”<sup>21</sup> Because the Legislature did not define what it  
13 meant by “just and reasonable” and the Commission “has a special expertise in the area of regulated  
14 utilities,” the Court must show “a great deal of deference” to the Commission’s determination of what is  
15 “just and reasonable.”<sup>22</sup> Moreover, the statute requires that the determination of justness and  
16 reasonableness be made “*by the commission.*”<sup>23</sup>

17 Thus, the statute itself clearly states who is to determine what is “just and  
18 reasonable” – it is the Commission, not the courts. For this reason also,

19  
20 RCW 81.77.040 and retains the identical “satisfaction of the commission” requirement without further direction regarding  
application of the standard.

21 <sup>19</sup> *Id.* at 597. In contrast, other regulations requiring service to the satisfaction of a government agency specifically define  
22 the standard the agency is to apply. See, e.g., RCW 50.04.140 (“Services performed by an individual for remuneration shall  
23 be deemed to be employment subject to this title unless and until it is shown to the satisfaction of the commissioner that:  
[stating three-part test]”) (emphasis added); WAC 296-128-012 (“An employer shall substantiate any deviation from  
24 payment on an hourly basis to the satisfaction of the department by using the following formula or an alternative formula  
that, at a minimum, compensates hours worked in excess of forty hours per week at an overtime rate of pay and distributes  
the projected overtime pay over the average number of hours projected to be worked.”) (emphasis added).

25 <sup>20</sup> 125 Wn.2d 805, 811, 888 P.2d 728 (1995) (quoting RCW 80.28.200; emphasis added).

26 <sup>21</sup> *Id.* at 811.

27 <sup>22</sup> *Id.* Stericycle recognizes that “Washington’s courts are bound to give the Commission’s interpretation of the law  
substantial weight.” *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Stericycle’s Mot. for  
28 Summ. Determination ¶ 31 (May 6, 2011).

<sup>23</sup> *Arco Prods.*, 125 Wn.2d at 811 (quoting RCW 80.28.200; emphasis by the Supreme Court).

1 we defer to the WUTC's determination of whether the allocation of the  
2 refund is "just and reasonable."<sup>24</sup>

3 The courts will not disturb the Commission's discretionary decisions absent a clear showing of abuse.<sup>25</sup>

4 10. Hence, it is for the Commission to make the discretionary determination as to whether an  
5 incumbent certificate holder will or will not provide satisfactory service under RCW 81.77.040.

6 **B. The Commission Historically Has Evaluated Its Satisfaction With Incumbent Biomedical  
7 Waste Collectors Differently Than It Has Evaluated Its Satisfaction With Incumbent  
8 Garbage Collectors.**

9 11. The Commission consistently has recognized that the unique issues posed by biomedical  
10 waste collection and transportation require regulation distinct from standard universal garbage  
11 collection. In 1990, the Commission explained that "in the context of neighborhood solid waste  
12 collection," RCW 81.77.040

13 contemplates an exclusive grant of authority as the best and most efficient  
14 way of serving all customers in a given territory. In this general context, it  
15 is assumed that all or most people and businesses in a given territory are  
16 also customers needing garbage service. Under these circumstances, an  
17 exclusive grant of authority in a given territory promotes service,  
18 efficiency, consistency and is generally in the public interest.

19 The collection of medical waste is quite a different situation. Customers  
20 are only a small percentage of the total business in any given territory.  
21 The applicants for medical waste authority wish to serve the entire state or  
22 large portions of the state. The entire operation more closely resembles  
23 that of a motor freight common carrier with statewide authority than that  
24 of a typical garbage company. The Commission is at this point  
25 unconvinced that any single carrier presently authorized to serve in the  
26 state of Washington could provide a level of service, on its own, which  
27 would satisfy the Commission and meet the needs of the waste generators.  
28 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 grant of one  
application for statewide authority would preclude a grant of others, and  
will consider this element in future proceedings.<sup>26</sup>

<sup>24</sup> *Id.* at 811-12; accord *US West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 86, 105, 949 P.2d 1337 (1997).

<sup>25</sup> *Arco Prods.*, 125 Wn.2d at 812.

