

**NOTE! An important notice to parties about administrative review appears at the end of this order.**

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition	)	DOCKET NO. TG-970532
of Commission Staff for a	)	
Declaratory Ruling	)	DECLARATORY ORDER
	)	(INITIAL ORDER)
. . . . .	)	
. . . . .	)	

**PROCEEDING:** This is a proceeding on a petition for declaratory ruling. On March 21, 1997, the Staff of the Washington Utilities and Transportation Commission (“Commission Staff”) filed a petition for a declaratory ruling. The petition requests that the Commission rule on a number of issues concerning the competitive practices of biohazardous or biomedical waste carriers operating in this state. Specifically, the petition requests a ruling concerning (1) whether statutes and rules which govern discontinuing service and charging tariff rates apply to service agreements for the collection and disposal of biomedical waste, and specifically to service agreement provisions requiring a minimum length of service, extended notice time for cancellation, and liquidated damages; (2) whether it is appropriate to allow carriers in the highly competitive market of collection and disposal of biomedical waste to charge reduced rates to charitable or non-profit hospitals and clinics under the “charitable purposes” exception of RCW 81.28.080; and (3) the meaning of a carrier’s obligation to serve under a certificate, when the Commission has granted certificates to more than one carrier in a particular service area.

On April 2, 1997, the Commission gave notice of receipt of the petition and notice of opportunity to participate to all certificated solid waste companies and other persons. The Commission received comments and requests for party status.

Two prehearing conferences were held before Administrative Law Judge John Prusia. The requests for party status were granted. The parties subsequently agreed to submit the matter to the Commission upon stipulated facts and an agreed schedule. The parties filed stipulated facts and briefs.

**SUMMARY:** The Commission declares that provisions in a service agreement for the collection and transportation of biomedical waste relating to minimum period of service and notice of discontinuance of service are subject to the requirements of WAC 480-70-710(1). It declares that provisions in such an agreement that require a customer to give more than three business days’ notice to the carrier to discontinue service, or that require a minimum length term of service of more than three

business days, or that provide liquidated damages on violation of such provisions, violate WAC 480-70-710(1). It declares that a liquidated damages provision in a service agreement for the collection and transportation of biomedical waste is subject to the tariff filing requirements of RCW 81.28.080.

The Commission declares that the current practice of biomedical waste carriers charging reduced rates for service to non-profit hospitals and clinics, for competitive rather than charitable purposes, is illegal.

**APPEARANCES:** Mary M. Tennyson, Senior Assistant Attorney General, Olympia, represents petitioner Staff of the Washington Utilities and Transportation Commission (Commission Staff). James K. Sells, attorney, Bremerton, represents Washington Refuse & Recycling Association; Murrey's and American Disposal; Rubatino Refuse, Inc.; LeMay Enterprises, Inc.; Empire Disposal, Inc; Consolidated Disposal, Inc.; and Disposal Services. David W. Wiley, attorney, Seattle, represents BFI Medical Waste Systems of Washington, Inc. Stephen B. Johnson, attorney, Seattle, represents Stericycle of Washington, Inc. Barbara Allen Shickich, attorney, Seattle, represents the Washington State Hospital Association.

### **MEMORANDUM**

This is a proceeding on a Petition for Declaratory Ruling filed by the staff of the Commission ("Commission Staff"), relating to biohazardous or biomedical waste. The Petition alleges that certain practices of carriers of biomedical waste are anticompetitive and detrimental to the customers and the carriers, and asks the Commission to declare that the practices are prohibited by Commission rule or statute.

#### **I. The Commission's Regulation of Biomedical Waste Collection**

The transportation of solid waste for collection or disposal is governed by Chapter 81.77 RCW. Biohazardous or biomedical waste is solid waste for purposes of Chapter 81.77. Other provisions in Title 81 RCW relating to all regulated carriers and to common carriers in general also apply to solid waste collection companies.

The collection and disposal of biomedical waste requires specialized handling. It involves heightened exposure to liability both for the carrier and for the generator of the waste. Because of the unique requirements and attributes of the activity, some holders of general solid waste authority from the Commission do not provide biomedical waste collection service, and biomedical waste collection service has attracted specialized carriers.

The Commission has recognized the specialized nature of biomedical waste collection in granting authority to provide such service. Although the industry historically has been characterized by monopoly service in a given territory, the

Commission has granted overlapping authority for this specialized service.<sup>1</sup> One result of the granting of overlapping authority is competition among carriers, a situation which did not occur in the industry prior to the 1990s.

## **II. Procedural History**

Commission Staff filed its Petition on March 21, 1997. The Commission gave notice of receipt of the petition and notice of opportunity to participate to all certificated solid waste companies, and to other persons that the Commission identified as possibly having an interest in the rates and practices of biomedical waste carriers. The Commission received requests for party status, all of which it granted, from the two carriers with statewide biomedical waste authority -- BFI Medical Waste Systems of Washington, Inc., and Stericycle of Washington, Inc.; the Washington Refuse and Recycling Association; several smaller solid waste collection companies; and the Washington State Hospital Association.

Two prehearing conferences were held. The prehearing conferences took the form of round table discussions of current practices in the industry, issues raised by the petition, and possible amendments to the petition.

On June 27, 1997, the parties submitted an agreement on process and schedule. The parties submitted the matter to the Commission upon stipulated facts. The parties filed memoranda or briefs.

