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7 BEFORE THE WASHINGTON STATE
8 UTILITIES AND TRANSPORTATION COMMISSION

9 In Re Application of Waste
10 Management of Washington,
11 Inc. d/b/a WM Healthcare
12 Solutions of Washington

Docket TG-120033

13 PROTESTANTS WASHINGTON REFUSE &
14 RECYCLING ASSOCIATION; RUBATINO
15 REFUSE REMOVAL, INC.; CONSOLIDATED
16 DISPOSAL SERVICES, INC.; MURREY'S
17 DISPOSAL, INC.; AND PULLMAN DISPOSAL
18 SERVICE, INC. RESPONSE TO BRIEFING
19 ON INITIAL ISSUES

20
21 **COME NOW** the above-referenced Protestants Washington Refuse and
22 Recycling Association; Rubatino Refuse Removal, Inc.; Consolidated Disposal
23 Services, Inc; Murrey's Disposal, Inc.; and Pullman Disposal Service, Inc.
24 (hereinafter "Protestants") and respectfully submit the following:

25
26 **I. RESPONSE TO STAFF'S INITIAL BRIEF
ON PRELIMINARY LEGAL ISSUES**

1) Protestants do not necessarily disagree with Staff's general
position here. It certainly is the case that this Application must (like all other
Applications for solid waste authority) be considered "under the standards of
RCW 81.77.040."¹ There simply are no exceptions, nor "ways around" the
application of this statute.

¹ Staff Brief at pg. 4, para. 8

1 2) Staff does, however, argue that a somewhat different evidentiary
2 process should be applied to a medical waste proceeding; that being a “focus
3 on the needs of customers, not the applicant or incumbent.”² While
4 Protestants do not necessarily disagree that this may be sound policy, it is
5 essential that the foundations of the entire process not be discarded in favor
6 of an entirely customer/shipper-based test. If a customer has legitimate,
7 specialized needs and the incumbent cannot or will not meet those needs,
8 then the customer-based test may well be persuasive and should be a part of
9 the process, as Staff indicates.

10 3) However, there are two very important caveats which the
11 Commission must keep uppermost in mind. First, there is a big difference
12 between customer “needs” and customer “desires.” A medical waste generator
13 may truly need a specialized type of service that may not be available.³ On
14 the other hand, a customer with multiple facilities in different certificated
15 areas, whose “special need” is a desire for centralized billing to one hauler
16 statewide is an entirely different situation. It certainly is no secret that large
17 customers, medical facilities and “big box” stores want to deal with a single
18 carrier. That, however, is not the law as Protestants understand it, and the
19 Commission must be very careful to distinguish between a legitimate need for
20 a specialized, unavailable service, and accounting convenience.

21 4) Secondly, Staff cites to decisions regarding medical waste from
22 the 1980’s and 1990’s, because that is when the “medical waste battles” were
23 being actively and sometimes bitterly fought. Protestants are of the belief that
24 testimony at hearing will clearly show that the industry has made a great deal
25 of progress in storage, collection and disposal. Many, if not all, of the
26 concerns which arose in, for example, ***In re Biomedical Waste Carriers***,
Docket TG-970532, and the seemingly endless litigation in ***Sureway***, Order
M.V.G. 1674 (Dec., 1993), ***Ryder***, Order M.V.G. 1596 (June, 1993), and all

² Staff Brief, pg. 5, para. 10.

³ Although with Protestant Stericycle having statewide authority and apparently being the largest medical waste service provider, it is somewhat difficult to imagine what that need would be.

1 the others endlessly cited by all the parties here, (the undersigned included)⁴
2 have been resolved.

3 5) In summary, if customer preference is going to be a major part of
4 this hearing, which seems to be the case, it is all of our jobs to see that the
5 concerns are directly related to medical and public safety issues, not to
6 convenience in billing practices and/or the eternal quest for a "better deal."
7 This is still a regulated industry, and will remain so long after this Docket is
8 concluded. Protestants do not disagree with Staff, but want to be sure Staff's
9 conclusions are appropriate to the existing law.

10 **II. RESPONSE TO APPLICANT'S BRIEF
ON PRELIMINARY ISSUES**

11 6) Applicant here is in danger of arguing against itself. It already
12 provides medical waste service within its admittedly vast G-certificated
13 territory. Again, Protestants have no problem with that, and have supported
14 Applicant's absolute right to do so. This support, however, does not
15 necessarily make what would seem to be something of a quantum leap to
16 statewide authority. Statewide authority means that the service provider is as
17 willing to provide service to a rural veterinarian clinic in Republic as it is to
18 pursue large hospitals in urban areas, particularly those which can be
19 expected to testify as to their desire to have a "single server" statewide.

