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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
OPPOSITION TO STERICYCLE'S
MOTION TO COMPEL**

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I. RELIEF REQUESTED

1. Applicant Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington (“Waste Management”) requests that the Commission deny Stericycle of Washington, Inc.’s (“Stericycle”) Motion to Compel Responses to Data Requests and Production of Documents (“Stericycle’s Motion”).

II. STATEMENT OF FACTS

2. At the outset of these proceedings, the Presiding Officer issued a Prehearing Conference Order authorizing limited discovery and reminding the parties of their obligations to properly use the discovery process.

Discovery is limited to the scope of the parties’ interest in the proceeding pursuant to WAC 480-07-400(3). Specifically, the protesting parties do not have a significant interest in, and may not conduct discovery on, issues related to Waste Management’s financial or operational fitness to provide service under the extended authority for which it has applied. Such issues include, but are not necessarily limited to, the statutory factors of an estimate of the costs of facilities to be used to provide the proposed service, the Company’s assets, or Waste Management’s prior experience in the field.¹

The Prehearing Conference Order further “remind[ed] the parties that discovery ‘must not be used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the costs of litigation.’ WAC 480-07-400(3). The Commission will have no tolerance for abuse of the discovery process.”²

3. Stericycle has strenuously – and repeatedly – objected to the Commission’s discovery limitations. In response to the first such objections, the Presiding Officer reaffirmed the discovery limitations and found that

Stericycle fundamentally misunderstand[s] the nature of discovery in administrative adjudicative proceedings in general, and in the context of the fitness issues in this docket in particular.

Unlike civil litigation in state superior court, the availability of discovery in Commission adjudicative proceedings is discretionary except in certain specified cases. This is not one of those cases. The Commission often conducts adjudicative proceedings in which no discovery is authorized, relying solely on the evidence the parties have developed

¹ Order 01 ¶ 8.

² *Id.* ¶ 9.

1 independently. Consistent with RCW 34.05.446 and WAC 480-07-400, therefore, the
2 Commission could have precluded any and all discovery in this case.³

3 This second Order reaffirmed that “no party, including protestants, has a right to discovery at all in this
4 docket, much less on any specific issues.”⁴ Moreover, the Presiding Officer held that Stericycle had
5 failed to identify any “legitimate interest” Stericycle “has in whether Waste Management is fit to
6 provide the requested service.”⁵ The responsibility of examining Waste Management’s fitness “is the
7 responsibility of the Commission, not private parties, particularly when those private parties are
8 competing service providers.”⁶

9 4. Stericycle again objected to the discovery limitation in opposition to Waste
10 Management’s Motion for Summary Determination.⁷ For the third time, the Presiding Officer rejected
11 Stericycle’s request for expansive, burdensome discovery and refused to revisit prior orders prohibiting
12 Stericycle from conducting discovery on issues of Waste Management’s financial and operational
13 fitness.⁸

14 5. Notwithstanding these limitations, Stericycle served voluminous data requests on Waste
15 Management seeking detailed information and documentation of Waste Management’s financial and
16 operational fitness and unduly burdensome discovery of permissible subjects. The data requests take up
17 29 pages of single-spaced type, including data requests with subparts numbered (A) – (Y).⁹ After Waste
18 Management objected to some data requests and responded to others,¹⁰ counsel for Waste Management
19 participated in two lengthy telephone calls regarding Stericycle’s claims that it is entitled to more
20 discovery.¹¹ In response to these conversations, Waste Management supplemented its written answers
21

22 ³ Order 03 ¶¶14-15 (n. omitted).

23 ⁴ *Id.* ¶ 15.

24 ⁵ *Id.* ¶ 17.

25 ⁶ *Id.*

26 ⁷ *In re Waste Mgmt. of Wash., Inc.*, Docket TG-120033, Stericycle’s Opp. to WM’s Mot. for Summ. Det. (May 25, 2012),
pp. 15-17.

27 ⁸ Order 04 ¶ 10.

28 ⁹ *See, e.g.*, Stericycle’s Motion, Ex. A, DR No. 12.

¹⁰ Stericycle’s Mot., Ex. B.

¹¹ Declaration of Polly L. McNeill in Opposition to Stericycle’s Motion to Compel (“McNeill Decl.”), Exs. 1-2.

