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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re Application of  
WASTE MANAGEMENT OF  
WASHINGTON, INC.  
d/b/a WM Healthcare Solutions  
of Washington  
720 4th Ave. Ste 400  
Kirkland, WA 98033-8136

Docket No. TG-120033

PROTESTANT STERICYCLE OF  
WASHINGTON, INC.'S MOTION FOR  
LEAVE TO TAKE DEPOSITION AND TO  
COMPEL RESPONSES TO DEPOSITION  
QUESTIONS

PROTESTANT STERICYCLE OF WASHINGTON, INC.'S MOTION FOR  
LEAVE TO TAKE DEPOSITION AND TO COMPEL RESPONSES TO  
DEPOSITION QUESTIONS

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

1  
2 **I. Introduction**

3 1. Pursuant to WAC 480-07-410 and Prehearing Conference Order (Order 01),  
4 protestant Stericycle of Washington, Inc. (“Stericycle”) respectfully requests the Commission’s  
5 leave to take the deposition of Jeff Daub, an employee of Waste Management of Washington,  
6 Inc. (“Waste Management”) who has been identified by Waste Management as a witness on its  
7 behalf and who is a person with significant knowledge relevant to Stericycle’s case in this  
8 application proceeding. This is Stericycle’s second motion to take Mr. Daub’s deposition and  
9 Stericycle requests an order compelling the attendance of Mr. Daub and the Commission’s  
10 authorization for Stericycle’s counsel to issue a subpoena compelling his attendance pursuant to  
11 RCW 34.05.446. An order and subpoena are necessary because Mr. Daub has refused to attend  
12 a deposition that was noticed after Waste Management agreed to his deposition without  
13 reservation on the record before the Administrative Law Judge to avoid a ruling on Stericycle’s  
14 previous motion for Mr. Daub’s deposition.

15 2. Stericycle also respectfully requests an order compelling Jeff Norton, another  
16 Stericycle witness, to return to his continued deposition and respond to several lines of  
17 questioning that Waste Management’s counsel did not permit him to answer. These lines of  
18 questioning address several relevant subjects that are live issues for the hearing and that have  
19 not been prohibited from discovery by any previous ruling of the ALJ.

20 3. This Motion is based upon the Declaration of Jared Van Kirk (“Van Kirk  
21 Decl.”), filed herewith, and the other files and records herein.

22 **II. Discussion**

23 **A. Deposition of Jeff Daub.**

24 4. WAC 480-07-410(1) provides that “[a] party may depose any person identified  
25 by another party as a potential witness” and that “[a] party may depose a person who has not  
26

1 been identified as a potential witness, if the presiding officer approves the deposition on a  
2 finding that the person appears to possess information significant to the party's case.”

3 5. On July 31, 2012 Stericycle filed a motion to take the deposition of Waste  
4 Management witnesses, including Mr. Daub. In its response to that motion, Waste  
5 Management did not oppose the deposition of Mr. Daub. *See* WM Response to Stericycle’s  
6 Motion for Leave to Take Depositions, p. 1 (“Stericycle seeks leave to depose Messrs. Norton  
7 and Daub. Waste Management does not oppose this request.”). In addition, Waste  
8 Management admitted that Mr. Daub “will be [a] key witness[] for Waste Management.” *Id.*

9 6. At the August 8, 2012 hearing on Stericycle’s motion, the ALJ noted Waste  
10 Management’s agreement and, consequently, declined to order Mr. Daub’s deposition, stating:

11 As to taking depositions of potential Waste Management  
12 witnesses, it sounds to me like there is no objection to doing that.  
13 I have no problem with the parties making their own  
14 arrangements to take depositions should they so choose. I don’t  
15 see a need to order that if the parties are already in agreement.

16 Van Kirk Decl., Ex. A, Excerpts of August 8, 2012 hearing transcript, 97:8-13.

17 7. Stericycle and Waste Management subsequently agreed on a date for Mr.  
18 Daub’s deposition and Stericycle sent a formal notice of deposition to Waste Management’s  
19 Counsel on September 14, 2012. Van Kirk Decl., Ex. B.