## **III. The Petition for Declaratory Ruling**

In its Petition, Commission Staff states that after receiving informal complaints from customers, and after discussions with and correspondence from

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<sup>1</sup> RCW 81.77.040 provides that the Commission may grant solid waste authority only if the service is required by the public convenience and necessity. The statute also expresses a preference for monopoly service in the collection of solid waste, allowing the Commission to grant new authority in already-served territory only if it finds that the existing certificate holder will not provide satisfactory service. In applications for specialized biomedical waste authority, the Commission has interpreted the statutory requirements consistently with the unique requirements and attributes of the service, giving considerable weight to testimony of waste generators regarding their service requirements. See, Order M.V.G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993); Order M.V.G. No. 1663, In re Sureway Medical Services, Inc., App. No. GA-75968 (November 1993); and Order M. V. G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995), and orders cited therein. The Commission has granted statewide specialized biomedical waste authority to two carriers -- the predecessor of BFI and Stericycle.

carriers of biomedical waste, it has become concerned that certain practices exist which are anticompetitive and detrimental to customers and the carriers. The practices that Commission Staff has identified as of concern include the presence of terms in service agreements requiring a minimum length of service, extended notice requirements for cancellation, and liquidated damages; bidding “wars” between carriers to provide service to charitable or non-profit hospitals and clinics; and the failure of carriers with biomedical waste authority to hold themselves out as available to provide service in less profitable areas in their authorized service territories.

The Petition asks the Commission to declare that:

1. Any requirement for a minimum length term of service or notice of cancellation in a service agreement is subject to the terms of WAC 480-70-710(1), which allows a customer to discontinue service by notifying the company, at least three full business days before the next scheduled pickup to stop service, and a longer minimum service period therefore is prohibited.
2. Liquidated damages provisions in service agreements are a violation of RCW 81.28.080, which requires that a carrier only charge tariffed rates, and therefore are prohibited.
3. Carriers may not charge free or reduced rates to charitable or non-profit hospitals or clinics under RCW 81.28.080 without demonstrating a “charitable purpose.”
4. Any carrier’s obligation to serve all customers in a service territory requires the carrier to hold itself out to provide service to all customers by advertising throughout their service territory.

#### **IV. Stipulated Facts**

The parties have agreed and stipulated to the following facts:

1. Requiring a customer to sign an agreement specifying a minimum term of service may have an effect of discouraging the customer from exercising its right to terminate service under [WAC 480-70-710(1)] and choose another carrier. Some regulated carriers may be using preprinted service agreement forms implemented before the advent of the [Commission’s] customer service rules.
2. Some carriers are including minimum lengths of service, extended notice requirements for cancellation, and liquidated damages provisions in service agreements for transportation and disposal of medical waste.
3. Including a liquidated damages provision in a service agreement

discourages customers from exercising their right to terminate service under [WAC 480-70-710(1)] and choose service provided by another carrier without restriction.

4. There are currently approximately 75 solid waste carriers with authority to transport biomedical waste in limited service areas of the state, and two carriers of biomedical waste with statewide authority. While the carriers with statewide authority are in competition with each other across the state, they also compete with carriers in limited service areas.

5. There is currently competition in the market for provision of services of transportation and disposal of biomedical waste.

6. Not-for-profit hospitals have requested bids from different carriers in order to obtain the lowest rates.

7. There is an exception to the requirement that carriers may only assess rates and charges set forth in tariffs filed with the Commission. RCW 81.28.080 provides, in part, that "common carriers subject to the provisions of this title may carry, store, or handle, free or at reduced rates, property for . . . charitable purposes."

8. Under the current practice of carriers providing reduced rates to not-for-profit hospitals and clinics but charging tariffed rates to for-profit hospitals and clinics, the difference is not the type of service provided, but the organization to whom the service is provided.

9. Biomedical waste collection companies do not offer below-tariff rates for regular biomedical waste collection service to non-profit hospitals and clinics for charitable purposes but rather as a means to compete for this business.

## **V. Relevant Statutes and Rules**

### **A. Terms of service; notice of cancellation;**

**WAC 480-70-710 Discontinuance of service.** (1) By a customer. A customer may discontinue service by notifying the company to stop service. The notice shall be made to the company at least three full business days before the next scheduled pickup date. . . .

### **B. Rates**

**RCW 81.28.010 Duties as to rates, services, and facilities.** All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier, . . . shall be just, fair, reasonable and sufficient.

**RCW 81.28.040 Tariff schedules to be filed with commission--Public schedules--Commission's powers as to schedules.** Every common carrier shall file with the commission and shall print and keep open for public inspection, schedules showing the rates, fares, charges, and classification for the transportation of persons and property within the state between each point upon the carrier's route and all other points thereon; . . .

The commission has power, from time to time, to determine and prescribe by order such changes in the form of the schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting, and filing of schedules either in particular instances or by general rule or order applicable to special or peculiar circumstances or conditions.

**RCW 81.28.050 Tariff changes--statutory notice--Exception.** Unless the commission otherwise orders, no change may be made in any classification, rate, fare, charge, rule, or regulation filed and published by a common carrier other than a rail carrier, except after thirty days' notice to the commission and to the public. In the case of a solid waste collection company, no such change may be made except after forty-five days' notice to the commission and to the public. . . .

