



SEATTLE OFFICE
 eighteenth floor
 second & seneca building
 1191 second avenue
 seattle, washington 98101-2939
 TEL 206 464 3939 FAX 206 464 0125

anchorage, alaska
 beijing, china
 new york, new york
 portland, oregon
 washington, d.c.
 GSBLAW.COM

GARVEY SCHUBERT BARER

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

Please reply to STEPHEN B. JOHNSON
 sjohnson@gsblaw.com
 DIRECT 206-816-1309

September 5, 2013

VIA EMAIL AND FEDEX

Steven V. King
 Executive Director and Secretary
 Washington Utilities and Transportation Commission
 1300 S. Evergreen Park Dr. SW
 PO Box 47250
 Olympia, WA 98504-7250

RECEIVED
 GENERAL MANAGER
 2013 SEP - 6 AM 9:35
 STATE OF WASH
 UTIL AND TRAN
 COMMISSION


Re: No. TG-121597
 Application of Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington

Dear Mr. King:

Enclosed please find an original and six (6) copies of Complainant Stericycle of Washington, Inc.'s Response to Notice of Opportunity to Respond Construing Motion for Reconsideration as Petition for Interlocutory Review.

Very truly yours,

GARVEY SCHUBERT BARER

By 
 Stephen B. Johnson

Enclosures

cc: Polly L. McNeill
 Jessica Goldman
 Adam Torem
 Steven W. Smith
 James Sells

Hard Copy
 RMS
 dmh

RECEIVED
WASTE MANAGEMENT

2013 SEP -6 AM 9:35

STATE OF WASHINGTON
UTIL. AND TRNSP. COM. STAFF

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 RESPONSE TO
NOTICE OF OPPORTUNITY TO
RESPOND CONSTRUING MOTION FOR
RECONSIDERATION AS PETITION FOR
INTERLOCUTORY REVIEW

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
206 464-3939

RESPONSE TO NOTICE OF OPPORTUNITY TO RESPOND

SEA_DOCS:1115001.2

ORIGINAL

1
2 **I. Introduction**

3 1. On August 26, 2013, Stericycle of Washington, Inc. (“Stericycle”) moved for
4 reconsideration of the Commission’s Order 05 denying Stericycle’s Motion for Third Party
5 Discovery. On August 29, the Commission issued a Notice of Opportunity to Respond
6 (“Notice”) stating that the “Commission’s procedural rules do not allow petitions for
7 reconsideration of interlocutory orders” and, therefore, that it would construe Stericycle’s
8 Motion for Reconsideration as a petition for interlocutory review by the full Commission under
9 WAC 480-07-810.

10 2. Stericycle responds to the Commission’s Notice on two grounds. First,
11 Stericycle’s motion should not be considered a petition for interlocutory review by the full
12 Commission – the Commission’s rules do not prohibit a motion to reconsider an interlocutory
13 order. Stericycle’s motion seeks reconsideration of Order 05 with respect to discovery sought
14 from Northwest Hospital & Medical Center (“Northwest Hospital”) because the Administrative
15 Law Judge (“ALJ”) failed to consider a critical reason why Stericycle needs information that
16 can only be obtained from Northwest Hospital. It is appropriate and efficient to allow the ALJ
17 to consider these issues in the first instance. Second, if the Commission considers Stericycle’s
18 Motion for Reconsideration as a petition for interlocutory review, the Commission should grant
19 the petition and allow the limited discovery sought by Stericycle.

20 **II. Discussion**

21 3. Motions in Commission adjudicative proceedings are governed by WAC 480-
22 07-375, which defines a motion as “[a] party’s written or oral request for commission action in
23 the context of an adjudicative proceeding.” WAC 480-07-375(1). Motions include discovery
24 motions, which are “requests to promote or limit the exchange of information among parties
25 during the discovery phase of a proceeding.” WAC 480-07-375(1)(c). Stericycle’s Motion for
26 Reconsideration is a written request for Commission action to promote the exchange of

1 information, namely to reconsider and grant Stericycle's motion for third-party discovery from
2 Northwest Hospital. Stericycle's motion for reconsideration is, therefore, a permissible motion
3 under WAC 480-07-375 and nothing in the Commission's rules otherwise prohibit a motion to
4 reconsider an order denying discovery.¹ The Commission should treat Stericycle's Motion for
5 Reconsideration as a procedurally proper motion addressed to the ALJ.