20 8. Despite its representations in a filed pleading, and Stericycle and the ALJ’s  
21 reliance on those representations, on October 10, 2012, only three working days before Mr.  
22 Daub’s deposition, Waste Management “withdrew” its agreement to Mr. Daub’s deposition.

23 9. The ALJ declined Stericycle’s request to hold a discovery conference based  
24 upon Stericycle’s first motion to take Mr. Daub’s deposition and Waste Management’s  
25 representations in response to that motion. Stericycle, therefore, brings this second motion for  
26 leave to take Mr. Daub’s deposition.

1           10. Under WAC 480-07-410(1) Mr. Daub is a person Stericycle is entitled to depose  
2 in this hearing. Waste Management specifically identified Mr. Daub as a “key witness” in its  
3 case. Moreover, Waste Management submitted a lengthy declaration containing testimony on  
4 which Waste Management intends to rely in this proceeding, making him an actual witness in  
5 this case. As a “person identified by another party as a potential witness,” Stericycle is entitled  
6 to take Mr. Daub’s deposition. WAC 480-07-410(1).

7           11. Mr. Daub is also a person that possesses information significant to Stericycle’s  
8 defense in this application proceeding, and should also be made available for a deposition on  
9 that ground. *See* WAC 480-07-410(1). First, Mr. Daub’s testimony is largely devoted to  
10 describing the services Waste Management intends to offer if its application is granted. No  
11 other witness offers this testimony. The Commission cannot grant Waste Management’s  
12 application unless it determines that the proposed services are in the public’s interest, which  
13 presumably requires understanding those services. Thus, Mr. Daub’s testimony is Waste  
14 Management’s principle evidence relevant to the public interest inquiry. Exploring the features  
15 of the services described by Mr. Daub and probing the factual basis for his testimony is  
16 important to preparing Stericycle’s protest. By way of example only, Mr. Daub testifies that  
17 Waste Management employees “decontaminate” biomedical waste containers before returning  
18 them to customers, but he does not explain anything about this process, how employees are  
19 involved, and how they are protected during this decontamination. Daub Testimony, ¶15, 19.  
20 This public interest information will not be discovered unless Mr. Daub’s description of Waste  
21 Management’s services is subject to examination.

22           12. Second, Mr. Daub describes numerous aspects of the services that Waste  
23 Management intends to provide that have been alleged as superior to Stericycle’s services  
24 and/or alleged to respond to a generator’s alleged dissatisfaction with some aspect of  
25 Stericycle’s services. For example, certain prefilled generator testimony alleges dissatisfaction  
26 with aspects of Stericycle’s customer service. Mr. Daub’s testimony reveals that he is

1 knowledgeable about Waste Management's customer service. *See* Daub Declaration, ¶5. To  
2 rebut claims that Waste Management's customer service will addresses generators' alleged  
3 dissatisfactions, Stericycle is entitled to question the only Waste Management witness to offer  
4 testimony concerning Waste Management's customer service practices.

5 13. Likewise, certain generators and Mr. Norton have alleged in prefiled testimony  
6 that Waste Management's processing facility is more convenient to generators and carries  
7 lower risk. Mr. Daub's testimony indicates that he is the Waste Management employee who is  
8 responsible for all of the biomedical waste collection and processing services in Washington  
9 and, thus, the employee most knowledgeable concerning the risks observed in Waste  
10 Management's transport and processing activities. *See* Daub. Decl., ¶3.

11 14. In his deposition, Mr. Norton also indicated that Mr. Daub was knowledgeable  
12 on relevant topics that Mr. Norton was not. For example, Mr. Norton indicated that Mr. Daub  
13 was the primary contact with certain of the generators who have submitted prefiled testimony  
14 and would have knowledge of how they discussed their needs and the service provided by  
15 Stericycle. *See* Van Kirk Decl., Ex. C, Excerpts of J. Norton Deposition Transcript ("Norton  
16 Dep."), 63:18-22, 66:20-67:15; 91:16-93:2. Mr. Daub's deposition is necessary to examine  
17 what these generators have stated with respect to their needs and experiences with Stericycle  
18 and to allow Stericycle to prepare to cross examine the generators concerning their prefiled  
19 testimony.

