

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

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| STERICYCLE OF WASHINGTON, |) | DOCKET TG-121597 |
| INC., |) | |
| |) | |
| Complainant, |) | ORDER 06 |
| |) | |
| v. |) | |
| |) | ORDER DENYING MOTION FOR |
| WASTE MANAGEMENT OF |) | REVIEW OF ORDER 05 |
| WASHINGTON, INC., d/b/a WM |) | |
| HEALTHCARE SOLUTIONS OF |) | |
| WASHINGTON, |) | |
| |) | |
| Respondent. |) | |
| |) | |

BACKGROUND

- 1 On October 3, 2012, Stericycle of Washington, Inc. (Stericycle) filed a complaint against Waste Management of Washington, Inc., d/b/a WM Healthcare Solutions of Washington (Waste Management). As relevant here, the complaint alleges that Waste Management is unlawfully soliciting biomedical waste collection business from Washington generators by offering discounts on Waste Management’s recycling or other services, or otherwise rebating a portion of its biomedical waste tariff rates.

- 2 On March 8, 2013, the Washington Utilities and Transportation Commission (Commission) entered Order 04, Order Authorizing Limited Discovery (Order 04). Order 04 authorized the parties to conduct discovery of each other but required Commission approval for any discovery directed to third parties. The order provides that third party discovery “may be approved upon a showing that Stericycle cannot obtain information necessary to support its claims in any other way,” and that the Commission will “consider third party opposition to discovery requests.”¹

- 3 Stericycle propounded written discovery on Waste Management and deposed one of Waste Management’s employees. On July 22, 2013, Stericycle sought Commission authority to engage in third party discovery to obtain testimony and documents

¹ Order 04 ¶ 14.

directly from certain biomedical waste generators to whom Waste Management offered both biomedical waste and recycling services.

- 4 On August 16, 2013, the presiding Administrative Law Judge (ALJ) entered Order 05, Order Denying Stericycle’s Motion for Third Party Discovery (Order 05). The order determined that Stericycle had already obtained evidence from Waste Management related to the issues in Stericycle’s complaint and was seeking to gather additional information from third parties who are opposed to participating in Stericycle’s dispute with Waste Management. Order 05 denied Stericycle’s request to engage in third party discovery for failure to show that Stericycle cannot obtain information necessary to support its claims in any other way.
- 5 On August 26, 2013, Stericycle filed a Motion for Reconsideration of Order Denying Third-Party Discovery (Motion). Stericycle asks that the presiding ALJ reconsider Order 05, specifically with regard to the issuance of subpoenas to two Northwest Hospital employees. Stericycle contends that the testimony it seeks to obtain from these employees is significant and essential to its case. Stericycle concedes that Northwest Hospital “may have been reluctant to offer witnesses and documents to Stericycle informally,” but “but there is no evidence that it ‘strongly opposes any participation in Stericycle’s dispute with Waste Management,’ as Order 05 found.”² According to Stericycle, “Northwest Hospital has taken no position on its willingness to cooperate [if] subpoenaed.”³
- 6 On August 29, 2013, the Commission issued a Notice of Opportunity to Respond (Notice), characterizing Order 05 as an interlocutory order concerning discovery. The Commission interpreted the Motion as a petition for review governed by WAC 480-07-810 and invited the parties to file answers.
- 7 Staff filed its answer to the Motion on September 4, 2013. Staff opposes Stericycle conducting third party depositions when the purpose is to support a possible motion for summary determination, particularly when Waste Management is likely to dispute issues of material fact. Staff argues that in litigation before the Commission, deposing third parties is an extraordinary event. Staff suggests that Stericycle should instead rely on the Administrative Procedure Act’s (APA) authority for its counsel to subpoena third party witnesses to appear at the evidentiary hearing in this matter.

² Motion ¶ 15.

³ *Id.*

8 Waste Management filed its answer on September 5, 2013, and also opposes the Motion, pointing out that Waste Management has already provided Stericycle with extensive documentation regarding its negotiations with Northwest Hospital. Waste Management also states that Northwest Hospital has never been afforded an opportunity to formally state its opposition to the subpoenas.

9 Stericycle filed its own response to the Notice on September 5, 2013. Stericycle contends that the Commission's procedural rules allow for a motion requesting that the presiding ALJ reconsider a decision set out in a discovery order. In the alternative, Stericycle maintains that the Motion should be construed as a new motion to the ALJ for third-party discovery. Under either alternative, Stericycle believes that the ALJ should initially resolve the Motion because he overlooked the fact that Waste Management would dispute Stericycle's evidence of a rebate to Northwest Hospital. If treated as a petition for review of an interlocutory order, Stericycle argues that the Commission should grant the request because the burden on Northwest Hospital will be small and the information Stericycle seeks is potentially dispositive of its unlawful rebating claim.⁴

DISCUSSION AND DECISION

10 Order 05 is an interlocutory order ruling on a discovery issue. The Commission's procedural rules do not expressly authorize petitions for reconsideration of interlocutory orders, and we decline to use WAC 480-07-375(1) to create the new procedure Stericycle requests. Nor will we construe the Motion as a new motion for third party discovery when the Motion seeks the same relief as Stericycle's original motion for third party discovery. Either approach would unduly burden the ALJ with repeated requests to change a decision that he has already made.

