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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

STERICYCLE OF WASHINGTON, INC.,

Complainant,

v.

WASTE MANAGEMENT OF
WASHINGTON, INC., d/b/a WM
HEALTHCARE SOLUTIONS OF
WASHINGTON,

Respondent.

Docket No. TG-121597

COMPLAINANT STERICYCLE OF
WASHINGTON, INC.'S MOTION FOR
RECONSIDERATION OF ORDER
DENYING THIRD-PARTY DISCOVERY
FROM NORTHWEST HOSPITAL

MOTION FOR RECONSIDERATION OF ORDER DENYING THIRD-
PARTY DISCOVERY

SEA_DOCS:1114043.3

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1
2 **I. Introduction**

3 1. Stericycle of Washington, Inc. (“Stericycle”) hereby moves for reconsideration
4 of Order 05, denying Stericycle’s Motion for Third Party Discovery, with respect to
5 Stericycle’s request for depositions and documents from Northwest Hospital & Medical Center
6 (“Northwest Hospital”).¹ Email communications and the declaration of Stericycle employee
7 James Ryan provide evidence that Waste Management of Washington, Inc. (“Waste
8 Management”), through its employee Jeff Norton, gave an unlawful rebate to Northwest
9 Hospital in exchange for Northwest Hospital’s agreement to engage Waste Management for
10 biomedical waste services in the form of reduced charges for recycling services. Despite the
11 evidence of unlawful rebating, Order 05 denied Stericycle’s requests for subpoenas for relevant
12 documents and depositions of the two Northwest Hospital employees, Juan Escalante and Rose
13 Hong, who apparently received and agreed to Waste Management’s rebating offer.

14 2. Order 05 denied Stericycle access to these witnesses and the relevant documents
15 in Northwest Hospital’s possession for two reasons: in part because Stericycle has already
16 obtained some evidence demonstrating unlawful rebating, and therefore cannot demonstrate
17 that it is unable to obtain information necessary to support its claims without third party
18 discovery, and in part because Northwest Hospital’s refusal to provide information to
19 Stericycle informally demonstrates, allegedly, that it opposes providing formal discovery. *See*
20 *Order 05, p.3.* Denying Stericycle access to witnesses and documents that are directly relevant
21 to its claims overlooks the central importance of third-party evidence when this matter is
22 presented to the Commission for resolution through summary determination or at hearing.
23 *Order 05 and Stericycle’s Motion for Third-Party Discovery should be reconsidered.*

24
25 ¹ Although this Motion for Reconsideration seeks reconsideration of Order 05 only with respect to the
26 depositions and documents sought from Northwest Hospital, Stericycle reserves the right to renew its
request for third-party discovery from Skagit Valley Hospital, Virginia Mason Medical Center, and
Valley Medical Center at a later time.

1 3. Although existing documentary evidence and testimony from a Stericycle
2 witness strongly indicate that Waste Management has engaged in unlawful rebating, on a
3 motion for summary determination or at a hearing Waste Management is likely to present
4 testimony from Jeff Norton in an attempt to raise a factual dispute about the biomedical waste
5 and recycling offers that were made to and accepted by Northwest Hospital. Mr. Norton's
6 testimony in a recent deposition indicates that he will contend that the recycling and biomedical
7 waste agreements were not linked, that Northwest Hospital was not given reduced recycling
8 charges in exchange for Northwest Hospital's agreement to engage Waste Management for
9 biomedical waste services, and that his subsequent email admitting to such an exchange does
10 not mean what it says. The testimony of the two Northwest Hospital employees who received
11 and accepted Waste Management's contract offers is essential to resolving this factual dispute,
12 which is strongly in the public interest. It is uncontested that this information cannot be
13 obtained through any means other than Commission subpoenas for testimony and documents.
14 This need more than satisfies the Commission's rules providing for discovery of information
15 "significant" to a party's case and satisfies Order 04, which required Stericycle to demonstrate
16 that it could not obtain necessary third-party information in any other way than through a
17 subpoena.

18 **II. Facts and Procedural History**

19 4. The facts and procedural history relevant to this motion are set forth below, in
20 the Supplemental Declaration of Stephen Johnson in support of this motion and in Stericycle's
21 Motion for Third-Party Discovery, together with its supporting declarations and exhibits, all of
22 which are incorporated herein by this reference.