6 4. Stericycle's Motion for Reconsideration should be heard by the ALJ because it
7 raises issues the ALJ overlooked in issuing Order 05. As set forth more completely in the
8 Motion for Reconsideration, Order 05 found that Stericycle did not meet the standard for third-
9 party discovery imposed by Order 04 – "a showing that Stericycle cannot obtain information
10 necessary to support its claims in any other way." Order 05, p.3. The ALJ concluded that
11 because Stericycle has obtained *some* evidence of rebating, including an email and declaration
12 indicating that a rebate was given to Northwest Hospital, it is unable to show that direct
13 testimony from hospital witnesses to the unlawful rebating is *necessary*. *Id.* The ALJ did not
14 consider, however, that the evidence of a rebate to Northwest Hospital would be disputed by
15 Waste Management of Washington, Inc. ("Waste Management").

16 5. Stericycle's Motion for Reconsideration presents the ALJ with the testimony of
17 Waste Management's representative to Northwest Hospital demonstrating that he will dispute
18 the evidence of rebating activity. This dispute can *only* be resolved by testimony from the
19 Northwest Hospital employees who were witness to Waste Management's solicitations and
20 who dealt with Waste Management for biomedical waste and recycling services. This
21 circumstance makes third-party evidence essential, and the ALJ should be allowed to
22 reconsider his finding to the contrary.

23
24
25 ¹ WAC 480-07-850 contains specific provisions for the timing, contents, and disposition of a
26 petition for reconsideration of a final order, but it does not prohibit or otherwise address the
appropriateness of a motion for reconsideration seeking discovery under the Commission's
rules permitting motion practice.

1 6. Alternatively, the Commission should construe Stericycle’s Motion for
2 Reconsideration as a new motion for third-party discovery seeking limited discovery from only
3 Northwest Hospital on grounds that have not yet been considered by the ALJ. In either case,
4 the ALJ should be allowed the first opportunity to consider Stericycle’s need for this discovery
5 in light of the Commission’s discovery rules and the additional showing imposed by Order 04,
6 both of which Stericycle has satisfied.

7 7. In its response to the Commission’s Notice of Opportunity to Respond, the
8 Commission Staff argues that Stericycle’s Motion for Reconsideration “primarily focuses on
9 Stericycle’s need for the information for purposes of a motion for summary determination.”
10 Commission Staff Answer, ¶2. This is not true. Stericycle needs the information it seeks to
11 prove a key factual issue in its claim of unlawful rebating, whether on summary determination
12 *or* at a hearing. For the same reason, this information is also necessary to the Commission,
13 which has a duty to adjudicate claims of unfair competition and to protect consumers from
14 unlawful business practices.

15 8. The Commission Staff’s other concern – that allowing third-party discovery in
16 this unique circumstance would be tantamount to making third-party discovery “readily
17 available” in all adjudicative proceedings – is without basis. *Id.*, ¶3. Stericycle has been
18 required to make and has made an extraordinary showing of need to obtain third-party
19 discovery. As discussed in Stericycle’s Motion for Reconsideration, Order 04 required a
20 showing of necessity far beyond that required by the Commission’s discovery rules and, in
21 addition, required Stericycle to demonstrate that it could not obtain the information it is seeking
22 in any other way. As Order 05 recognized, Stericycle made extensive efforts to obtain
23 information informally before requesting third-party discovery from the Commission.
24 Recognizing that Stericycle has met the high standards for obtaining third-party discovery set
25 forth in the Commission’s rules and those additionally imposed by Order 04 will not make such
26 discovery “readily available” in all adjudicative proceedings.

1 9. Finally, if Stericycle's Motion for Reconsideration is deemed a petition for
2 interlocutory review under WAC 480-07-810, that petition should be granted. Petitions for
3 interlocutory review are appropriate when "review could save the commission and the parties
4 substantial effort or expense" or when "some other factor is present that outweighs the costs in
5 time and delay of exercising review." WAC 480-07-810(2).