1 and produced additional documents.¹² Waste Management has now produced 688 pages of
2 documents.¹³

3 6. Stericycle now seeks an order compelling yet further discovery from Waste Management
4 in response to 23 data requests.

5 III. STATEMENT OF ISSUES

6 7. Should Stericycle's request to use the discovery process to harass, cause unnecessary
7 delay and needlessly increase the costs of this litigation be denied?

8 IV. EVIDENCE RELIED UPON

9 8. Waste Management relies on the Declarations of Polly McNeill and Jeff Norton filed
10 herewith, and Waste Management's Application for authority to provide extended service.

11 V. ARGUMENT

12 A. Stericycle Has Failed to Meet and Confer Regarding 12 Data Requests.

13 9. Pursuant to WAC 480-07-425(1), "[p]arties must make good faith efforts to resolve
14 informally all discovery disputes." Only "if a dispute cannot be informally resolved" may a party file a
15 motion to compel.¹⁴ The Presiding Officer reiterated this requirement in "urg[ing] the parties to work
16 cooperatively together to avoid having to bring discovery matters forward for formal resolution."¹⁵
17 Counsel for all of the parties participated in two lengthy telephone calls in which Stericycle outlined the
18 29 Data Requests it contended were incomplete. Those conversations – and Waste Management's
19 response to Stericycle's substantive arguments, and Waste Management's agreement to produce
20 additional information and documents in response to some of those 29 Data Requests – were
21 memorialized in two letters from Waste Management's counsel.¹⁶

22 10. In its Motion to Compel, Stericycle **for the first time** contends that Waste
23 Management's responses to 12 **additional** Data Requests were improper and that further responses
24

25 ¹² Stericycle's Mot., Ex. C.

26 ¹³ McNeill Decl. ¶ 4.

27 ¹⁴ WAC 480-07-425(1).

28 ¹⁵ Order 01 ¶ 9.

¹⁶ McNeill Decl., Exs. 1-2.

1 should be compelled. Specifically, Stericycle seeks to compel further responses to Data Request
2 Nos. 1-4, 6-7, 11, 13, 17, 19, and 27.¹⁷

3 11. The improper sandbagging attempted here by Stericycle is exemplified by its motion for
4 an order compelling a further response to Data Request No. 6, which, in addition to never having been
5 the subject of a discovery conference, Stericycle now admits “was overbroad as written.”¹⁸ So,
6 Stericycle asks the Presiding Officer to compel Waste Management to “instead” provide a response to
7 *New Data Request No. 6* seeking information about biomedical waste generators to whom Waste
8 Management has provided both regulated biomedical waste service and non-regulated services such as
9 recycling.¹⁹ However, in the discovery conference about Data Request No. 21 – which seeks largely
10 the same information requested in *New Data Request No. 6* – Stericycle agreed that Waste Management
11 need not produce anything further at this time.²⁰

12 12. Having failed to first address Data Request Nos. 1-4, 6-7, 11, 13, 17, 19, and 27 with
13 Waste Management,²¹ Stericycle’s motion to compel further response to these 12 Data Requests is
14 improper and must be denied.²²

15 **B. Stericycle Is Not Entitled to an Order Compelling Supplementation of Data Requests**
16 **“Describing Waste Management’s Proposed Biomedical Waste Services.”²³**

17 13. Stericycle contends that it lacks “basic background information on the services Waste
18 Management and its affiliates are presently offering to biomedical waste generators and the services
19 they propose to offer if Waste Management’s application is granted.”²⁴ As to this subject, Stericycle
20 seeks to compel further response to Data Request Nos. 1-4, 6-7, 10-11, 13, and 15-19.²⁵ Of these, only

21 _____
22 ¹⁷ Stericycle’s Mot. at 1:6-7.

23 ¹⁸ *Id.* at 5:5-6.

24 ¹⁹ *Id.* at 5:6-9.

25 ²⁰ McNeill Decl., Ex. 2.

26 ²¹ *Id.*, Exs. 1-2 (memorializing the parties’ discussion of Data Request Nos. 8-10, 12(T), 12(V), 12(Y), 14-15, 18, 20-22, 24-
27 26, 28-36, 38-41, 45).

28 ²² For this reason, Waste Management moves to strike paragraphs 5-8 in Stericycle’s Motion.