23 **III. Discussion**

24 5. As set forth in Stericycle's Motion for Third-Party Discovery, the available
25 evidence indicates that Waste Management has improperly offered and provided an unlawful
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1 rebate to Northwest Hospital by providing a discounted rate for recycling services in exchange
2 for Northwest Hospital's agreement to contract with Waste Management for biomedical waste
3 services. In an email from Jeff Norton of Waste Management to Valley Medical Center, Mr.
4 Norton clearly stated that "If we can also service you for medical waste . . . we can reduce your
5 recycling to \$120 haul fee and \$15/ton processing. This is similar to what we did for
6 Northwest Hospital." Declaration of Stephen Johnson filed in support of Stericycle's Motion
7 for Third-Party Discovery (hereinafter "Johnson Decl."), Ex. A (emphasis added). This email
8 clearly describes a conditional offer to exchange a recycling rate discount for new biomedical
9 waste business, and describes the arrangement with Northwest Hospital as such an exchange.
10 In this proceeding, Stericycle contends that this quid pro quo with Northwest Hospital (also
11 offered to Valley Medical Center) is an unlawful rebate.

12 6. Waste Management's admission in this email is consistent with communications
13 from Northwest Hospital's Juan Escalante to Stericycle account representative James Ryan. In
14 an email to Mr. Ryan, Mr. Escalante stated that "All together, we were expecting a savings of
15 \$6,000" from switching to Waste Management's biomedical waste services. Supplemental
16 Declaration of Stephen Johnson in Support of Stericycle's Motion for Reconsideration of Order
17 Denying Third-Party Discovery (hereinafter, "Supp. Johnson Decl."), Ex. 1 (Feb. 28, 2012
18 email from J. Escalante to J. Ryan). Mr. Escalante confirmed in a telephone call to Mr. Ryan
19 that Waste Management had offered to reduce the cost of its recycling services in exchange for
20 Northwest Hospital agreeing to switch its biomedical waste service to Waste Management.
21 Declaration of James Ryan, ¶3. The available evidence, therefore, indicates that Northwest
22 Hospital was offered a discounted recycling rate that led to significant realized cash savings in
23 exchange for engaging Waste Management for biomedical waste services, exactly as Mr.
24 Norton later reported in his email to Valley Medical Center.

25 7. Finally, Mr. Norton confirms that he discussed Waste Management's recycling
26 and biomedical waste services together with Mr. Escalante in early 2011, prior to providing

1 Northwest Hospital a written offer for discounted recycling services. Supp. Johnson Decl.,
2 Ex.2 (excerpts from the July 17, 2013 Deposition of Jeffery Norton) 61:6-18.² In November
3 2011, another email from Mr. Norton shows that Northwest Hospital informed Waste
4 Management of its decision to switch its biomedical waste service to Waste Management at the
5 same time that it accepted Waste Management's offer of discounted recycling rates. Johnson
6 Decl., Ex. C (November 1, 2011 email from J. Norton to M. Jefferies). Thus, evidence
7 demonstrates that Waste Management offered Northwest Hospital reduced recycling rates and
8 biomedical waste services at the same time and that Northwest Hospital accepted those offers
9 as a package, consistent with the subsequent email and telephone communications of Mr.
10 Norton and Mr. Escalante explicitly referencing the rebating exchange.

11 8. Order 05 acknowledges this evidence, which clearly indicates that Mr. Escalante
12 (and his supervisor, Rose Hong)³ have critical knowledge concerning Waste Management's
13 conduct. Nevertheless, Order 05 concludes that because Stericycle has been able to obtain this
14 evidence of rebating, it cannot meet the standard for third-party discovery imposed by Order
15 04, "a showing that Stericycle cannot obtain information necessary to support its claims in any
16 other way." Order 05, p.3. Essentially, Order 05 concludes that because Stericycle has
17 obtained *some* evidence of rebating, to which Northwest Hospital and its employees Mr.
18 Escalante and Ms. Hong were witness, it is unable to show that direct testimony from those
19 witnesses is *necessary*. Leaving aside for the moment that this high standard for third-party

20 ² "Q Before this written recycling offer was made on July 1st, 2011, you communicated about both
21 potential services [recycling and biomedical waste].

22 A Yes.

23 Q Okay. In the ways that you already described. And you don't recall whether or not you talked about
24 them at the same meetings or not.

25 A I am sure I did.

26 Q Okay. So you did talk about them in the same meetings.

A I don't know about all of them, but some of them, yes.

Q They were talked about at the same time, at least sometimes.

A Yes."

³ Waste Management identified Mr. Escalante as the Northwest employee most responsible for the
negotiations with Waste Management, along with Northwest employee Rose Hong. Johnson Decl., Ex.
B, DR No. 2.

1 discovery is far greater than that imposed by the Commission's rules, Order 05's conclusion is
2 incorrect and the denial of discovery from Northwest Hospital should be reconsidered and
3 approved.