**RCW 81.28.080 Published rates to be charged--Exceptions.** No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified excepting upon order of the commission as hereinafter provided, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all person and corporations under like circumstances. No common carrier shall, directly or indirectly, issue or give any free ticket, free pass or free or reduced transportation for passengers between points within this state, except . . . [a long list of exceptions and provisos follows].

Common carriers subject to the provisions of this title may carry, store or handle, free or at reduced rates, property for the

United States, state, county or municipal governments, or for charitable purposes, or to or from fairs and exhibitions for exhibition thereat, and may carry, store or handle, free or at reduced rates, the household goods and personal effects of its employees and those entering or leaving its service and those killed or dying while in its service.

Nothing in this title . . . [paragraph relates to railroad companies].

**RCW 81.28.180 Rate discrimination prohibited.** A common carrier shall not, directly or indirectly, by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person or corporation a greater or lesser compensation for any service rendered or to be rendered in the transportation of persons or property, except as authorized in this title, than it charges, demands, collects, or receives from any person or corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions. . . .

**RCW 81.28.190 Unreasonable preferences prohibited.** A common carrier shall not make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

## **VI. Positions of the Parties**

### **A. Opening Memoranda**

#### **1. Commission Staff**

The Petition for Declaratory Ruling serves as Commission Staff's opening memorandum.

Commission Staff contends that the following provisions in service

agreements violate the Commission rule governing discontinuance of service, WAC 480-70-710(1): requiring a customer to provide more than three business days' notice of cancellation; requiring a minimum term of service; and, including a liquidated damages provision applicable on violation of those agreement provisions.

Commission Staff contends that a liquidated damages provision in a service agreement violates RCW 81.28.080's requirement that all charges be tariffed.

Commission Staff contends that the current practice among biomedical waste carriers of charging not-for-profit hospitals and clinics a reduced rate for service is no longer appropriate, and that the Commission should no longer allow the practice. It asks the Commission to define under what circumstances a carrier may charge free or reduced rates.

In the Petition, Commission Staff contends that RCW 81.28.020 is permissive, that it allows the Commission "to permit carriers to charge free or reduced rates." Staff cites examples of the application of the charitable purposes exception which it concludes evidence Commission acceptance of the practice of charging not-for-profit hospitals and clinics a reduced rate.<sup>2</sup> Staff contends that the "current [Commission] practice of allowing carriers of biomedical waste to charge reduced rates to charitable or non-profit hospitals and clinics is no longer appropriate," because its purpose is competitive rather than charitable; because it is discriminatory; because it has encouraged bidding wars between the carriers which may be detrimental to a carrier's financial viability; and because the current practice has allowed what is supposed to be an exception to become the rule.

The Petition states that Commission Staff seeks the following relief with respect to this issue: a declaratory ruling ordering that "carriers may not charge free or reduced rates to charitable or non-profit hospitals or clinics under RCW 81.28.080 without demonstrating a "charitable purpose."

Commission Staff states that it is concerned that carriers operating in a competitive environment will not hold themselves out to serve less profitable customers, particularly rural customers. It contends that certificated carriers have an obligation to serve all customers in the territory of their certificate by holding themselves out as available to provide services. In order to ensure a fair competitive arena, it

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<sup>2</sup> Commission Staff cites a November 22, 1991 letter from the Commission Secretary that stated that non-profit hospitals qualify for free or reduced rates. It also cites a reference to the practice of charging not-for-profit hospitals and clinics a reduced rate in Order M.V.G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).



recommends that the Commission set out specific ground rules or guidelines for the obligation to serve. It specifically requests that the Commission declare as follows: a carrier's obligation to serve all customers in a service territory requires the carrier to hold itself out to provide service to all customers by advertising throughout their service territory. Commission Staff suggests that if carriers have nonrecoverable expenses due to start-up costs for initiating service and routing to rural and other customers, they can request a nonrefundable start-up fee to cover the cost of initiating service.

## **2. BFI Medical Waste Systems of Washington, Inc.**

BFI is one of two holders of statewide authority for the collection and transportation of biomedical waste.<sup>3</sup>

BFI notes that the Commission has viewed entry into this specialized solid waste field differently from entry into the conventional solid waste arena. It reviews the history of Commission proceedings which established safety rules and rate designs for biomedical waste carriers. BFI contends that detailed service agreements have been an integral part of ongoing operations of most biomedical waste haulers from the outset of operations. It contends that in a field overlaid with concerns for liability under both state and federal law (chapter 36.58 RCW; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*), carriers, customers and regulators alike seemed to quickly grasp the value of memorializing waste protocol, levels of service, and other important rights and responsibilities. BFI notes that service agreements were typically submitted as exhibits in medical waste hearing records, citing the records in Application Nos. GA-872 (order entered November 1990), and GA-75154 and GA-77539 (order entered August 1995). It notes that the Commission's customer service rules that are the basis for Commission Staff's petition were adopted in January 1994.

BFI does not contest Commission Staff's contention that any provision for a minimum length of service contained in a service agreement between a biomedical waste hauler and its customer is subject to the WAC 480-700-710(1) provision that allows a solid waste customer to unilaterally terminate service on three business days' notice, unless expressly excepted by waiver or other order of the Commission. BFI contends, however, that resolution of the customer service rules must occur in the context of resolving the "free or reduced" tariff rate issue raised in the petition, and that existing contracts should be grandfathered. BFI also does not contest the contention that any liquidated damages requirements must be tariffed. BFI contends that existing contracts should be grandfathered, while the Commission engages in a rulemaking process that will consider the issue of service initiation fees.

