BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Penalty Assessment against WASTE MANAGEMENT OF WASHINGTON, INC. In the amount of $47,700	DOCKET TG-190495 COMMISSION STAFF'S REPLY TO WASTE MANAGEMENT OF WASHINGTON, INC.'S RESPONSE TO PENALTY ASSESSMENT

BACKGROUND

1 In March 2019, Special Investigator Wayne Gilbert of the Washington Utilities and Transportation Commission (Commission) initiated a routine safety investigation of Waste Management of Washington, Inc. (WM or Company) for the purpose of determining the safety fitness of the Company as set forth in Title 49 Code of Federal Regulations (CFR) and adopted under Washington law.

2 On June 11, 2019, during a closing interview, Investigator Gilbert notified the Company of violations discovered in the investigative report.[1] The report documented the following violations:

- **199 acute violations of 49 CFR Part 383.37(a)** – Knowingly allowing, requiring, permitting, or authorizing an employee to operate a commercial motor vehicle during any period in which the driver does not have a current commercial driver license or does not have a commercial driver license with the proper class or endorsements.

[1] *See* Attachment 1 to the Declaration of Jason Sharp (Sharp Decl.), Investigation Report by Wayne Gilbert, dated June 11, 2019.

Specifically: (1) Reese Penhollow drove with a downgraded commercial driver license on 126 occasions between September 14, 2018, and March 25, 2019; and (2) Jason Troupe drove with a downgraded commercial driver license on 73 occasions between November 11, 2018 and March 25, 2019.

- **274 critical violations of 49 CFR Part 391.45(a)** – Using a driver not medically examined and certified. Specifically, the Company allowed six of its drivers to drive without having been medically examined and certified: (1) Scott Crandall drove a total of nine times without a medical certificate between March 4, 2019 and March 25, 2019; (2) Errin Ellington drove a total of eight times without a medical certificate between November 20, 2019 and November 29, 2019; (3) Arnulfo Garcia drove a total of 115 times without a medical certificate between October 1, 2018 and April 3, 2019; (4) Adam Petereit drove a total of 76 times without a medical certificate between November 26, 2018 and April 3, 2019; (5) Donald Phillips, Jr. drove a total of 62 times without a medical certificate between January 3, 2019 and April 15, 2019; and (6) Aaron Hutchison drove a total of four times without a medical certificate between January 14, 2019 and January 17, 2019.
- **1 violation of 49 CFR Part 391.51(b)(2)** – Failing to maintain general requirements for driver qualification file. Specifically, for one of its drivers, the Company failed to maintain inquiries into the driver's driving record in the driver qualification file.
- **4 violations of 49 CFR Part 396.3(a)(1)** – Parts and accessories shall be in safe and proper operating condition at all times. Specifically, four vehicles were placed out of service, one because the left tire on axle one was making contact with the drag link

when making right turns, and three because 20 percent or more of each vehicle's service brakes were defective.

3 On July 10, 2019, the Commission issued a Notice of Penalties Incurred and Due for Violations of Laws and Rules (Notice). In the Notice, the Commission set forth the above-described violations and assessed a $47,000 penalty against the Company:

- $19,900 for the 199 violations of 49 CFR Part 383.37(a);
- $27,400 for the 274 violations of 49 CFR Part 391.45(a); and,
- $400 for the four violations of 49 CFR Part 396.3(a)(1).[2]

4 On July 25, 2019, the Company filed its Response to Penalty Assessment (Response) in this Docket. In the Response, the Company did not contest the violations of 49 CFR Parts 383.37(a), 391.51(b)(2), or 396.3(a)(1) as alleged by the Commission. Instead, the Company admitted these violations and requested that the Commission mitigate penalties. *See* § II *infra*. However, the Company contested 253 of the 274 violations of 49 CFR Part 391.45(a) based on the following definition of "motor vehicle" in Revised Code of Washington (RCW) 81.77.010(1) and a similar definition in Washington Administrative Code (WAC) 480-70-041:

> 'Motor vehicle' means any truck, trailer, semitrailer, tractor, or any self-propelled or motor driven vehicle used upon any public highway of this state ***for the purpose of transporting solid waste***, for the collection or disposal, or both, of solid waste.[3]

WM argues that the Commission's driver medical certification requirements do not apply to its drivers for the 253 contested trips because the trucks driven, weighing between 10,001 and 26,000 pounds, carried loads of empty waste containers rather than solid waste. For this

[2] The Commission did not assess a penalty for the violation of 49 CFR Part 391.51(b)(2).
[3] RCW 81.77.010(1) (emphasis added).

reason, according to WM, those 253 trips were not "for the purpose of transporting solid waste," and the trucks therefore did not fit within the definition of "motor vehicles" that are subject to Chapter 81.77 of the Revised Code of Washington (RCW) and by extension the Commission's driver safety requirements.

5 For the reasons that follow, Staff disagrees with the Company's assertion that the Commission improperly cited 253 violations of Part 391.45(a). However, Staff believes the Company has demonstrated a sufficient basis to mitigate the penalties assessed. Lastly, Staff does not oppose the Company's request that the Commission decide this matter based solely on the written record in this Docket.

DISCUSSION

I. THE COMMISSION'S DRIVER SAFETY REQUIREMENTS APPLY TO THE 253 CONTESTED VIOLATIONS OF 49 CFR PART 391.45(a)

A. The hauling and provision of waste containers is for the "purpose of transporting solid waste"

i. The hauling and provision of waste containers is "for the purpose of transporting solid waste" under the Company's solid waste collection tariffs

6 WM argues that the contested trips were not for the purpose of transporting solid waste because "the commercial motor vehicles . . . carried only empty containers to or from customers." But the Company's *own* solid waste collection tariffs make clear that the hauling and provision of waste containers in commercial motor vehicles is not only for the purpose of transporting solid waste, but represents an essential, expressly identified, and necessary component of the Company's tariffs, and is therefore a regulated function subject to the Commission's driver safety requirements.[4] For example:

[4] Furthermore, the phrase "for the purpose of" preceding "transporting solid waste" in RCW 81.77.010(1) serves to broaden the scope of covered activities to those necessarily involved in or done in furtherance of transporting solid waste.

- The definition of "permanent service" (Item 20 – Definitions): "Container and drop-box service provided at the customer's request for more than ninety days."[5]
- The definition of "container" (Item 20 – Definitions): "Container means a detachable receptacle (normally designed to hold at least a cubic yard of solid waste) from which materials are collected by mechanically lifting the receptacle and emptying the contents into the company's vehicle."[6]
- The Company's tariff includes charges to customers for retrieval, servicing, and returning waste containers to customers (Item 52 – Re-delivery Charges; and Item 210 – Washing and Sanitizing Containers and/or Drop Boxes): "A pickup and re-delivery fee of $ 32.15 will be assessed to customers who request that their container or Drop Box be washed, steam cleaned and sanitized. Please see Item 210."[7]
- The rates the Company may charge depend on the number and type of containers provided and/or used by a WM customer (Item 100 – Residential Service – Monthly Rates).[8]
- The Company's solid waste collection tariff mandates that they provide containers to customers (Item 200 – Containers and/or Drop Boxes – General Rules): "Availability. A company must maintain a supply of all sizes of containers and drop boxes for which rates are listed in this tariff. If a customer requests a container or drop box of a size listed in the company's tariff, and the company is unable to provide the requested size within 7 days of the customer request, the customer must be notified in writing or by

[5] *See* Attachment B, Tariff No. 23, Waste Management of Washington, Inc., Waste Management – South Sound and Waste Management of Seattle, Certificate No. G-237 at p. 11.
[6] *Id*.
[7] *Id*. at pp. 17, 33.
[8] *Id*. at p. 22.

telephone."[9]

7 These are only a few examples, and the tariffs contain further references to containers that make clear that their provision to customers are for the purpose of, and actually necessary for, the primary function of WM's business, the collection and transportation of solid waste.