²³ Stericycle’s Mot. at 1:20.

²⁴ *Id.* at 1:21-23.

²⁵ *Id.* at 2:1-3.

1 Data Request Nos. 10, 15, and 18 were previously raised by Stericycle and discussed in the parties'
2 discovery conferences.²⁶ However, Waste Management has responded to those requests in its
3 supplemental response.

4 14. Stericycle admittedly narrowed Data Request No. 10 to ask for copies of all non-
5 identical form contracts for services provided by Waste Management related to those customers who
6 have also been offered or provided recycling services, as identified in relation to Data Request No. 20.²⁷
7 In fact, Waste Management has already produced all of such contracts that it currently uses with those
8 customers.²⁸ Had Stericycle articulated its concerns prior to making its motion, Waste Management
9 could have confirmed that fact. There is no more to say on this subject, and it should not for the first
10 time be a position articulated in a motion to compel.²⁹

11 15. Other than including Data Request Nos. 15 and 18 in the laundry list mentioned at the
12 outset of Section II.A of Stericycle's Motion,³⁰ Stericycle fails to identify what additional information
13 or documents it contends it needs or why. Data Request No. 15 requested:

14 [A]ll Your policies, procedures, handbooks, manuals, operating plans, transportation
15 plans, training and certification materials, protocols, guidelines, or other similar
16

17 ²⁶ McNeill Decl., Exs. 1-2.

18 ²⁷ *Id.*, Ex. 1.

19 ²⁸ Declaration of Jeff Norton in Opposition to Stericycle's Motion to Compel ("Norton Decl.") ¶ 2. Stericycle's data
20 requests were exceedingly duplicative, making it difficult to differentiate among production documents. Compare Data
21 Request Nos. 7, 10, 11, 21, and 22 (all seeking customer contracts, among other enumerated documents). Stericycle's Mot.,
22 Ex. A. Yet Stericycle gripes about Waste Management's supplemental production as being "an undifferentiated hodge-
23 podge of documentary material." Stericycle's Mot. at 2:12. Here, Stericycle seems to suggest that the documents
24 responsive to its narrowed Data Request No. 10 might have been produced, but they should not count because they were
25 "apparently in response to other data requests." Stericycle's Mot. at 6:1.

26 ²⁹ The record reflects Waste Management's objection to Data Request No. 10 seeking identification of Waste
27 Management's customers, and Stericycle's ongoing insistence for that information. McNeill Decl., Ex. 1. Waste
28 Management fully intends to present evidence of sentiment in the community to the Commission, but it objected to
Stericycle's fishing expedition which improperly sought identification of all customers without having legitimate reasons
and possibly having the inappropriate goal of harassing those customers before they give testimony. Stericycle appears to
have now relinquished that aspect of Data Request No. 10.

30 Stericycle's Mot. at 2:2-3 ("Stericycle seeks an order compelling responses to Data Requests No. 1-4, 6-7, 10-11, 13, and
15-19." (Emphasis added.)) Note that in its Introduction, a different list is presented. Stericycle's Mot. at 1:6-7 (identifying
Data Request Nos. 1-4, 6-7, 10-11, 13, 17, 19, 20-22, 24-27, and 35-36 – omitting reference to Nos. 15, 16 and 18). Note
further that no argument is made anywhere in its motion about Data Request Nos. 4, 15, 19, 26, and 27. It is not entirely
clear exactly which Data Requests Stericycle needs, but Waste Management submits that Stericycle's request to compel
responses to these data request for which no argument is presented should be denied outright.

1 documents Relating to your current and proposed Biomedical Waste Services for
2 Washington State customers.³¹

3 Waste Management has produced all of its written policies, procedures, operating plan, and training
4 materials that are responsive to this request.³²

5 16. In turn, Data Request No. 18 requested a description of Waste Management's program
6 for handling sharps, including the BD ecoFinity program.³³ When the parties conducted their discovery
7 conference regarding this Data Request, Stericycle's counsel requested that Waste Management
8 supplement its response by providing the following information:

9 (1) Where does Waste Management treat the BD ecoFinity waste to render it
10 noninfectious? (2) Is infections BD ecoFinity waste leaving Washington for treatment?
11 (3) Who manufactures the sharps and sharp containers which Waste Management's
12 alternative program? (4) What is the percentage of the sharps and sharps containers that
13 is recycled? (5) What are the rates Waste Management charges to collect and transport
14 sharps or sharps waste? (6) Production of documents regarding Waste Management's
15 sharps or sharps waste services.³⁴

16 In a subsequent discovery conference, Stericycle requested additionally that Waste Management
17 supplement its response to Data Request No. 18 by providing "alternatively, the names of Waste
18 Management customers signed up for the BD ecoFinity program in Washington or the number of such
19 customers."³⁵ Waste Management agreed to³⁶ and then did provide the requested supplemental
20 information.³⁷

21 17. Stericycle's request for an order compelling supplementation of Data Request Nos. 1-4,
22 6-7, 10-11, 13, and 15-19 should be denied. To do otherwise would sanction its unwillingness to
23 undertake good faith efforts to informally resolve discovery disputes and reward its failure to present
24 any rationale for compelling further responses – timely or not. As to the bulk of these, Stericycle failed

24 ³¹ Stericycle's Mot., Ex. A.

25 ³² Norton Decl. ¶ 3.

26 ³³ Stericycle's Mot., Ex. A.

27 ³⁴ McNeill Decl., Ex. 1.

28 ³⁵ *Id.*, Ex. 2.

³⁶ *Id.*, Exs. 1-2.

³⁷ Stericycle's Mot., Ex. C; McNeill Decl. ¶ 6.

1 to conduct the requisite discovery conference. As to the remaining three, Waste Management has
2 produced the supplemental information Stericycle requested in the discovery conferences.³⁸

3 **C. Stericycle Is Not Entitled to An Order Compelling Supplementation of Data Requests**
4 **“Relevant to ‘Public Need.’”³⁹**

5 18. Although Stericycle acknowledges that Waste Management “provide[d] substantial
6 information concerning Waste Management’s contentions with respect to ‘public need’ for its
7 services,”⁴⁰ Stericycle seeks an order compelling further response to Data Request Nos. 24-26.⁴¹ Data
8 Request No. 24 sought information regarding waste generators’ claims to Waste Management that a
9 need exists for Waste Management’s biomedical waste services.⁴² In response to the Data Request and
10 the parties’ discovery conferences, Waste Management produced a recitation of the biomedical waste
11 generators who are known to Waste Management to be dissatisfied with currently available biomedical
12 waste services.⁴³ As to each such generator, Waste Management advised that the “[d]issatisfaction was
13 communicated orally.”⁴⁴ Stericycle contends this answer “is simply not credible in this era of hectic
14 schedules and constant email communication.”⁴⁵ Beyond that, it fails to justify why Waste
15 Management should be put to the burden of detailing its search for documents which may discuss these
16 complaints.

17 19. Other than including Data Request Nos. 25 and 26 in the laundry list,⁴⁶ Stericycle does
18 not explain how Waste Management’s responses to these two Data Requests (which requested no
19

20
21 ³⁸ The substantive bases for rejecting the data requests that Stericycle now characterizes as seeking “basic information” about
22 the Applicant’s current and proposed services are articulated in Waste Management’s initial data request responses and its
23 correspondence documenting discovery conference discussions. Stericycle’s Mot., Ex. B; McNeill Decl., Exs. 1-2.
24 Stericycle’s abuse of the discovery process, however, makes it unnecessary to rely on those arguments.

25 ³⁹ Stericycle’s Mot. at 6:5.

26 ⁴⁰ *Id.* at 6:12-14.

27 ⁴¹ *Id.* at 6:6.

28 ⁴² *Id.*, Ex. A.

⁴³ *Id.*, Ex. C.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 6:6.

1 documents) were incomplete. To the contrary, Waste Management provided a precise answer to the
2 two questions posed.⁴⁷

3 20. Stericycle's request for an order compelling supplementation of Data Request Nos. 24-
4 26 should be denied.

5 **D. Stericycle Is Not Entitled to an Order Compelling Supplementation of Data Requests**
6 **"Concerning the Financial Feasibility of Waste Management's Proposed Services."**⁴⁸

7 21. Stericycle contends it is entitled to the information requested in Data Request Nos. 35
8 and 36.⁴⁹ Each of these is an unduly burdensome request for discovery which the Presiding Officer
9 barred Stericycle from requesting.