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<sup>3</sup> BFI's predecessor was the first solid waste collection company to receive statewide certification to collect and transport this specialized product. Order M.V.G. No. 1452, In re American Environmental Management Corporation, App. No. GA-872 (November 1990).

BFI contends that there has been a long-prevailing practice by medical waste haulers, affected customers, and Commission Staff, to except charitable institutions from adherence to filed tariffs under RCW 81.28.080. It contends that this practice has apparently been observed throughout the majority of the regulated medical waste industry. It contends that previous Commission orders have noted the existence of this practice (citing Order M.V.G. No. 1762, In re Stericycle of Washington, Inc., *supra*).

BFI does not defend the current practice of biomedical waste carriers charging reduced rates to non-profit/charitable institutions. However, its analysis of RCW 81.28.080 differs significantly from Commission Staff's. BFI contends that the intent of the transportation movement is not necessarily addressed in the "charitable purposes" provision of RCW 81.28.080. BFI's concern with the current practice is that it may be difficult to defend under an equal protection analysis. BFI argues that in the competitive atmosphere that exists in the medical waste collection and transportation industry, offering free or reduced rates to non-profit entities does not clearly have a direct relationship to a legitimate end (of maintaining or expanding service offered to the public), nor does the legislative distinction between customers foster the environmental, safety, or health goals of the state. Thus, the legislative classification may be suspect under the "rational basis" standard set out in Romer v. Evans, 517 U.S. \_\_\_\_, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

BFI argues that the Commission must grandfather existing service agreements between biomedical carriers and non-profit/charitable hospitals. BFI argues that immediately implementing an interpretation that affects existing contracts between carriers and hospitals likely would violate the impairment of contract prohibitions in Article 1, Section 23 of the Washington Constitution and Article 1, Section 10 of the U.S. Constitution. It argues that an immediate overhaul of existing practice also would portend serious operational and/or economic disruptions. It argues that hospitals would experience rate shock by a sudden change. It argues that investments in personnel and equipment made in reliance on existing contracts and longstanding industry economic assumptions would be jeopardized. BFI contends that voiding existing contractual terms would ignore the good faith reliance that medical waste transporters, Commission Staff, and customers have traditionally placed in the long prevailing practice and on Commission Staff opinions and Commission orders ostensibly validating these practices. BFI contends that grandfathering of existing contracts would allow for an orderly transition period to allow contracts already in existence to be completed while minimizing further equal protection implications.

Finally, BFI contends that during the grandfathering period, the Commission should examine whether exclusive marketing arrangements between a provider and a marketing arm of the most significant segment of the biomedical waste ratepaying public (i.e., the marketing agreement between Stericycle and the marketing arm of WSHA, Washington Hospital Services) are appropriate in a regulated market. It

notes that Commission Staff referred to the marketing agreement in the petition, as evidence that there is great competition in the medical waste market.

### **3. Stericycle of Washington, Inc.**

Stericycle is the other carrier with statewide authority to transport biomedical waste for collection and disposal. Stericycle received permanent authority from the Commission in 1995. Order M.V.G. No. 1761, In re Ryder Distribution Resources, Inc., App. No. GA-75154; In re Stericycle of Washington, Inc., App. No. GA-77539 (August 1995).

Stericycle analyzes the statutory scheme for the regulation of biomedical waste collection. Stericycle contends that provisions of Chapter 81.04 and 81.28 RCW are applicable to solid waste collection companies only to the extent they are made applicable to those companies by a Commission rule, WAC 480-70-440.<sup>4</sup> Stericycle notes that the Commission has recognized the unique aspects of the market served and services offered by specialized biomedical waste collection companies in a series of decisions dealing with licensing such companies.

Stericycle concurs with Commission Staff that liquidated damages provisions in service agreements are subject to the tariff filing and related requirements of WAC 480-70-240 and RCW 81.28.040 and -.080. Stericycle concurs with Commission Staff that requirements in service agreements which limit a generator's right to terminate service are inconsistent with WAC 480-70-710(1). Stericycle takes no position as to whether it would be possible to adopt valid rules as

part of a carrier's tariff to stabilize routes and ensure the recovery of costs incurred in initiating service to new customers or rural customers, and views the validity of hypothetical future tariff provisions as beyond the scope of this proceeding.

Stericycle states that it is its understanding that Commission Staff intends to drop the obligation to serve issue.

Regarding free or reduced rates, Stericycle agrees with Commission Staff that the current practice under which some carriers have charged deeply discounted, below-tariff rates to non-profit hospitals and clinics has resulted in discriminatory, predatory and anticompetitive pricing which, if allowed to continue, will adversely affect the economic health of all carriers. Stericycle believes that these unlawful practices can be curbed by ensuring that biomedical waste collection companies adhere to published tariffs for their services to all customers.

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<sup>4</sup> WAC 480-70-440 provides, in pertinent part: "Solid waste collection companies are subject to the following statutes: [RCW 81.04.130; 81.04.405; 81.28.010; 81.28.040; 81.28.050; 81.28.080; 81.28.180; 81.28.190; 81.28.210; ;and 81.28.230]."