4 9. In deposition testimony Mr. Norton has contested the obvious meaning of the
5 documentary evidence discussed above and contends that his solicitations to Northwest
6 Hospital did not include an offer of reduced recycling rates in exchange for Northwest
7 Hospital's agreement to engage Waste Management for biomedical waste services. This
8 testimony creates an apparent factual dispute on this critical issue. Evidence directly from
9 Northwest Hospital, including testimony from Mr. Escalante and Ms. Hong, the only other
10 persons with relevant knowledge, is therefore necessary to resolve this factual dispute. Since
11 this evidence cannot be obtained by Stericycle without a subpoena from the Commission, as set
12 forth in Stericycle's Motion for Third-Party Discovery and not contested in Order 05,
13 subpoenas for testimony and records must issue.

14 10. Mr. Norton's email to Valley Medical Center clearly states that Waste
15 Management will reduce recycling rates "If we can also service you for medical waste," and
16 that this offer is "similar to what we did for Northwest Hospital." Johnson Decl., Ex. A.
17 Despite this acknowledgement of a quid pro quo exchange with Northwest Hospital, in
18 testimony Mr. Norton contends that his statement was not true and was, essentially, mere
19 puffery to inform Valley Medical Center that Northwest Hospital was a customer in order to
20 obtain more business. Supp. Johnson Decl., Ex.2 64:7-65:2. Mr. Norton testified that he agreed
21 that this characterization was not consistent with what he wrote in his email to Valley Medical
22 Center but, nonetheless, he maintained that he mentioned Northwest Hospital only as a
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1 “reference” and not because he actually offered a rebate of recycling fees to Northwest Hospital
2 in exchange for its biomedical waste business. *Id.*⁴

3 11. Mr. Norton denied in his deposition testimony that the Northwest Hospital
4 recycling and biomedical waste agreements were a package deal, contrary to the evidence
5 discussed above and the fact that they were discussed with Northwest Hospital simultaneously
6 and that Northwest Hospital agreed to them at the same time. *Id.*, 62:9-16.⁵ Finally, Mr.
7 Norton contests the ultimate conclusion naturally drawn from the evidence discussed above,
8 that a recycling rate reduction was given in exchange for new biomedical waste business, by
9 contending instead that Northwest Hospital could have accepted either service independently of
10 the other. *Id.*, 62:17-18; 63:16-25.⁶

11 12. Although Mr. Norton’s testimony is at odds with the weight of the evidence, it
12 nevertheless indicates that a factual dispute exists as to whether Waste Management has given
13 Northwest hospital an unlawful rebate for biomedical waste services. Other than documents

14 ⁴ “A Well, this is purely me trying to get some more medical waste business. The rates aren't the same
15 as Northwest Hospital. I believe that's because they weren't giving any cardboard. And I was trying to
16 get some medical waste business separately. I did mention Northwest Hospital, but probably just as a
17 reference that we're getting their – their business as well.

18 Q But you understand that's not what -- that's not what this language means, right?

19 MS. GOLDMAN: Objection. Asked and answered.

20 Q Do you agree that what you just told me is not the same as what's written in this email?

21 A Yes.

22 Q Can you think of any reason why you wouldn't have been saying something that was accurate in this
23 email?

24 A I just knew that I could get approved for that pricing, those two different prices, and I was trying to
25 get medical waste service for this account. I mentioned Northwest Hospital just as a reference.”

26 ⁵ “Q Isn't it the case then that these two agreements were linked in your offer to Northwest in a package
deal?

A I wouldn't call them a package deal, no, because I would have had a bundled agreement like I did
with Skagit or -- these were separate services that we talked about. Since they already had other
services with us, it made sense to do them all at the same time.”

⁶ “Q So it's your testimony that they didn't have to agree to one to do the other.

A That's correct.”

“Q So given the -- the similarity and the timeline of the negotiation with the hospital that we already
talked about, and then on top of it the subsequent email where you say that the deal with Northwest
Hospital was similar to your offer to provide reduced recycling rates in exchange for medical waste
service, it's still your testimony that the two were not linked?

MS. GOLDMAN: Objection. Misstates the email that's being referenced.

THE WITNESS: Yes.”

1 and testimony that have already been obtained from Waste Management and Stericycle,
2 discussed above, the only evidence that could resolve this factual dispute are documents and
3 testimony from Northwest Hospital, the other participant in these events. Third-party
4 testimony from Mr. Escalante and Ms. Hong and relevant documents in Northwest Hospital's
5 possession are, therefore, necessary evidence in Stericycle's case.