10 22. Data Request No. 35 provides:

11 Produce and itemize in detail the data, analysis, methodology, assumptions and other
12 considerations involved in any prior budget, study, evaluation or projection prepared or
13 conducted by You (or for You by others) of the potential revenues, expenses or
14 profitability of Your Biomedical Waste Services (a) within the territory covered by
15 Certificate No. G-237 and/or (b) within the territory covered by Your Application, and
16 produce all Documents Relating to any such data, analysis, methodology, assumptions,
17 considerations, budget, studies, evaluations or projections.⁵⁰

18 23. Data Request No. 36 states:

19 Please provide detailed projections of the capital investment, revenues and expenses that
20 You anticipate for Your Biomedical Waste Services for each of the years 2013-2015
21 assuming, alternatively, (a) that Your Application is denied, and (b) that Your
22 Application is granted in 2012. Describe in detail the basis for Your projections. Please
23 provide such projections in the manner, format and detail of the Annual Report (including
24 all Schedules) that Class A Solid Waste Collection Companies are required to file under
25 WAC 480-70-071. Please provide separate projections of the capital investment,
26 revenues and expenses anticipated for your Biomedical Waste collection and
27 transportation services and Your services associated with treatment and disposal of
28 Biomedical Waste.

Produce all Documents supporting or otherwise Relating to Your projections of capital
investment, revenues and expenses described and itemized in response to this Data

26 ⁴⁷ Stericycle's Mot., Ex. C.

27 ⁴⁸ *Id.* at 7:6.

28 ⁴⁹ *Id.* at 7:14-15.

⁵⁰ *Id.*, Ex. A.

1 Request No. 31 [sic], and Identify all persons who contributed to preparing such
2 objections.⁵¹

3 24. Stericycle not-so-subtly intrudes into impermissible discovery of information related to
4 Waste Management's financial *fitness* under the guise of financial *feasibility*, in yet another end-run
5 around the reasonable constraints on discovery imposed on it.⁵² Indeed, Stericycle practically concedes
6 Waste Management's financial fitness – which frees it then to pursue the same data albeit ostensibly to
7 prove a different point.⁵³ Citing to precedent only for the proposition that financial feasibility and
8 financial fitness are *separate*,⁵⁴ Stericycle fails to complete the statement that concludes, “but they are
9 so interrelated that they [should be] discussed together.”⁵⁵ If the line between fitness and feasibility is
10 blurred, that is no reason for allowing Stericycle to violate the discovery prohibitions imposed on it.
11 The Presiding Officer exercised discretion to allow limited discovery.⁵⁶ Seeking “current and likely
12 future revenues, costs, customers and profitability”⁵⁷ under these two data requests exceeds the bounds
13 of his discretion, in spirit if not in letter.⁵⁸ Even if Data Request Nos. 35 and 36 were not strictly
14 deemed to be asking about financial and operational fitness, they are only two of the possible topics the
15 Presiding Officer warned Protestants to avoid.⁵⁹ Stericycle's continued chafing against the constraints
16 imposed upon it is now evidenced by an exceedingly narrow interpretation of the scope of the
17 discovery limitation, which warrants rebuffing its attempt by broadening the prohibition as needed to
18 prevent abuse of discovery. The Presiding Officer has reminded the parties that discovery in

19 _____
20 ⁵¹ Stericycle's Mot., Ex. A.

21 ⁵² *Id.* at 7-11.

22 ⁵³ *Id.* at 8:fn2 (“Stericycle has no doubt that Waste Management will be able to prove its financial fitness at hearing and does
not ask the Commission to compel discovery to the extent of any data request directed to that issue.”).

23 ⁵⁴ *Id.* at 11:6-6 (citing to *Ryder*).

24 ⁵⁵ *In re Ryder Distribution Res., Inc.*, App. No. GA-75154 and *In re Stericycle of Wash., Inc.*, App. No. 77539, Order M.V.G.
No. 1761 at 9 (Wash. Utils. & Transp. Comm'n, Aug. 11, 1995).

25 ⁵⁶ Order 01 ¶7.

26 ⁵⁷ Stericycle's Mot. at 9:5.