Stericycle disagrees with Commission Staff's analysis of RCW 81.28.080 as giving the Commission the discretion to allow or not allow carriers to transport property for free or at reduced rates for charitable purposes. Stericycle contends that the statute authorizes carriers to make a choice, not the Commission.

Stericycle contends that RCW 81.28.080 is not by its terms applicable to solid waste collection companies, because they are not carriers of "property," and that the statute is applicable to such companies only by operation of Commission rule, WAC 480-70-440. Stericycle contends that the Commission clearly has authority to interpret and to modify its own rule.

Stericycle contends that the "charitable purposes" exception makes no sense when applied to regular service in the context of biomedical waste collection. Stericycle argues that the Legislature envisioned the "charitable purposes" exception as applying to a limited and unusual category of service where both the shipper and the carrier were motivated by charitable purposes. It argues that the Legislature could not have envisioned that the transportation of property for "charitable purposes" at below tariff rates would comprise a substantial part of any property carrier's business or that carriers of property would compete with one another for the right to transport property for "charitable purposes" at below tariff rates. It argues that the statutory exception was intended to give carriers of property the flexibility to carry goods for charity in a context where such charitable transportation would be an exception to and an insignificant part of the carriers' business and where charitable transportation would burden a carrier's bottom line, rather than enhancing it -- a context in which the carrier could only be motivated by "charitable purposes." It argues that the exception was not intended to swallow the rule, as it threatens to do in the context of biomedical waste collection, where service to non-profit hospitals and clinics is a large part of the carriers' business.

Stericycle contends that because the exception applies to biomedical waste collection only by virtue of Commission rule, the Commission has the authority to interpret the exception in a way that makes sense in these unique circumstances.

Stericycle further contends that under any reading of RCW 81.28.080, the charitable purposes exception does not apply to the existing practice in the biomedical waste collection industry, in light of the stipulation of the parties that "biomedical waste collection companies do not offer below-tariff rates for regular biomedical waste collection service to non-profit hospitals and clinics for charitable purposes but rather as a means to compete for this business." Stericycle contends that in light of the unique market in which biomedical waste collection companies operate and this stipulation, the Commission must conclude that the "charitable purposes" exception does not apply to regular biomedical waste collection service offered to non-profit hospitals and clinics or other non-profit entities by certificated biomedical waste collection companies.

Stericycle contends that a ruling by the Commission to this effect should be applied prospectively only. It contends that biomedical waste collection companies and their non-profit customers have offered and accepted below-tariff rates in reliance on prior interpretation by the Attorney General's Office and the Commission Staff, and tacit Commission acceptance of the practice.

Stericycle contends that the service agreement and reduced rate issues are ripe and appropriate for Commission decision in this proceeding and should be decided together. It urges the Commission to avoid deciding these issues piecemeal. It contends that a ruling which overturns the provisions of existing long-term service agreements, without also bringing rates charged to non-profit hospitals and clinics under Commission control, could unleash a damaging price war between carriers.

#### **4. Washington Refuse & Recycling Association and Member Companies (WRRRA)**

WRRRA is a non-profit trade association representing the majority of solid waste haulers in the state. It submits its brief on behalf of WRRRA and its specific members who provide medical waste service pursuant to their authority.

WRRRA emphasizes that medical waste is solid waste, and that any rule changes, staff opinions, or legislative proposals which may result from this proceeding will affect not just the medical waste industry. WRRRA urges the Commission to be careful not to allow solutions to the sometimes unique problems of medical waste to be invoked to the possible detriment of the entire industry.

WRRRA's position on service agreements is that they are useful, but that a service agreement must comply with existing statutes and rule. If existing rules are inappropriate for this specialized area, modifications can be addressed in a rulemaking or in waiver requests.

WRRRA agrees with Commission Staff that certificated solid waste haulers have an obligation to provide service to all those who want it within the certificated territory. A statewide permit carries with it the obligation to offer and provide statewide service. WRRRA believes that lack of enforcement in this area has led to "cream skimming." WRRRA argues that the Commission should adopt guidelines to enforce this position, if necessary.

WRRRA contends that, at present, the offering of reduced rates to non-profit hospitals is in clear violation of well-established law regarding tariffs. Reduced rates are being offered because of competition for the particular hospital's business, not to support non-profit medical care. WRRRA contends that the "charitable purpose" of the non-profit entity would seem to have little to do with the exception

language in RCW 81.28.080. The only realistic interpretation of the exception is that the purpose of the transportation must be charitable. WRRRA contends that the practice is common and apparently accepted by the Commission. It expresses concern that solid waste carriers will be pressured by hospitals to reduce rates for “regular” solid waste service comparably to the medical waste reduction.

WRRRA agrees with Commission Staff’s position that there may be situations where a reduced rate is appropriate, but that it should first be reviewed by the Commission.

Finally, WRRRA urges the Commission to continue to monitor closely the situation of marketing agreements (i.e., the agreement between Stericycle and Washington Hospital Services) and confirm that this “anticompetitive” and “discriminatory” practice no longer exists.