20 15. Waste Management will contend that despite being an identified and actual  
21 witness in this application proceeding, Mr. Daub should not be subject to deposition because  
22 his testimony is allegedly being proffered only on the issues of operational and financial  
23 fitness. This position is wrong as a matter of fact and on the law.

24 16. Although Mr. Daub's declaration is captioned as a declaration "Regarding  
25 Waste Management's Fitness," nothing about the testimony in that declaration is so limited.  
26 Mr. Daub does not testify that he is offering testimony only to address "fitness." In addition,

1 the testimony addresses far more than Waste Management's operational ability to provide  
2 collection and transportation in Washington (so-called "operational fitness") and does not  
3 address at all Waste Management's financial wherewithal to provide its services now and in the  
4 immediate future (so-called "financial fitness"). His testimony purports to explain Waste  
5 Management's relationship with its corporate affiliates, customer service, containers and waste  
6 acceptance policies, employee training, waste tracking and documentation, spill control  
7 procedures, decontamination processes, insurance coverage, waste processing, final waste  
8 disposal, facility permitting, inspection violations, and customer complaints. As discussed  
9 above, this comprehensive description goes directly to the public's need for and interest in the  
10 services that Waste Management intends to offer, issues of competitive entry that are contested  
11 by Stericycle in this proceeding and that have not been excluded from the hearing or from  
12 discovery by any order of the ALJ.

13 17. In addition, as noted above, Mr. Daub has information concerning testifying  
14 generators that is entirely separate from his proffered testimony.

15 18. Finally, the WAC standard for depositions is not limited in the manner Waste  
16 Management suggests. The rule provides for depositions of all party witnesses, including "key  
17 witnesses" like Mr. Daub, and further provides that the presiding officer may allow a  
18 deposition of any other person who possesses information significant to a party's case. WAC  
19 480-07-410(1). As discussed above, Mr. Daub clearly possesses substantial knowledge  
20 concerning Waste Management's services and those aspects of its services that are alleged to  
21 address alleged generator dissatisfaction – which is why Waste Management identified him as a  
22 "key witness" in the first place.

23 19. For the foregoing reasons, Stericycle respectfully requests that the ALJ order  
24 Mr. Daub to appear for a deposition and authorize Stericycle to issue a subpoena for such  
25 deposition.  
26

1           A.     Refused Testimony of Jeff Norton.

2           20.     On October 15, 2012 Stericycle took the deposition of Waste Management  
3 witness Jeff Norton. At that deposition Waste Management's counsel refused to allow Mr.  
4 Norton to provide testimony on several topics, contending that discovery in those areas was not  
5 permitted. Before the end of that deposition day, Waste Management counsel and Mr. Norton  
6 left the deposition without agreement before the conclusion of Stericycle's counsel's  
7 examination. *See Norton Dep.*, 192:1-193:4.

8           21.     Mr. Norton was not permitted to state whether Waste Management has  
9 employed an account manager who provided customer service related to medical waste or  
10 answer any related follow up questions. Mr. Norton testified that such a position was currently  
11 vacant, but was not permitted to answer whether any such employee had existed in the past.  
12 *See Norton Dep.*, 55:12-59:17. Waste Management took the position that these questions were  
13 related to the "structure of the company" and therefore improper. *Id.* First, the question clearly  
14 goes to Waste Management's customer service, which is an issue of public need and public  
15 interest raised by certain generator testimony claiming dissatisfaction with customer service,  
16 including the alleged lack of local customer service representatives. Whether Waste  
17 Management offers different services that will address these allegations is relevant information  
18 to discover. Second, Waste Management identified no grounds for its position that the  
19 relationships between its entities and the services provided to Washington customers by each  
20 entity is not a proper subject of discovery. Indeed, Mr. Daub has offered testimony on this  
21 subject in support of Waste Management's application, conceding its relevance in this  
22 proceeding. *See Daub Decl.*, ¶¶4-5.