27 ⁵⁸ See Order 04 ¶ 9 (“The statute requires, at a minimum, a description and analysis of the facilities needed, the estimated
attendant costs, and the assets the applicant commits to provide, to offer the requested service.”) The bar is not high. *Id.*

28 ⁵⁹ Order 01 ¶ 8 (“Such issues include, but are not necessarily limited to, the statutory factors of an estimate of the costs of
facilities to be used to provide the proposed service, the Company's assets, or Waste Management's prior experience in the
field.” (Emphasis added)).

1 adjudicative proceedings before the Commission is not subject to the *carte blanche* procedure permitted
2 in Superior Court.⁶⁰ Rather, the parties are constrained to discovering information as to issues in which
3 they have a “significant interest”⁶¹ – as reflected in the legal standard, not in their desire to punish a
4 competitor.

5 25. Stericycle suggests that Waste Management should be required to produce documents
6 proving that its proposed operations can be conducted profitably so that Stericycle can make its case
7 that Waste Management’s expansion will “de-stabilize rates and service levels.”⁶² Yet it is the
8 incumbent’s responsibility to provide evidence that its ability to provide the collection of biohazardous
9 waste or the public’s ability to receive that service is endangered.⁶³ Stericycle asserts that rural areas
10 are less profitable,⁶⁴ but offers no support for this contention – and it alone is uniquely suited to have
11 that information at hand. Stericycle does not require an order compelling information from Waste
12 Management to prove its allegations. It need only look at its own costs, profit and margins.⁶⁵
13 Burdening Waste Management with proof of profitability is itself not a prerequisite to entry;⁶⁶
14 compelling it to produce documents to prove the point is therefore not proper.

15 26. The notion that Waste Management intends to operate an unprofitable business is not a
16 logical basis for burdensome and protracted discovery. Waste Management’s financial ability to
17 expand into new territories and withstand start-up of its new venture will be fully explored at hearing.
18 The test is “whether the applicant has the financing to conduct the operations for a reasonable period;
19
20

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22 ⁶⁰ Order 03 ¶ 15.

23 ⁶¹ Order 01 ¶ 8.

24 ⁶² Stericycle’s Mot. at 9:2.

25 ⁶³ *In re Ryder Distribution Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1596 at 15 (Wash. Utils. & Transp. Comm’n,
26 Jan. 25, 1993).

27 ⁶⁴ Stericycle’s Mot. at 8:13.

28 ⁶⁵ And yet Stericycle refuses to produce data that is necessary to evaluate whether Waste Management’s expansion will
adversely impact the financial stability of the incumbent. *In re Waste Mgmt. of Wash., Inc.*, Docket TG-120033, WM’s Mot.
to Compel Disc. from Stericycle (July 31, 2012).

⁶⁶ *In re Stericycle of Wash., Inc.*, App. No. GA-77539, Order M.V.G. No. 1761 at 9 (Wash. Utils. & Transp. Comm’n, Aug.
11, 1995 (“An applicant need not demonstrate profitability of proposed operations as a prerequisite to entry.”)).

1 whether it has reasonably considered the costs of providing service; and whether those costs appear to
2 be reasonable.”⁶⁷ These are all components of Waste Management’s burden of proof.

3 27. Contentions in support of Data Request Nos. 35 and 36 evidence a stubborn refusal to
4 acknowledge the difference between what the applicant must demonstrate to meet statutory
5 requirements, versus what may be discovered by the incumbent.⁶⁸ It also ignores the leeway granted to
6 companies starting new ventures with regard to profitability. The Applicant must show that it can
7 withstand the initial period where its operations may not yet be profitable.⁶⁹ **The Commission** must
8 determine whether Waste Management has the financial wherewithal to start and maintain operations,
9 to operate through the start up phase of its new business, and whether it can provide consistent service
10 to the costumers and continue to meet those needs by acquiring additional equipment and personnel.⁷⁰
11 An applicant is *not* required to prove that its proposed operations are certain to be profitable⁷¹ – but to
12 the extent such proof is relevant, it is the Commission’s responsibility to determine whether Waste
13 Management meets its burden of proof, not Stericycle’s.⁷²

14 28. Stericycle’s interests in discovery regarding financial factors required to be proven to the
15 Commission are attenuated, at best. Stericycle’s request for an order compelling any response to Data
16 Request Nos. 35 and 36 should be denied.