## **5. Washington State Hospital Association (WSHA)**

WSHA contends that the Commission should decline to issue a declaratory ruling as to reduced rates for charitable purposes, and instead should commence further discussions among interested parties for the purpose of developing regulations. WSHA argues that only part of the declaratory relief that Commission Staff seeks regarding reduced rates is within the scope of a declaratory ruling. It argues that to the extent the petition requests a ruling ordering that carriers may not charge free or reduced rates to charitable or non-profit hospitals or clinics under RCW 81.28.080 without demonstrating “charitable purpose,” it is an appropriate request for interpretation or applicability of a statute, but that establishing criteria for determining a biomedical waste carrier’s charitable purpose, or setting guidelines for charging free or reduced rates for charitable purposes, extends beyond a determination as to the applicability of the statute, and is more appropriately addressed in regulations.

WSHA analyses RCW 81.28.080. It contends that the statute does not address the authority of the Commission, but rather the obligations of carriers. It gives carriers the choice of carrying, storing, or handling property at a reduced rate in order to fulfill their charitable purposes or intentions. WSHA argues that reduced rate language of RCW 81.28.080 creates an exception to both the rule that no carrier may charge different rates than tariff rates, and the nondiscrimination requirements of RCW 81.28.180. WSHA agrees with Commission Staff’s analysis that in determining whether a carrier seeks to provide free or reduced rates for charitable purposes, the Commission should look first to whether the shipper is a charitable organization.

WSHA agrees with other parties that in light of the stipulated facts, carriers do not have “charitable purposes” in charging reduced rates to hospitals.

WSHA argues that a Commission ruling that carriers do not have “charitable purposes” in charging reduced rates to hospitals would raise several

additional issues which should not be addressed in a declaratory proceeding. What would be the effect on existing service agreements entered into in good faith by hospitals on the representation that non-tariff rates were permissible for charitable organizations? Is there a way to minimize the impact of a Commission ruling which might adversely affect existing non-tariff rates? What is the best way to assure Commission supervision and review of service agreements in this specialized area? WSHA contends that these issues cannot adequately be addressed in a declaratory proceeding.

WSHA contends that a rulemaking proceeding should be commenced to address reduced rates for charitable purposes and a consistent process for service agreement review. WSHA suggests that one approach for an agreement review process might be the adoption of regulations similar to WAC 480-70-360 which addresses contracts between contract carriers and shippers.

## **B. Reply Memoranda**

### **1. Commission Staff's Reply Memorandum**

In its reply memorandum, Commission Staff makes additional arguments on the reduced rate issue, and requests different relief than it requested in its Petition.

Commission Staff agrees with the position of Stericycle that the charitable purposes exception in RCW 81.28.080 does not apply to "regular biomedical waste collection service offered to non-profit hospitals and clinics or other non-profit entities." Commission Staff contends that this conclusion comports with an opinion of the Washington Attorney General issued on October 30, 1939.

The Attorney General's opinion interpreted the RCW 81.28.080 paragraph that is the focus of the present inquiry, with regard to service provided to a governmental entity mentioned in the paragraph. The Attorney General's opinion concluded that a common carrier desiring to haul at reduced rates or free for any of the governmental entities mentioned in the exception must file a tariff or schedule stating such reduced or waived rates.

In its reply memorandum, Commission Staff asks the Commission to order that "no certificated carrier may prospectively enter into a service agreement to provide service to a non-profit entity at below-tariff rates, unless such rates are included in an approved tariff filing." Commission Staff proposes the following language for the Commission order:

Biomedical waste collection companies that are providing, or wish to provide, regular biomedical or other regular waste collection

service to non-profit organizations, governmental units, or charitable organizations must have an approved tariff including the reduced rates. For carriers providing special or unusual waste collection services to charitable organizations to provide such services at free or reduced rates, the carrier will be required to demonstrate a charitable purpose for that service.

In its reply memorandum, Commission Staff requests that, considering past Commission Staff interpretations of the “charitable purposes” exception, and in order to avoid issues of interfering with the right to contract, the Commission should order that current service agreements with below-tariff rates may run their course, but may not be extended or renewed, without compliance with the tariff filing requirements.

Commission Staff abandons the part of its petition which requests relief concerning carriers’ obligation to provide service. It states that it has no specific examples of any refusal of service. It suggests that this issue is more appropriately reserved for rulemaking.

## **2. BFI’s Reply Brief**

BFI opposes WSHA’s position that the Commission should defer resolution of the “charitable purposes” issue to a rulemaking proceeding. BFI argues that the effect of WSHA’s position clearly advantages the large non-profit generators of medical waste, who would be able to unilaterally cancel existing long-term agreements yet continue to seek bids from carriers, which would potentially trigger a downward rate spiral threatening carrier stability. It contends that the proposed two-prong solution could exacerbate the present fluidity of hospital/charitable institution pricing which now exists, triggering a potentially catastrophic rate war between carriers. BFI argues that the Commission should link the substantive resolution of both issues.

BFI expands upon its argument that the Commission should examine the exclusive marketing agreement between Stericycle and Washington Hospital Services. It notes that WSHA’s memorandum describes the agreement as providing for specific marketing activities on behalf of Stericycle for which WHS is compensated on a fixed fee basis. BFI notes that the Commission struck down a predecessor agreement between the two entities as constituting an unlawful rebate, and that the new agreement has never been formally reviewed by the Commission. BFI contends that such a marketing arrangement would not appear consistent with the underlying premise of this proceeding seeking to eliminate unpublished “hidden” service costs and charges not disclosed in tariffs. It contends that the playing field will not be leveled through this proceeding if preferential and unregulated marketing agreements are unexamined and



unreconciled with the principles of competition supposedly being accomplished by this declaratory order proceeding.