11 We therefore construe Stericycle's motion as a petition for interlocutory review of Order 05. Such review is discretionary and is available only under limited circumstances:

When review is available. Interlocutory review is discretionary with the commission. The commission may accept review of interim or interlocutory orders in adjudicative proceedings if it finds that:

⁴ Stericycle also provides a reply to Staff's response to the Motion. The Commission, however, did not request or authorize replies, and accordingly, we do not consider this portion of Stericycle's response.

(a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;

(b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or

(c) A review could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.⁵

12 In this case, Stericycle contends that the Commission should exercise its discretion to review the order now because Stericycle's inability to take depositions from third party employees at Northwest Hospital is potentially dispositive of its claim that Waste Management offered unlawful rebates to obtain business from generators. That is not a finding the Commission can make at this point in the proceeding. We nevertheless find that review of Order 05 now could save the Commission and the parties substantial effort or expense, and accordingly, we exercise our discretion to accept review of Order 05.

13 Upon review, we affirm the decision in Order 05. Discovery is not a matter of right in administrative agency adjudicative proceedings. The APA permits agencies to adopt rules determining "whether or not discovery is to be available in adjudicative proceedings and, if so, which forms of discovery may be used."⁶ If not provided for by agency rules, "the presiding officer may decide whether to permit the taking of depositions" and "may condition use of discovery on a showing of necessity and unavailability by other means."⁷ The Commission's procedural rules authorize depositions of persons identified as a potential witness in a proceeding.⁸ For a person not identified as a potential witness, the presiding officer may, but is not obligated to, approve a deposition "on a finding that the person appears to possess information significant to the party's case."⁹

⁵ WAC 480-07-810(2).

⁶ RCW 34.05.446(2).

⁷ RCW 34.05.446(3).

⁸ WAC 480-07-410(1); RCW 81.04.060.

⁹ WAC 480-07-410(1). Stericycle argues that "WAC 480-07-400 provides that subpoenas from the Commission are always available as a mechanism to obtain discovery in such circumstances."

- 14 The two Northwest Hospital employees Stericycle seeks to depose are not identified as potential witnesses. According to Stericycle, they possess information essential to its case because they “apparently received and agreed to Waste Management’s rebating offer.”¹⁰ Stericycle claims that this satisfies the standard for approving depositions in the Commission’s rules, as well as the prerequisite in Order 04 that a party seeking to conduct discovery of third parties must demonstrate that the party cannot obtain information necessary to support its claims in any other way.
- 15 We agree with Staff that deposing third parties who have not been designated as potential witnesses is an extraordinary form of discovery in Commission proceedings. Indeed, Stericycle cites no proceeding in which the Commission has ordered the deposition of such persons. The Commission must safeguard the public interest, which requires a balance between the interests of the companies the Commission regulates and consumers of regulated services. That balancing rarely, if ever, requires the involuntary participation of customers in an adjudication between two competing carriers. Consistent with the APA and Commission rules, the limitations on third party discovery in Order 04 appropriately recognize and reserve the Commission’s discretion to authorize such discovery only in the most compelling circumstances.
- 16 Stericycle has not shown that such circumstances exist in this case. Stericycle has already conducted discovery of Waste Management and obtained information related to the issues in the complaint. Stericycle now seeks to extract information from Waste Management’s customers who have informed Stericycle that they are not willing to provide that information voluntarily. Stericycle’s desire to buttress the data collected from Waste Management does not provide sufficient grounds to force customer employees to submit to depositions.
- 17 The fact that Waste Management disputes the evidence Stericycle has gathered to date also does not demonstrate the necessity of deposing third parties. To the contrary, Waste Management likely would also contest any adverse deposition testimony

Stericycle Motion for Reconsideration ¶ 16 (emphasis in original). The rule, however, provides that “[s]ubpoenas are available as a means of discovery as provided in Title 80 or 81 RCW and chapter 34.05 RCW.” WAC 480-07-400(2)(a). The APA, in turn, states, “The presiding officer *may* issue subpoenas A subpoena *may* be issued with like effect by the agency or the attorney of record in whose behalf the witness is required to appear.” RCW 34.05.446(1) (emphasis added). This provision is permissive – for both the agency and participating counsel – and imposes no obligation on the Commission to issue a subpoena under any circumstances.

¹⁰ Motion ¶ 1.

Northwest Hospital's employees gave, which would place an unwilling customer squarely in the middle of a dispute between two regulated companies. We find no compelling reason to require such customer involvement in this case.

- 18 Deposition testimony from Northwest Hospital employees, moreover, is not the only, or even the best, evidence of the rates the hospital pays for those services. Invoices, records of payments, and other documents memorializing or describing the business arrangement between Northwest Hospital and Waste Management would provide a more convincing demonstration of whether Waste Management is actually charging less than its tariffed rates for regulated services than testimony on any "agreement" or understanding Northwest Hospital employees may believe they had with Waste Management. Stericycle makes no claim that it has been unable to obtain such documents.
- 19 Under these circumstances, the Commission will not compel the Northwest Hospital employees or any other third parties to be deposed in this docket.

ORDER

- 20 THE COMMISSION ORDERS That Stericycle's motion for interlocutory review of Order 05 is DENIED.

Dated at Olympia, Washington, and effective December 12, 2013.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, Commissioner