<sup>26</sup> *In re Sure-Way Incineration, Inc.*, App. No. GA-868, Order No. 1451 at 16-17 (Wash. Utils. & Transp. Comm'n, Nov. 30, 1990) (citations omitted; emphasis added). Even in the case of universal garbage collection service, the Court of Appeals has confirmed that RCW 81.77.040 does not express a legislative intent to foster monopolies. *Superior Refuse Removal*, WASTE MANAGEMENT'S OPENING BRIEF ON

1 While noting the distinct issues raised for generators of biomedical waste, the Commission in 1990 was  
2 faced with only one qualified transporter of such waste, AEMC.<sup>27</sup>

3 12. In 1992, Stericycle, over the objection of statewide biomedical waste hauler AEMC and  
4 of certificated solid waste haulers which were then providing biomedical waste collection services in  
5 their various territories, requested that the Commission grant temporary authority for Ryder Distribution  
6 Systems, Inc. to provide biomedical waste collection services for Stericycle in 17 Washington counties.  
7 The Commission rejected the protestants' claims that granting Stericycle's request would "strike a fatal  
8 blow to the statutory plan for solid waste collection regulation."<sup>28</sup>

9 13. The following year, in considering Stericycle's request that Ryder be granted permanent  
10 authority to transport Stericycle's biomedical waste, the Commission again emphasized the difference  
11 between biomedical waste and universal garbage collection. The law "treats solid waste collection as a  
12 natural monopoly with efficiencies and public benefit gained through exclusive service."<sup>29</sup> However,  
13 the special handling needs of hazardous wastes had challenged "the usefulness of universal collection"  
14 of such wastes.<sup>30</sup> "The toxic nature of the substances, and required specialized collection and disposal,  
15 are such that the tests developed for grants of universal service many not be directly relevant to needs  
16 for collection of certain kinds of waste."<sup>31</sup>

17 14. In late 1993, in considering Sureway Medical Services, Inc.'s application for authority to  
18 transport biomedical waste, the Commission again explained that to accomplish the statutory goal of  
19 providing proper collection services to all waste generators in the State, biomedical waste collection  
20 must be regulated distinctly from universal garbage collection.

21  
22 *Inc. v. Wash. Utils. & Transp. Comm'n*, 81 Wn. App. 43, 52-53, 913 P.2d 818 (1996). The statutory test of "to the  
23 satisfaction of the commission" is *not* synonymous with a finding that another carrier already provided solid waste  
24 collection service in the relevant territory. Rather, the Commission must determine if the service provided is, indeed,  
25 satisfactory. *Id.*

26 <sup>27</sup> *In re Am. Envtl. Mgmt. Corp.*, App. No. GA-874, Order M.V.G. No. 1452 at 6 (Wash. Utils. & Transp. Comm'n, Nov. 30,  
27 1990).

28 <sup>28</sup> *In re Ryder Distribution Sys., Inc.*, App. No. GA-75563, Order M.V.G. No. 1536 at 6 (Wash. Utils. & Transp. Comm'n,  
Jan. 30, 1992).

<sup>29</sup> *In re Ryder Distrib. Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1596 at 5 (Wash. Utils. & Transp. Comm'n, Jan.  
25, 1993).

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.*

1 The Commission has consistently applied a stringent test for an  
2 overlapping grant of neighborhood garbage collection service, in light of  
the statutory statements of policy in Chapter 81.77.

3 The Commission views specialized hazardous waste collection service as  
4 different from traditional neighborhood collection service. Beginning in  
5 the 1970s, the Commission recognized a public need for specialized  
6 carriers who will provide universal collection of wastes requiring  
7 specialized services, such as hazardous waste, in specified service  
8 territories. In subsequent adjudicative decisions, the Commission  
9 recognized that the objectives of Chapter 81.77 RCW are not necessarily  
best achieved by strict adherence to the same tests applied to grants of  
typical residential or commercial collection service. It has applied  
standards for grants of overlapping specialized biohazardous waste  
collection and disposal that are consistent with the nature of the service.<sup>32</sup>

10 15. Furthermore, the Commission recognized that the specialized nature of biomedical waste  
11 means that applicants for such service – like Stericycle – “usually wish to serve the entire state or large  
12 portions of the state. The needs of specialized market segments are an important factor in evaluating the  
13 adequacy of existing service.”<sup>33</sup>

14 16. Consequently,

15 [t]he Commission continues to believe that the objectives of RCW  
16 81.77.040 are not necessarily best achieved for specialized services by the  
17 tests applied to determine grants of neighborhood garbage collection  
18 service, particularly when the service territory is large or is the entire state.  
19 In evaluating applications for overlapping specialized biomedical waste  
20 authority, the Commission will continue to follow the approach set out in  
Sure-Way Incineration and Ryder. It will apply provisions of Chapter  
81.77 RCW consistently with the unique requirements and attributes of the  
specialized service.