23           22.     Mr. Norton was not permitted to discuss specifics of Waste Management's  
24 waste processing protocol, a line of questioning initiated by a question concerning the handling  
25 of disposable sharps containers at its processing facility. *See Norton Dep.*, 118:21-119:21.  
26 How Waste Management handles biomedical waste is an issue of safety and, hence, whether

1 the services are in the public interest. Waste Management acknowledges the relevance of this  
2 information by itself presenting testimony related to its container and waste handling in Mr.  
3 Daub's declaration. *See* Daub. Decl., ¶¶17-19. At the deposition, Waste Management counsel  
4 simply dismissed such questioning as going to "fitness." This is wrong, as the refused line of  
5 questioning did not address the operational or financial ability to provide biomedical waste  
6 collection and transportation, but rather the safe handling of waste about which there is no  
7 limitation on discovery.

8 23. Mr. Norton was not permitted to respond to questions concerning a flat-fee,  
9 bundled service contract between a Washington generator and WM Healthcare Solutions, Inc.,  
10 Waste Management's parent company not authorized to provide service in Washington. *See*  
11 Norton Dep., 179:10-184:2. This line of questioning goes several relevant issues. First, it goes  
12 to understanding which companies provide services to Washington customers or purport to act  
13 as their agents in contracting for regulated services. Mr. Daub has again provided testimony  
14 concerning the relationship between the Waste Management entities and the services they  
15 provide in Washington, yet in Mr. Norton's deposition Waste management took the position  
16 that such questioning was not appropriate. *See* Daub Decl., ¶5.

17 24. Moreover, Waste Management's ability and willingness to comply with  
18 Commission rules, in this case the limitations on providing services through uncertificated  
19 affiliates, is something that is in Stericycle's interest to discover and has not been excluded  
20 from the hearing or from discovery. Waste Management's position is that discovery related in  
21 any way to its past regulatory compliance or willingness to comply with rules in the future is  
22 not permitted. However, the ALJ's Order No. 1 does not place any restriction on discovery  
23 related to Waste Management's regulatory compliance. Moreover, Stericycle has a direct  
24 interest in Waste Management's ability to play be the rules should its application be granted  
25 because it will be the principle victim of any unfair competition. Deposition questioning to  
26 discover whether Waste Management's activities demonstrate a willingness to comply with



1 Commission regulations in the future is, therefore, relevant and appropriate for Stericycle to  
2 conduct

3 25. This line of questioning also goes to whether Waste Management is charging its  
4 tariff rates in these multi-service contracts. The contract provides for a flat fee for several  
5 collection and transportation services, including biomedical waste services. Van Kirk Decl.,  
6 Ex. D, Skagit Valley Medical Center Contract. There is no indication in the contract or related  
7 invoices that this fee is adjusted depending on the actual volume of biomedical waste collected  
8 relative to other waste types. The logical conclusion is that the volume price of regulated  
9 biomedical waste services will vary from month to month depending on the relative proportions  
10 of biomedical waste, solid waste, and recycling that are collected. Such variance would not be  
11 permissible under Waste Management's tariff. This is again an ongoing regulatory compliance  
12 issue in which Stericycle has a strong interest as the principle prospective competitor with  
13 Waste Management and which had not been excluded from the hearing in this proceeding or  
14 form discovery.

15 26. Finally, Mr. Norton was not permitted to respond to examination concerning  
16 evidence that he has offered discounts to recycling service rates in exchange for generators  
17 switching from Stericycle's biomedical waste services to Waste Management's. *See Norton*  
18 *Dep.*, 185:16-186:13; 191:1-193:4. Such testimony goes to the issue of unlawful rebating of  
19 regulated biomedical waste rates, and raises a significant question of Waste Management's  
20 ability and willingness to comply with the Commission's rules.