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22 ⁶⁷ *In re Ryder Distribution Res., Inc.*, App. No. GA-75154 and *In re Stericycle of Wash., Inc.*, App. No. 77539, Order M.V.G.
No. 1761 at 9 (Wash. Utils. & Transp. Comm’n, Aug. 11, 1995).

23 ⁶⁸ Stericycle’s Mot. at 10:14-25 (citing *Sureway*).

24 ⁶⁹ *In re Sureway Med. Servs., Inc.*, App. No. GA-75968, Order M.V.G. No. 1663 at 19 (Wash. Utils. & Transp. Comm’n,
Nov. 19, 1993) (“The Commission [must be] satisfied that the applicant can finance operations in expanded territories for a
reasonable period, until its operation either become profitable or demonstrate that they lack feasibility.”).

25 ⁷⁰ *In re Sure-Way Incineration, Inc.*, App. No. GA-868, Order No. 1451 at 9 (Wash. Utils. & Transp. Comm’n, Nov. 30,
26 1990).

27 ⁷¹ *In re Sureway Med. Servs., Inc.*, App. No. GA-75968, Order M.V.G. No. 1663 at 19 (Wash. Utils. & Transp. Comm’n,
Nov. 19, 1993) (“The Commission [must be] satisfied that the applicant can finance operations in expanded territories for a
reasonable period, until its operation either become profitable or demonstrate that they lack feasibility.”).

28 ⁷² Order 04 ¶16.

1 **E. Stericycle Is Not Entitled to an Order Compelling Further Supplementation of Data**
2 **Requests “Related to Regulatory Fitness.”⁷³**

3 29. Stericycle is dissatisfied with Waste Management’s responses to Data Request Nos. 18
4 and 20-22 apparently more on the basis of legal theories about the evidence, rather than on the nature of
5 the responses themselves. These data requests were the subject of discussion and clarification, and
6 Waste Management ultimately agreed to respond;⁷⁴ and did so.⁷⁵ Stericycle’s motion to compel further
7 supplementation to this line of discovery should be denied.

8 30. Waste Management provided extensive information describing the BD ecoFinity Life
9 Cycle Solution sharps recycling program in response to Data Request No. 18. Stericycle disagrees with
10 Waste Management about whether this program offers unregulated commercial recycling – but it is not
11 the data response with which it quarrels. Stericycle is alarmed about Waste Management’s innovative
12 sharps recycling program, especially since it comprises a service that Stericycle does not offer.
13 Stericycle’s arguments about the definition of commercial recycling are telling, but they are wrong.
14 Commercial recycling is not regulated by the Commission, and it is not the subject of tariff rates.⁷⁶ The
15 BD ecoFinity program is a unique and novel recycling program for which Waste Management is free to
16 charge competitive rates.⁷⁷ Stericycle’s suspicions about Waste Management’s ability to recycle sharps
17 are not grounds for seeking an order compelling further production. Although it seems more like a
18 bully-pulpit for Stericycle to test its legal theories than a request for further discovery, its motion must
19 be denied to the extent it seeks further supplementation of information sought in Data Request No. 18.

20 31. Similarly, Data Request Nos. 20-22 were the subject of give-and-take through discovery
21 conferences, and Waste Management produced information and documents sought.⁷⁸ Waste
22 Management offered detailed descriptions of the commercial recycling arrangements with the six
23 generators about which Stericycle inquired in Data Request No. 20, as agreed by the parties; and then it

24 ⁷³ Stericycle’s Mot. at 11:11.

25 ⁷⁴ McNeill Decl., Ex. 1.

26 ⁷⁵ Stericycle’s Mot., Ex. C.

27 ⁷⁶ RCW 81.77.140 (“Nothing in this chapter shall prevent a recycling company or nonprofit entity from collecting and
transporting recyclable materials from ... a commercial or industrial generator of recyclable materials”).

28 ⁷⁷ Stericycle’s Mot., Ex. C.

⁷⁸ Stericycle’s Mot., Ex. C. *See also* McNeill Decl., Exs. 1-2.