21 In evaluating whether existing companies will provide service to the  
22 satisfaction of the Commission, the Commission will not limit its  
23 consideration to evidence of service failures of the sort that usually are  
24 significant in neighborhood garbage collection service, such as service  
25 refusals, missed pickups or garbage strewn about. Rather, it will broaden  
the satisfactory service inquiry to include need-related sufficiency of  
service considerations – whether the existing service reasonably serves the  
needs of the specialized market.<sup>34</sup>

26 <sup>32</sup> *In re Sureway Med. Servs., Inc.*, App. No. GA-75968, Order M.V.G. No. 1663 at 9 (Wash. Utils. & Transp. Comm’n, Nov.  
27 19, 1993) (citation omitted).

28 <sup>33</sup> *Id.* n.10.

<sup>34</sup> *Id.* at 10-11 (emphasis added).

1 Consistent with the nature of this specialized market, the Commission gives considerable weight to the  
2 judgments of biomedical waste generators regarding the sufficiency of the existing service options and  
3 their need for alternatives.<sup>35</sup>

4 17. The statutory goal of providing proper collection services to all garbage generators in the  
5 State is effectuated by authorizing within a given territory a single collection service with a large enough  
6 base to ensure economic viability. In the case of biomedical waste collection, however, economic  
7 viability has not been jeopardized by allowing waste generators a choice of haulers. Thus, in 1993,  
8 based on existing competition, the Commission rejected BFI's contention that granting Sureway a  
9 competing biomedical waste certificate would "cripple" BFI.<sup>36</sup> "BFI has been competing with Sureway  
10 and its predecessors in the Seattle area since the Commission granted BFI's predecessor, American  
11 Environmental, authority in 1990. Granting this application should have little effect on the viability of  
12 BFI's operations in that portion of the state."<sup>37</sup> As to areas where BFI was then the only service  
13 provider, the Commission imposed on BFI the burden of showing that these areas "cannot support more  
14 than one specialized biohazardous waste collector" and held that BFI had failed to make the requisite  
15 showing.<sup>38</sup> So, the Commission approved a second biomedical waste transporter for most areas of the  
16 State.

17 18. The following year, the Commission again recognized that biomedical waste service is  
18 different than universal garbage collection and, thus, the former "is evaluated differently when looking  
19 at performance to the Commission's satisfaction ...."<sup>39</sup>

20 19. In 1995, despite recognizing the obvious fact that "carriers in an environment of  
21 controlled competition may not be able to make as much money as carriers with a monopoly franchise,"  
22 the Commission granted Stericycle leave to become a second, overlapping statewide provider of  
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25 <sup>35</sup> *Id.* at 13.

26 <sup>36</sup> *Id.* at 16-17.

27 <sup>37</sup> *Id.* at 17.

28 <sup>38</sup> *Id.*

<sup>39</sup> *In re Med. Res. Recycling Sys., Inc.*, App. No. GA-76820, Order M.V.G. No. 1707 at 2 (Wash. Utils. & Transp. Comm'n, May 25, 1994).