6 13. Because this necessary evidence cannot be obtained by Stericycle without a
7 Commission subpoena, which Stericycle established without contest in its Motion for Third-
8 Party Discovery, Stericycle has satisfied the direction in Order 04 that it must show it "cannot
9 obtain information necessary to support its claims in any other way."

10 14. Just as Stericycle's need is clear, so too is the public interest in this discovery.
11 Unlawful rebating subverts the regulated tariff rate system under which solid waste services are
12 offered to the public on a non-discriminatory basis. When rebates are provided for regulated
13 services, either directly or indirectly through provision of other reduced rate services, the
14 recipient receives a benefit that other customers do not receive and the company providing the
15 rebate is allowed to compete unfairly in the marketplace, undermining the Commission's
16 authority to regulate and control the rates for solid waste collection services. Rebating is
17 strongly indicated by the available evidence and it is in the public's interest to obtain third-
18 party evidence that could resolve a factual dispute that may otherwise allow unlawful rebating
19 to continue unremedied.

20 15. Although Northwest Hospital may have been reluctant to offer witnesses and
21 documents to Stericycle informally, there is no evidence that it "strongly oppose[s] any
22 participation in Stericycle's dispute with Waste Management," as Order 05 found. In fact, the
23 evidence merely indicates that Northwest Hospital declined to become involved in a dispute
24 between Stericycle and Waste Management on a voluntary or informal basis. Northwest
25 Hospital has taken no position on its willingness to cooperate is subpoenaed. In all events, the
26 public interest in exposing and eradicating unlawful rebating, discriminatory rates, and unfair

1 competition outweigh the relatively minor inconvenience of producing documents related to a
2 single transaction and presenting two employees for limited depositions.

3 16. Finally, although Order 04 placed a high burden on obtaining third-party
4 discovery, which Stericycle has met, the Commission rules authorize the discovery sought on a
5 lesser showing. In cases where additional discovery mechanisms have been authorized,
6 including this case alleging unfair competition, WAC 480-07-410 authorizes depositions of
7 persons identified as potential witnesses as of right, and of other persons by approval of the
8 presiding officer if those persons appear to possess information significant to the requesting
9 party's case. From the foregoing discussion it is clear that Northwest Hospital and its
10 employees Juan Escalante and Rose Hong "possess information significant to" Stericycle's
11 case. This is the only showing required by the Commission's rules. WAC 480-07-400
12 provides that subpoenas from the Commission are always available as a mechanism to obtain
13 discovery in such circumstances.


14 II. Conclusion

15 17. For the foregoing reasons the Commission should reconsider Order 05 denying
16 Stericycle's request for third-party discovery and grant Stericycle's Motion for Third-Party
17 Discovery from Northwest Hospital. This discovery meets the Commission's standards for
18 third-party discovery because the evidence sought is "significant" to Stericycle's case. This
19 discovery meets the heightened standard imposed by Order 04 because evidence from
20 Northwest Hospital and its two knowledgeable employees is necessary to overcome a factual
21 dispute created by testimony from Jeff Norton of Waste Management that is inconsistent with
22 the facts indicating unlawful rebating. This discovery is in the public interest because it will
23 remove a barrier to eliminating unlawful rebating from the biomedical waste market. The
24 public interest easily outweighs the small inconvenience of briefly participating in this
25 proceeding as a third-party witness. Proposed subpoenas for depositions and documents
26

1 addressed to Juan Escalante and Rose Hong are submitted herewith. Supp. Johnson Decl.,
2 Ex.3.

3 DATED this 26th day of August, 2013.

4
5 Respectfully submitted,
GARVEY SCHUBERT BARER

6
7 By 
8 Stephen B. Johnson, WSBA #6196
9 Jared Van Kirk, WSBA #37029
10 Attorneys for Protestant Stericycle of
11 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 August 26, 2013, I caused to be served on the person(s) listed below in the
4 manner shown a copy of COMPLAINANT STERICYCLE OF WASHINGTON, INC.'S
5 MOTION FOR RECONSIDERATION OF ORDER DENYING THIRD-PARTY
6 DISCOVERY FROM NORTHWEST HOSPITAL:

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

- Via Legal Messenger
- Via Facsimile
- Via FedEx
- Via Email

14 Administrative Law Judge
15 Adam E. Torem
16 atorem@utc.wa.gov

- Via Email

17 Jessica Goldman
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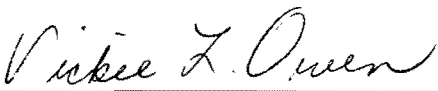
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Dated at Seattle, Washington this 26th day of August, 2013.



Vickie L. Owen
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