1 produced contracts and emails.⁷⁹ Stericycle indicated that Waste Management did not need to produce
2 anything further in response to Data Request No. 21, and clarified that producing correspondence
3 between Jeff Norton and any of the six generators identified in Data Request No. 20 was sufficient.⁸⁰
4 Now, however, Stericycle criticizes Waste Management’s responses.⁸¹

5 32. Stericycle argues that Data Request Nos. 20-22 were intended to elucidate evidence
6 about commercial recycling discounts that it characterizes as “unlawful rebates.”⁸² Again, Stericycle’s
7 motion is more oriented toward justifying its legal conclusions than it is about the evidence produced.

8 33. In its arguments about allegedly illegal rebates, Stericycle reveals its significant cause
9 for alarm. Waste Management can offer shippers a full-service waste management option, in which it
10 could conceivably bring to bear its resources involving municipal solid waste, commercial recycling,
11 and overall waste – and expense – reduction.⁸³ It has the capacity to serve customers needing
12 biomedical waste collection by performing commercial recycling, including lamp and battery recycling,
13 pharmaceutical waste management, organics and composting collection, and construction and
14 demolition debris recycling.⁸⁴ For customers located in the territory authorized by Certificate No. G-
15 237, it could also include collection of municipal solid waste.⁸⁵ In addition, Waste Management has
16 the ability to provide consulting services to minimize total charges incurred by customers for full-
17 stream waste handling.⁸⁶

18 34. Stericycle’s only hope is to characterize this “bundling” of services as impermissible
19 kick-backs. Arguments based on what Stericycle “believes” to be true aside, there is nothing illegal
20 about offering a competitive rate for commercial recycling in combination with a contract for managing
21 biomedical waste. Openly negotiating with shippers to match the prices of other commercial recycling
22

23 ⁷⁹ Stericycle’s Mot., Ex. C.

24 ⁸⁰ McNeill Decl., Ex. 2.

25 ⁸¹ Stericycle’s Mot. at 12-14.

26 ⁸² *Id.* at 11:25.

27 ⁸³ Norton Decl. ¶ 4.

28 ⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

1 companies is not “anti-competitive” behavior, the hallmark of illegal rebates.⁸⁷ A rebate is not
2 inherently anti-competitive unless it is secret and unearned.⁸⁸ Offering unregulated commercial
3 recycling services at competitive prices is not discriminatory.⁸⁹ Indeed, it is an important point of
4 distinction between the Applicant and Stericycle, and Stericycle’s inability to offer the same range of
5 services does not make it illegal for Waste Management to do so. Waste Management has produced the
6 requested information, and compelling further supplementation would essentially sanction Stericycle’s
7 fishing expedition.

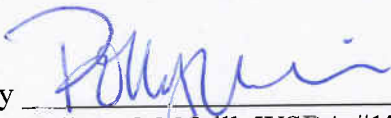
8 35. Stericycle’s request for an order compelling supplementation of Data Request Nos. 20-
9 22 should be denied.

10 **VI. CONCLUSION**

11 36. Waste Management requests that the Commission deny Stericycle’s Motion for an order
12 compelling further responses on the data requests that are the subject of its motion. Stericycle is not
13 complying with regulatory policies related to informal resolution of discovery disputes, it is intruding on
14 the topics of discovery prohibited by the Commission, and it is using the process to needlessly increase
15 Waste Managements’ costs in this litigation.

16 DATED this 6th day of August, 2012.

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26 ⁸⁷ *In re Ryder Distribution Res., Inc.*, App. No. GA-75154 and *In re Stericycle of Wash., Inc.*, App. No. 77539, Order M.V.G.
27 No. 1761 at 8 (Wash. Utils. & Transp. Comm’n, Aug. 11, 1995).

28 ⁸⁸ 54A. Am. Jur. 2d Monopolies and Restraints of Trade § 104.

⁸⁹ *In re Ryder Distribution Res., Inc.*, App. No. GA-75154 and *In re Stericycle of Wash., Inc.*, App. No. 77539, Order M.V.G.
No. 1761 at 9 (Wash. Utils. & Transp. Comm’n, Aug. 11, 1995).

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.

Washington Utilities and Transportation Commission 1300 S. Evergreen Park Dr. SW PO Box 47250 Olympia, WA 98504-7250 360-664-1160 records@utc.wa.gov	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Federal Express <input checked="" type="checkbox"/> Via Email
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DATED at Seattle, Washington, this 6th day of August, 2012.


 Deanna L. Schow