1 biomedical waste collection services in Washington.<sup>40</sup> The Commission held that “[w]hile competition  
2 may operate in a limited market to reduce available business to uneconomic levels, it is also true that  
3 competition can bring benefits to consumers,” including an increase in the range of services offered.<sup>41</sup>  
4 Moreover, the Commission noted that granting Stericycle’s application would not render the incumbent  
5 statewide biomedical waste service provider “insolvent,”<sup>42</sup> and economic damage to the incumbent is  
6 only relevant to the degree the incumbent established that the competition will “cause[] a reduction to  
7 unacceptable levels of available reasonably priced services to consumers.”<sup>43</sup>

8         20. When the Commission next addressed biomedical waste in 1997 in a declaratory action  
9 brought by Commission Staff, it again recognized in an initial order that biomedical waste collection  
10 services did not operate as the regulated garbage collection monopolies. “Although the industry  
11 historically has been characterized by monopoly service in a given territory, the Commission has  
12 granted overlapping authority for this specialized service. One result of the granting of overlapping  
13 authority is competition among carriers, a situation which did not occur in the industry prior to the  
14 1990s.”<sup>44</sup> The Commission has interpreted RCW 81.77.040’s requirements “consistently with the  
15 unique requirements and attributes of [biomedical waste] service,” and granted statewide authority  
16 concurrently to two carriers, first AEMC and then Stericycle.<sup>45</sup> In addition to the competition among  
17 the two statewide biomedical waste haulers, the Commission recognized that there was also  
18 competition from 75 haulers providing biomedical waste collection service in limited service areas.<sup>46</sup>  
19 Hence, the Commission favorably recognized that in 1997 there was “competition in the market for  
20 provision of services of transportation and disposal of biomedical waste.”<sup>47</sup> In that proceeding,

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22 <sup>40</sup> *In re Ryder Distrib. Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1761 at 13 (Wash. Utils. & Transp. Comm’n, Aug.  
23 11, 1995).

24 <sup>41</sup> *Id.* at 13-14.

25 <sup>42</sup> *Id.* at 13.

26 <sup>43</sup> *Id.* at 14.

27 <sup>44</sup> *In re Pet’n of Comm’n Staff for a Decl. Ruling*, Docket No. TG-970532, Decl. Order at 3 (Wash. Utils. & Trans. Comm’n,  
28 Oct. 29, 1997) (n. omitted).

<sup>45</sup> *Id.* at 3 n.1.

<sup>46</sup> *Id.* at 5.

<sup>47</sup> *Id.*

1 Stericycle had no difficulty recognizing that the Commission, in licensing haulers, views biomedical  
2 waste generators and collection companies as “unique.”<sup>48</sup>

3 21. In the Commission’s final order in the declaratory action, it reiterated the different  
4 statutory treatment of universal garbage haulers and biomedical waste collectors.

5 The Commission has recognized the specialized nature of biomedical  
6 waste collection in granting authority to provide such service. Although  
7 the solid waste industry historically has been characterized by monopoly  
8 service in a given territory, the Commission has granted overlapping  
9 authority for this specialized service. RCW 81.77.040 provides that the  
10 Commission may grant solid waste authority only if the service is required  
11 by the public convenience and necessity. The statute also expresses a  
12 preference for monopoly service in the collection of solid waste, allowing  
13 the Commission to grant new authority in already-served territory only if  
14 it finds that the existing certificate holder will not provide satisfactory  
15 service. In applications for specialized biomedical waste authority, the  
16 Commission has interpreted the statutory requirements consistently with  
17 the unique requirements and attributes of the service, giving considerable  
18 weight to testimony of waste generators regarding their service  
19 requirements.<sup>49</sup>

20 The Commission emphasized that biomedical waste collection “has evolved into a highly competitive  
21 industry as a result of the Commission interpreting RCW 81.77.040 consistently with the unique  
22 requirements and attributes of the service.”<sup>50</sup>

23 22. To the degree there was any possible doubt regarding the Commission’s belief that  
24 competition is necessary and proper in the biomedical waste collection market, last year it explained:  
25 “the Commission has historically found that promoting competition in this segment of the industry is in  
26 the public interest because, among other things, it promotes higher quality of service in terms of  
27 protecting the public health and safety.”<sup>51</sup> The Commission “recognized that its regulation of this  
28 specialized service is underpinned by different policies than the ones applicable to traditional solid  
waste collection ....”<sup>52</sup> “[W]hile the solid waste industry in general is characterized by monopoly

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<sup>48</sup> *Id.* at 11.

<sup>49</sup> *In re Pet’n of Comm’n Staff for a Decl. Ruling*, Docket No. TG-970532, Decl. Order at 9 (Wash. Utils. & Transp. Comm’n, Aug. 14, 1998).

<sup>50</sup> *Id.* at 10.