### **3. Stericycle's Reply Memorandum**

Stericycle opposes WSHA's position that the Commission should bifurcate the proceeding and defer resolution of the "charitable purposes" issue to a rulemaking. It contends that the result of WSHA's position would be to immediately free all non-profit hospitals from their existing agreements while forcing the carriers into a mad scramble to compete for the business of every non-profit hospital in the state at below-tariff rates. It contends that this would lead to a potentially catastrophic rate war between carriers.

Stericycle opposes BFI's suggestion that existing rate agreements with non-profit hospitals should be "grandfathered" and allowed to remain in effect. Stericycle contends that the proposal is entirely without legal support. It argues that the law is clear that contracts made in violation of RCW 81.28.080 are void and unenforceable. It further argues that the Commission does not have the authority to authorize the rate discrimination that would occur between hospitals who are required to pay tariff rates and hospitals permitted to continue to pay below-tariff rates. It contends that illegal contracts can be set aside without violating the Contract Clause. It argues that there are no facts before the Commission to suggest that requiring non-profit hospitals to pay tariff rates for medical waste collection services will have any significant adverse effect on the hospitals.

Stericycle opposes the request of BFI and WRRRA that the Commission rule on the propriety of the marketing agreement between Stericycle and Washington Hospital Services in this proceeding. Stericycle argues that the issue exceeds the scope of issues raised by the Commission Staff's petition, and that no facts are before the Commission concerning this agreement or its alleged impacts on the marketplace.

### **4. Reply Brief of WRRRA and Member Companies**

WRRRA disagrees with WSHA's position that the issue of reduced rates should be removed from this proceeding and dealt with separately in a future rulemaking. WRRRA argues that this kind of separation of issues could result in an untenable situation for medical waste service providers. Generators could cancel their agreements with three days' notice in order to receive reduced rates from another carrier. This would result in a chaotic situation for existing carriers who follow their tariff and have invested substantial sums to provide service. Such a practice would encourage "cream skimming" by larger carriers. WRRRA argues that the Commission must address and resolve the situation in one forum -- either the present proceeding or a rulemaking.

WRRRA contends that this is an appropriate forum for review of the

marketing agreement between Stericycle and the Washington Hospital Association. It argues that if the Commission's goal here is to promote fair competition, it should closely scrutinize any arrangement which may be anticompetitive.

## **VII. Commission Discussion and Decision**

### **A. Service Agreement Issues**

The parties have stipulated that some carriers of biomedical waste are using service agreements which include a minimum length of service, extended notice requirements for cancellation of service by a customer, and liquidated damages provisions for termination earlier than allowed by the agreement. All of the parties in this proceeding appear to agree that such terms violate WAC 480-70-710(1).

The Commission agrees with Commission Staff that WAC 480-70-710(1) applies to biohazardous waste customers. The Commission concludes, and will order, that provisions in a service agreement or other service arrangement that require a customer to provide more than three business days' notice to a solid waste carrier to terminate service, or that require a minimum service period longer than three business days, or that provide liquidated damages applicable on violation of such provisions, violate WAC 480-70-710(1), unless the carrier has obtained a waiver of the rule from the Commission.

All of the parties in this proceeding also appear to agree that the tariff filing requirements of RCW 81.28.080 are applicable to liquidated damages provisions.

The Commission concludes, and will order, that liquidated damages provisions in a service agreement are subject to the tariff filing requirements of RCW 81.28.080 (and therefore also subject to the requirements of RCW 81.28.040 and WAC 480-70-240). Liquidated damages provisions in a service agreement violate RCW 80.28.080 unless they are included in a tariff approved by the Commission.

### **B. Obligation to Serve**

The Petition expresses concern that some biomedical waste carriers are not holding themselves out to provide service throughout their service territories, and in particular that they are not making their availability known in rural areas. The Petition requests that the Commission declare that any carrier's obligation to serve all customers in a service territory requires the carrier to hold itself out to provide service to all customers by advertising throughout their service territory.

The parties have not stipulated that biohazardous waste carriers are

failing to hold themselves out throughout their territories. Commission Staff states in its Reply Memorandum that it has no specific evidence to support its concern, and abandons this part of its request.

The Commission should accept the withdrawal of the request. Declaratory relief is appropriate only when the petitioner can show that uncertainty necessitating resolution exists, and that there is an actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion. RCW 34.05.240.

### **C. Reduced Rate Issues**

#### **1. Legality of the current practice**

The Petition asks the Commission to declare that a current practice in the industry -- a practice that all the parties agree is occurring -- is not appropriate under Commission statutes. The practice in question is charging reduced (below-tariff) rates to non-profit hospitals and other non-profit entities for the same service for which the carriers charge tariff rates to for-profit entities, and doing so not for charitable purposes but rather as a means of competing for the business of the non-profit entities.

Three threshold questions need to be determined. The first is whether Chapter 81.28 RCW is by its terms applicable to solid waste collection companies, or, as Stericycle contends, has been made applicable to solid waste collection companies only by virtue of Commission rule, WAC 480-70-440.<sup>5</sup>

The carriers that are engaging in the questioned practice are common carriers, as defined by RCW 81.77.010(3). As common carriers, they are subject to the requirements of chapter 81.28 RCW.