ii. Adopting the Company's interpretation would yield absurd results

8 Commission statutes and rules "must be read to avoid absurd results."[10] The practical outcomes of WM's interpretation would yield absurd results. For example, under WM's interpretation (i.e., that the contents of a truck at a given time dictate the applicable regulations), a driver of an empty truck leaving a WM facility to pick up a first load of solid waste would fall outside the Commission's driver safety regulations, but would become subject to those requirements the moment the driver's truck carried waste. This would again change after the driver disposed of the waste. In addition to creating an absurd hodgepodge of regulation, WM's interpretation is also potentially dangerous; trucks weighing more than 10,001 pounds, when not handled by medically examined and certified drivers, present a serious safety concern for Staff regardless of whether the truck is filled with waste receptacles, actual solid waste, or is empty.[11]

9 Additionally, Staff's application of the 10,001 pound threshold is consistent with how the Commission regulates other industries, such as household goods carriers.[12] It would represent an absurd result to require common carriers of household goods to be medically certified to operate an empty truck, yet not require the same certification for a solid waste

[9] *Id*. at p. 31.
[10] *Gen. Tel. Co. of the Nw. v. Wash. Util. & Transp. Comm'n*, 104 Wn.2d 460, 471, 706 P.2d 625 (1985) (interpreting RCW 80.04.180).
[11] *See* Attachment A, Sharp Decl. ¶ 8.
[12] *See, e.g.*, WAC 480-15-570(1)(c)(i)(E) (defining "commercial motor vehicle"); WAC 480-15-570(1)(c)(iv) (Qualification of Drivers); *see also* Sharp Decl. ¶ 7.

collection driver operating the exact same truck.

B. The Company contests 253 violations based on a general definition in RCW 81.77.010, but fails to address the definition of "commercial motor vehicle" in WAC 480-70-196 that directly applies to Part 5 of Chapter 480-70 WAC

10 Even assuming, for the sake of argument, that the 253 contested trips were *not* for the purpose of transporting solid waste (they were), the 253 alleged violations of Part 391.45(a) nonetheless stand. The Notice alleges violations of WAC 480-70-201, Vehicle and Driver Safety Requirements, which adopts title 49 CFR Parts 383, 391, and 396, among others. WAC 480-70-201 is included in Part 5—Equipment and Drivers, of Chapter 480-70 WAC. Part 5 includes WAC 480-70-196—Commercial Vehicle Defined, setting forth a specific definition of "commercial motor vehicle" to be applied to all rules under Part 5:

> ***For the purposes of the rules in Part 5***—Equipment and Drivers, 'commercial motor vehicle' means any self-propelled or towed motor vehicle used on a highway when the vehicle:
> (1) ***Has a gross vehicle weight rating*** or gross combination weight rating, ***or gross vehicle weight*** or gross combination weight, ***of ten thousand and one pounds or more***, whichever is greater . . .[13]

The legislature applied this more specific definition to violations of Part 5 (the violations at issue in this Docket), and by its plain text it does not require a vehicle to be used "for the purpose of transporting solid waste" in order to mandate compliance with the Commission's driver safety requirements. The above definition in WAC 480-70-196 directly parrots the Federal Motor Carrier Safety Administration's definition of commercial motor vehicle applicable to Part 391.45(a).[14] This is another indication of the legislature's intent to use that specific definition for violations of WAC 480-70-201. The Company's Response states that

[13] WAC 480-70-196 (emphasis added).
[14] *See* 49 CFR Part 390.5 ("*Commercial motor vehicle* means any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle - (1) ***Has a gross vehicle weight rating*** or gross combination weight rating, ***or gross vehicle weight*** or gross combination weight, ***of 4,536 kg (10,001 pounds) or more***, whichever is greater . . .") (emphasis added); *see also* Sharp. Decl. ¶ 8.

the trucks driven for the 253 contested trips had an applicable vehicle weight of 10,001 pounds or greater,[15] bringing them within the purview of the Commission's driver safety requirements for these trips. The Company's argument in contesting the violations of Part 391.45(a) is based on the purportedly applicable definition, but the Response failed to address the directly applicable definition in WAC 480-70-196.