<sup>51</sup> *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Final Order on Cross-Mot. for Dismissal & Summ. Determination at 14-15 (Wash. Utils. & Transp. Comm’n, July 13, 2011).

<sup>52</sup> *Id.* at 15.

1 service providers in given territories, the Commission has granted overlapping authority for the  
2 provision of biomedical waste services, including at one time statewide authority to two companies.  
3 Thus, Commission policy has historically encouraged competition in the provision of biomedical waste  
4 services.”<sup>53</sup> Notwithstanding – and, in fact, because of – Stericycle’s present “dominance” in providing  
5 biomedical waste service, the Commission emphasized its desire to make opportunities “readily  
6 available” for traditional solid waste collection companies to compete with Stericycle.<sup>54</sup> Hence, the  
7 Commission rejected “significant barriers to entry” to this “highly competitive industry.”<sup>55</sup>

8 23. Stericycle acknowledges that “the Commission has consistently considered biomedical  
9 waste authority under different standards than general solid waste – notwithstanding that the two are  
10 governed by the same statutory provisions ....”<sup>56</sup> Moreover, prior to Waste Management filing the  
11 pending Application, Stericycle “recognize[d] that the Commission may welcome additional  
12 competition in biomedical waste collection,” and declared that it did not oppose fair competition.<sup>57</sup>  
13 Indeed, just last year, Stericycle predicted “drastic service cut-backs and/or rate increases on healthcare  
14 facilities in rural counties and small towns” if Waste Management were not required to obtain statewide  
15 authority.<sup>58</sup> In Stericycle’s words, “[a]ny other result would ensure that the potential benefits of  
16 increased competition are unsustainable.”<sup>59</sup>

17 24. Consequently, today there can be no legitimate dispute as to the Commission’s oft-  
18 repeated judgment that competition is proper and desirable in the biomedical waste collection market.  
19 Biomedical waste collection service without meaningful competition is not, irrespective of incumbent  
20 service quality, “service to the satisfaction of the commission.”<sup>60</sup>

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22 <sup>53</sup> *Id.* at 15-16.

23 <sup>54</sup> *Id.* at 16.

24 <sup>55</sup> *Id.*

25 <sup>56</sup> *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Reply in Supp. of Stericycle’s Mot. for Summ.  
26 Determination at 4 (June 1, 2011).

27 <sup>57</sup> *In re Stericycle of Wash., Inc.*, Docket No. TG-110553, Compl. & Pet’n of Stericycle ¶ 7 (Mar. 21, 2011).

28 <sup>58</sup> *Id.* ¶ 11.

<sup>59</sup> *Id.* at 8 n.3.

<sup>60</sup> RCW 81.77.040. Since the Commission first considered biomedical waste collection service, the generators have emphasized the importance of competition in this specialized area given the inherent liability issues which uniquely are raised when transporting such waste. For example, Brien Stafford, past chairman of the board of Overlake Hospital, testified

WASTE MANAGEMENT’S OPENING BRIEF ON  
PRELIMINARY LEGAL ISSUE - 12

1 **C. The Commission Has Recognized the Importance to Multi-Site Generators of Contracting**  
2 **With a Single Biomedical Waste Hauler.**

3 25. When Stericycle battled for leave to provide biomedical waste service in Washington, it  
4 successfully pressed with the Commission the argument that generators had a “need for an integrated  
5 and unified transportation function” throughout the state.<sup>61</sup> In arguing for leave to provide statewide  
6 service, Stericycle proffered the testimony of Carol Winter of Kaiser Permanente who sought a single  
7 service provider for Kaiser Permanente’s multiple generating facilities.<sup>62</sup> The Commission concluded  
8 that “single carrier service is a reasonable shipper need ....”<sup>63</sup> That reasonable need continues today.  
9 For example, Pathology Associates Medical Laboratories (“PAML”), with approximately 60 facilities  
10 throughout the State of Washington, has “an immediate need for having all of our laboratories serviced  
11 by WM Healthcare Solutions of Washington.”<sup>64</sup> PAML’s procurement manager explains: “We are  
12 currently using WM Healthcare Solutions of Washington to collect and transport our Biomedical Waste  
13 from facilities located in the area authorized by G-237, but are forced to use the other statewide  
14 certificate holder for our other locations. It will promote efficiencies, eliminate administrative  
15 redundancies, and reduce internal overhead cost to use one company.”<sup>65</sup>