21 27. At the August 8, 2012 hearing on Stericycle's and Waste Management's cross  
22 motions to compel, the ALJ did decide not to compel an answer to a data request seeking  
23 information about Waste Management's rebating activities because the ALJ did not want "an  
24 exploratory effort" to search for such misconduct. Van Kirk Decl. Ex. A, Excerpts of  
25 August 8, 2012 hearing transcript, 95:12-16. At that time the data request was supported by  
26 communications from customers indicating that they were offered a recycling rebate, which

1 were presented to the ALJ in a declaration from a Stericycle sales executive who received the  
2 communications. Immediately after the hearing, however, Waste Management produced an  
3 email between Mr. Norton and Valley Medical Center in which he expressly offers a reduction  
4 in recycling rates on the condition that Valley Medical Center switch to Waste Management's  
5 biomedical waste services and in which Mr. Norton states that that offer was the same offer he  
6 made to Northwest Hospital, which accepted the deal. Van Kirk Decl., Ex E, J. Norton Email  
7 to Valley Medical Center. This new evidence makes clear that further examination about these  
8 practices is not an exploratory effort but, rather, an attempt to understand actual events that, as  
9 described in Mr. Norton's email, amount to a quid pro quo rebate of medical waste rates  
10 through a recycling discount. This well-defined inquiry is again highly relevant to Stericycle's  
11 interest in determining whether Waste Management is willing and able to play by the rules.  
12 This issue has not been excluded from the hearing in this application proceeding.

13         28.       Furthermore, in Mr. Daub's declaration Waste Management purports to offer the  
14 Commission testimony that establishes Waste Management's "fitness." Yet that testimony  
15 does not address regulatory compliance with tariffed rates or compliance with prohibitions  
16 against rebating. Waste Management's assertion of overall "fitness" is, therefore, incomplete  
17 and discovery by Stericycle to prepare a challenge to the regulatory compliance aspect of that  
18 "fitness" is relevant and not prohibited by the Commission's Order No. 1, which barred  
19 discovery only on Waste Management's operational and financial "fitness."

20         29.       Stericycle respectfully requests that Mr. Norton be compelled to return to the  
21 continued deposition and submit to examination concerning the topics addressed above, and  
22 any remaining questions that were prevented by Waste Management's early departure from the  
23 deposition without agreement.

1 DATED this 24<sup>th</sup> day of October, 2012.

2 Respectfully submitted,

3 GARVEY SCHUBERT BARER

4  
5 By 

6 Stephen B. Johnson, WSBA #6196

7 Jared Van Kirk, WSBA #37029

8 Attorneys for Protestant Stericycle of  
9 Washington, Inc.

1 **CERTIFICATE OF SERVICE**

2 I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of  
3 Washington that, on October 24, 2012, I caused to be served on the person(s) listed below in  
4 the manner shown a copy of PROTESTANT STERICYCLE OF WASHINGTON, INC.'S  
5 MOTION FOR LEAVE TO TAKE DEPOSITION AND TO COMPEL RESPONSES TO  
6 DEPOSITION QUESTIONS:

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 Gregory Kopta  
16 gkopta@utc.wa.gov

- Via Email

17 Jessica Goldman  
18 Polly L. McNeill  
19 Summit Law Group  
20 315 – 5<sup>th</sup> Avenue South  
21 Seattle, WA 98104  
22 jessicag@summitlaw.com  
23 polym@summitlaw.com  
24 kathym@summitlaw.com  
25 deannas@summitlaw.com

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

26 James K. Sells  
27 Attorney at Law  
28 PMB 22, 3110 Judson Street  
29 Gig Harbor, WA 98335  
30 jamesells@comcast.net  
31 cheryls@rsulaw.com  
32 *Attorney for Protestant WRRRA,  
33 Rubatino, Consolidated, Murrey's and  
34 Pullman*

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

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Frona Woods  
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  
[fwoods@utc.wa.gov](mailto:fwoods@utc.wa.gov)  
[BDeMarco@utc.wa.gov](mailto:BDeMarco@utc.wa.gov)

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

Dated at Seattle, Washington this 24<sup>th</sup> day of October, 2012.

  
\_\_\_\_\_  
Dominique Barrientes  
[dbarrientes@gsblaw.com](mailto:dbarrientes@gsblaw.com)