C. Commission Staff's rule interpretation and enforcement precedent

11 Commission Staff, who specialize in motor carrier safety investigations and are familiar with the Commission's enforcement policies, routinely consider and construe container trucks driven by solid waste companies to be regulated by the Commission and subject to the medical certification requirements adopted under WAC 480-70-201.[16] This is because, as stated, the Commission and the Federal Motor Carrier Safety Administration share the same vehicle threshold for commercial motor vehicles of 10,001 pounds or greater gross vehicle weight rating when applying the medical certification requirement to drivers.[17]

12 For each of the reasons above, Staff believes the penalty assessment issued in this Docket is accurate and disagrees with the Company's argument that the commercial motor vehicles identified during the investigation do not fall under the Commission's regulation.[18]

II. MITIGATION

13 As set forth in greater detail in the attached Declaration of Jason Sharp, Staff reviewed the Company's request for mitigation and finds that the Company's thorough response to the Notice, as illustrated in the Company's safety management plan, shows the Company took

[15] *See* Response at p. 2 ("Three of the drivers cited in the Penalty Notice (Garcia, Petereit, and Phillips) were driving container delivery vehicles – i.e., commercial motor vehicles with a gross vehicle weight rating (GVWR) between 10,001 and 26,000 pounds. [*sic*] that carried only empty containers to or from customers.").
[16] Sharp Decl. ¶¶ 7-8.
[17] *Id*. ¶ 8.
[18] *Id*. ¶¶ 7-9.

immediate corrective action to address each violation.[19] A summary of Staff's recommendation as to the Company's mitigation request is as follows:

- 199 acute violations of 49 CFR Part 383.37(a) for $19,900: The Company admitted and corrected the violations, and took steps to prevent future occurrences. Staff therefore recommends mitigation of this penalty to $9,950.[20]
- 274 critical violations of 49 CFR Part 391.45(a) for $27,400: While the Company contested 253 of the identified violations, the Company nonetheless directed the three container truck drivers (Garcia, Petereit, and Phillips) to be medically examined and certified. Staff also does not believe the Company knowingly violated this safety requirement but instead (incorrectly) interpreted its container service to fall under common carrier authority whose safety regulations are enforced by the Washington State Patrol, from whom the Company sought guidance regarding safety requirements for medical certification. Staff therefore recommends mitigation of this penalty to $13,700.[21]
- Four violations of 49 CFR Part 396.3(a)(1) for $400: The Company admitted and corrected these violations. WM represented that it communicated with maintenance personnel on this issue and also provided training to drivers on proper pre- and post-trip inspection procedures. Staff therefore recommends mitigation of this penalty to $200.[22]
- In total, Staff recommends mitigation of the assessed penalty from $47,700 to $23,850.

[19] *Id*. ¶¶ 10, 18.
[20] *Id*. ¶ 13.
[21] *Id*. ¶ 15.
[22] *Id*. ¶ 17.

- Staff further recommends suspension of $13,850 of the penalty for a period of two years before being waived, on the following conditions: (1) that Staff will conduct a focused safety investigation of 49 CFR Parts 383 and 391 in two years or as soon thereafter as practicable to review the Company's compliance; (2) the Company does not incur any repeat acute or critical violations; and (3) the Company pays the $10,000 portion of the penalty that is not suspended.[23]

III. WM'S REQUEST FOR A DECISION ON THE PAPERS

14 The Company requested that the Commission decide this matter solely on the written information provided with respect to both the contested and un-contested violations alleged in the Notice. Staff does not oppose this request.

CONCLUSION

15 For the reasons provided, Staff: (1) asks that the Commission uphold the 253 alleged violations of Part 391.45(a) that are contested by the company; (2) asks that the Commission grant the Company a mitigation of its penalties in line with Staff's recommendation in this pleading and the attached declaration; and (3) does not oppose the Company's request that the Commission decide this matter solely on the written record.

DATED this 8th day of August 2019.

Respectfully submitted,

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[23] *Id*. ¶ 18.

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