16 **D. Biomedical Waste Service Available from Only One Statewide Hauler Is Not Service to the**  
17 **Commission’s Satisfaction.**

18 26. We return now to the preliminary legal question posed by the Commission:  
19 Whether [RCW 81.77.040] authorizes the Commission to grant a  
20 certificate [authorizing biomedical waste collection services] only if the  
21 applicant demonstrates that the service it proposes to provide is different

22 that “competition should exist and that there should be more than one licensed infectious medical waste hauler in the state....  
23 Mr. Stafford argued for the ability to choose among competing vendors, on a level playing field, to obtain the best possible  
24 service.” *In re Am. Env'tl. Mgmt. Corp.*, App. No. GA-874, Order M.V.G. No. 1452 at 24 (Wash. Utils. & Transp. Comm’n,  
25 Nov. 30, 1990).

26 <sup>61</sup> *In re Ryder Distribution Sys., Inc.*, App. No. GA-75563, Order M.V.G. No. 1536 at 4-5 (Wash. Utils. & Transp. Comm’n,  
27 Jan. 30, 1992).

28 <sup>62</sup> *In re Ryder Distribution Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1761 at 17 (Wash. Utils. & Transp. Comm’n,  
29 Aug. 11, 1995).

<sup>63</sup> *In re Ryder Distribution Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1596 at 12 (Wash. Utils. & Transp. Comm’n,  
30 Jan. 25, 1993).

<sup>64</sup> Application for Certificate of Public Convenience, Sworn Statement (Dec. 29, 2011).

<sup>65</sup> *Id.*

1 than, or superior to, the services the incumbent provider offers or that the  
2 incumbent provider is otherwise unwilling or unable to provide the service  
the applicant proposes to offer.<sup>66</sup>

3 Based on the Commission's longstanding and oft-repeated conclusion that competition in this  
4 specialized market is permissible and beneficial, and that multiple-site generators' need for a single  
5 biomedical waste service is reasonable, the answer to the posed question must be "no." Even if the  
6 proffered service is not different than or superior to those of the incumbent service provider and the  
7 incumbent provider is willing and able to offer the proposed service, biomedical waste service by only  
8 one statewide hauler is not satisfactory.<sup>67</sup> The competition against Stericycle offered today by Waste  
9 Management and the other Protestants in their respective territories does not provide meaningful  
10 competition in the many parts of the State where Stericycle is the only approved option and it does not  
11 offer meaningful competition for the single service provider required by Washington's multi-site, large  
12 generators of biomedical waste. Meaningful competition and the choice among more than one  
13 statewide hauler serves and fosters generators' interest in safe, environmentally-sound, and economical  
14 collection, handling, and treatment of biomedical waste. Based on past and present experience,  
15 competition in this area does not in any way jeopardize – and, in fact, affords – reasonably priced  
16 services to customers.

## 17 VI. CONCLUSION

18 27. For these reasons, Waste Management urges the Commission to reaffirm its holding last  
19 year that “promoting competition in this segment of the industry is in the public interest because, among  
20 other things, it promotes higher quality of service in terms of protecting the public health and safety,”<sup>68</sup>  
21 and that the absence of statewide competition is not “service to the satisfaction of the commission”  
22 under RCW 81.77.040.

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<sup>66</sup> Prehearing Conference Order ¶ 6 (emphasis added).

26 <sup>67</sup> Of course, the conclusion that incumbents are not capable of providing service to the satisfaction of the Commission does  
27 not involve a moral element. *In re Ryder Distribution Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1596 at 12 (Wash.  
28 Utils. & Transp. Comm'n, Jan. 25, 1993) (finding lack of satisfaction “does not cast the existing carrier as ‘bad’”).

<sup>68</sup> *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Final Order on Cross-Mot. for Dismissal &  
Summ. Determination at 14-15 (Wash. Utils. & Transp. Comm'n, July 13, 2011).

1 DATED this 14th day of June, 2012.

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**CERTIFICATE OF SERVICE**

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

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DATED at Seattle, Washington, this 14th day of June, 2012.

  
 Deanna L. Schow