6 10. Stericycle is requesting limited discovery from a single third-party. Stericycle is
7 seeking documents and two depositions on a single factual issue. These depositions will be
8 short and the proposed depositions will be conducted at the deponents' place of business. The
9 burden on Northwest Hospital is small. The importance of the information that can be obtained
10 from Northwest Hospital, on the other hand, is great. This information is potentially
11 dispositive of Stericycle's claim of unlawful rebating, a claim that is supported by existing
12 evidence but is disputed by Waste Management. If the testimony of the Northwest Hospital
13 witnesses confirms that an unlawful rebate was paid and contradicts the denials of Waste
14 Management, then summary determination could be sought, obviating the effort and expense of
15 preparing for and conducting a hearing. If, on the other hand, the testimony of the Northwest
16 Hospital witnesses supports Waste Management's position and contradicts the existing
17 evidence of rebating, then a hearing could be avoided by summary determination or the
18 withdrawal of claims by Stericycle. In either case, interlocutory review of the denial of third-
19 party discovery "could save the commission and the parties substantial effort or expense."
20 This benefit "outweighs the costs in time and delay of exercising review," which are small
21 given that the petition is already before the Commission and there is no scheduled hearing date
22 that must be postponed.


23 11. In its response to the Commission's Notice of Opportunity to Respond, the
24 Commission Staff suggests an approach that guarantees extensive commitment of Commission
25 resources and the full expense of a hearing. The Commission Staff suggests that Stericycle
26 subpoena the Northwest Hospital witnesses to give testimony at a hearing. The Commission

1 Staff's suggestion entirely ignores Stericycle's need for documents in Northwest Hospital's
2 possession that could shed light on Waste Management's practices. Moreover, the Commission
3 Staff's approach would unnecessarily impose on the parties and the Commission the costs of
4 preparing all documentary and testimonial evidence for hearing, complying with the pre-
5 hearing procedural rules, and conducting a hearing, even though a small discovery expense and
6 brief imposition on Northwest Hospital could avoid such costs. This approach is not the best
7 use of the parties' resources or those of the Commission and should be avoided.

8 12. The Commission, on interlocutory review or upon reconsideration by the ALJ,
9 should grant Stericycle's request for third-party discovery from Northwest Hospital.

10 DATED this 5th day of September, 2013.

11
12 Respectfully submitted,
13 GARVEY SCHUBERT BARER

14 By 
15 Stephen B. Johnson, WSBA #6196
16 Jared Van Kirk, WSBA #37029
17 Attorneys for Protestant Stericycle of
18 Washington, Inc.

19
20
21
22
23
24
25
26
GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
206 464-3939

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 September 5, 2013, I caused to be served on the person(s) listed below in
4 the manner shown a copy of COMPLAINANT STERICYCLE OF WASHINGTON, INC.'S
5 RESPONSE TO NOTICE OF OPPORTUNITY TO RESPOND CONSTRUING MOTION
6 FOR RECONSIDERATION AS PETITION FOR INTERLOCUTORY REVIEW:

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
18 Polly L. McNeill
19 Summit Law Group
20 315 5th Avenue South, Suite 1000
21 Seattle, WA 98104
22 jessicag@summitlaw.com
23 pollym@summitlaw.com
24 katiea@summitlaw.com
25 brians@summitlaw.com

- Via Legal Messenger
- Via Facsimile
- Via U.S. Mail, First Class,
Postage Prepaid
- Via Email

26 Steven W. Smith
Office of the Attorney General
Utilities and Transportation Division
1400 S. Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1225
(360) 586-5522 Fax
ssmith@utc.wa.gov


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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

James K. Sells
Attorney at Law
PMB 22, 3110 Judson Street
Gig Harbor, WA 98335
jamesells@comcast.net
cheryls@rsulaw.com
*Attorney for Washington Refuse and
Recycling Association*

- Via Legal Messenger
- Via Facsimile
- Via U.S. Mail, First Class,
Postage Prepaid
- Via Email

Dated at Seattle, Washington this 5th day of September, 2013.



Vickie L. Owen
vowen@gsblaw.com