20 7) Therein lies what, in Protestants' view, is the real issue here; i.e.
21 which large medical waste company "gets a shot" at providing statewide
22 service to the increasing number of multi-location, large, and well-financed
23 hospitals and clinics. But we cannot forget nor ignore the law which requires
24 that a certificated solid waste collection company must provide the same level
25 of service, competence, and dedication to all customers it serves. That is the
26 very basis of our regulatory system, and it applies equally to all permit
holders, including those which provide medical waste service, either

⁴ And generously provided by Staff Counsel, saving everyone time and heartburn.

1 exclusively or as part and parcel of their daily, weekly and monthly solid
2 waste service.

3 8) That being said, Applicant's burden of proof here is neither more
4 nor less than that provided by the Legislature in RCW 81.77.040. Medical
5 waste may be "specialized"⁵ and it may well be ". . . quite a different situation
6 [from neighborhood solid waste collection]."⁶ But there is nothing to indicate
7 that the laws and rules the solid waste industry has lived with, and abided by,
8 since the early 1960's have changed the base test of RCW 81.77.040.
9 Applicant must prove, by traditional means, that even in a nontraditional
10 business environment, that:

11 . . . When an applicant requests a certificate to operate in a
12 territory already served by a certificate holder under this Chapter,
13 the Commission may, after notice and an opportunity for a
14 hearing, issue the certificate only if the existing solid waste
15 collection company or companies serving the territory will not
16 provide service to the satisfaction of the Commission or if the
17 existing solid waste collection company does not object. RCW
18 81.77.040 (in part).

19 9) At the risk of oversimplification, that is the law. Protestants agree
20 with Staff that the "tests" applied have evolved over the years, and medical
21 waste indeed presents a different, and challenging, situation for the
22 Commission. But the basic law is the same as it has been since its inception,
23 and we all have to avoid the temptation to apply tests and boundaries which
24 are not found in the statute simply because this Docket involves a specialized
25 waste stream (an obvious fact which Protestants acknowledge and accept).
26 However, the law and the Commission's rules are clear and must be followed –
they cannot be ignored or administratively altered by judicial discretion which
simply does not exist.

10) To perhaps simplify the issue here, Applicant has to present the
same sort of proof as in any other solid waste application situation.

⁵ *In re Sureway Medical Services, Inc.*, Order M.V.G. 1674 (Dec., 1993).

⁶ *In re Sureway Incineration, Inc.*, Order M.V.G. 1451 (Nov., 1990).

1 Protestants readily acknowledge Staff's position that customer/shipper
2 testimony will be more persuasive and perhaps more important than in a
3 "traditional" solid waste application hearing. But that testimony must be
4 presented and it must be subject to cross-examination by all Protestants.
5 Overlapping authority simply cannot be granted because of an earlier opinion
6 by previous Commissioners that competition in medical waste is desirable.⁷
7 Whatever the case, that competition does, in fact, exist. Whether it is working
8 for the benefit of the customer will, we suspect, be one of the many subjects of
9 the hearing process in this Docket. It is a reality that there is active
10 competition between two providers in many areas, and if this Application is
11 granted there will be three haulers providing service in some areas. The issue
12 of the efficacy of competition, and its ultimate effect on the consumer,
13 certainly will be the subject of the proffering of proof by the participants, and
14 the scrutiny of the ALJ and the Commission.

15 It is actually very simple: Applicant must meet the burden of proof
16 clearly specified in RCW 81.77.040. At the risk of stating the obvious, there
17 must be testimony (subject to cross-examination) that Applicant is "fit, willing
18 and able" to provide the service and, if it is, that the current certificated
19 haulers cannot or will not provide the service; and that the proposed service is
20 required by the public convenience and necessity.⁸ This is nothing new, and
21 certainly is no surprise to very experienced and competent counsel on both
22 sides of the issue. The fact that this is a statewide medical waste application
23 clearly will have an effect on the presentation of witnesses and argument of
24 counsel. This is clearly not a "garden variety" solid waste application and
25 Protestants are well aware that there may well be different and necessarily
26 innovative interpretations of the enabling statute and rules considered and
perhaps applied. However, it is, in Protestants' view, absolutely essential that
the law be followed here, and the requirements of RCW 81.77.040 be
scrupulously applied to whatever evidence may be presented. There is room

⁷ see *In re Sureway Incineration, Inc.*, Order M.V.G. 1451 (Nov., 1990).

⁸ RCW 81.77.040.

1 for acknowledgment of the unique nature of medical waste service, but there
2 is no room for administrative or judicial amendment of a long-standing and
3 still vitally applicable body of law.

4 Respectfully submitted this 21 day of June 2012.

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6 JAMES K. SELLS
7 WSBA No. 6040
8 Attorney for Protestants WRRRA,
9 Rubatino, Consolidated, Murrey's and
10 Pullman

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 as indicated below, pursuant to WAC 480-07-150.

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DATED at Silverdale, Washington, this 22nd day of June 2012.


Cheryl L. Sinclair