A second threshold question is whether the exceptions set out in the second paragraph of RCW 81.28.080 address the authority of the Commission to allow or not allow a practice, or relate to choices that a carrier may make. In the petition, Commission Staff argues that RCW 81.28.020 allows the Commission to permit or not permit carriers to charge free or reduced rates. The petition urges the Commission to

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<sup>5</sup> Stericycle argues in its brief that the provisions of Chapter 81.28 do not by their terms apply to solid waste collection companies because they are not carriers of property, and that the provisions of that chapter have been made applicable to solid waste collection companies only by Commission rule.

exercise its discretion to order a halt to the practice, for a number of reasons. Some of those reasons do not relate to whether the practice violates any Commission statute or rule. If that interpretation is correct, then the question before us is whether and how the Commission should exercise its discretion with regard to carriers providing service for free or for reduced rates.

That interpretation is incorrect. As WSHA argues in its brief, RCW 81.28.080 does not address the authority of the Commission. The word “may” does not grant the Commission the discretion to allow or not allow carriers to provide free or reduced-rate service for charitable purposes. Rather, the “charitable purposes” provision relates to the ability of a carrier to choose to provide free or reduced-rate service.

The third threshold question is whether a “charitable purpose” is precluded when the recipients of the reduced rates are private hospitals and clinics. The Commission concurs with Commission Staff’s analysis that in determining whether a carrier is offering free or reduced-rate service for charitable purposes, we must look at both the nature of the recipient and at the intention of the carrier. The recipient must be what is commonly viewed as an object of charity, and the carrier must have a donative intent. It is well established in Washington that non-profit hospitals are charitable organizations. In re Rust’s Estate, 168 Wash. 344, 12 P.2d 396 (1932).

This order now considers whether Commission statutes prohibit the current practice described in the Petition and stipulated by the parties.

Clearly the current practice of providing reduced rates to not-for-profit hospitals and clinics while charging tariffed rates to for-profit hospitals and clinics for the same service is illegal. The parties have stipulated that biomedical waste companies do not offer below-tariff rates for regular biomedical waste collection service to non-profit hospitals and clinics for charitable purposes but rather as a means to compete for this business. The “charitable purposes” provision in the second paragraph of RCW 81.28.080 therefore does not apply. There is no provision of that or any other statute that even arguably would except the current practice from the requirements of RCW 81.28.010 (requiring all rates to be just, fair, reasonable and sufficient), RCW 81.28.040 (requiring carriers to file with the Commission tariff schedules), the first paragraph of RCW 81.28.080 (prohibiting carriers from charging less than published rates), RCW 81.28.180 (prohibiting rate discrimination), or RCW 81.28.190 (prohibiting unreasonable preferences).

## **2. Guidelines for Charging Free or Reduced Rates; Requirement of a Tariff**

In the Petition, Commission Staff requested that the Commission either reject the current practice of biomedical waste collection companies or set guidelines for charging free or reduced rates for charitable purposes. In its reply memorandum,

Commission Staff asks the Commission to declare what the requirements are that apply to “biomedical or other regular waste collection service” provided to “non-profit organizations, governmental units, or charitable organizations.”

The expanded request take us into the realm of an advisory opinion. The Petition for Declaratory Ruling does not set forth facts or reasons showing that there is an actual controversy arising from an uncertainty with respect to the applicability of RCW 81.28.040 to carriers other than biomedical waste carriers that are charging reduced rates for competitive purposes, or with respect to customers other than charitable entities. The Commission generally does not provide advisory opinions.

Expanding the proceeding also raises notice concerns. If the Commission grants the relief requested in the reply memorandum, its order will impact governmental units and will impact all common carriers that seek to provide service under the exceptions. The Commission did not notify common carriers other than solid waste carriers about this proceeding, and its notice to governmental units did not indicate that the Commission might enter an order affecting service to them.

This order will not attempt to declare what the requirements are that apply to carriers that claim to provide service for free or at reduced rates for charitable purposes. However, this order will comment upon some of the proposals and arguments advanced by Commission Staff and other parties.

**a. Proposed distinction between “regular” and “special or unusual” service**

This discussion begins its further comments on the reduced-rate issue by commenting upon the attempted distinction between “regular” biomedical waste collection service and “special or unusual” service. Stericycle and Commission Staff contend that in light of the unique market in which biomedical waste collection companies operate, the Commission must conclude that the “charitable purposes” exception does not apply to “regular” biomedical waste collection service offered to non-profit hospitals and clinics or other non-profit entities by certificated biomedical waste collection companies. They argue that the charitable purposes exception is intended to apply to a relatively insignificant part of a carrier’s business -- situations in which the carrier is motivated to make an exception in order to benefit a charitable endeavor. They argue that the exception was not intended to swallow the rule.

It is likely, as Stericycle and Commission Staff argue, that the Legislature intended the charitable purposes exception as applying to a relatively insignificant part of a carrier’s business. However, an attempt to distinguish between “regular service” which is not covered by the statutory exception, and “special or unusual service,” risks creating presumptions which are not consistent with the intent of the statute. Would the distinction mean that a carrier cannot provide reduced-rate service on a regular basis, even if it is making a minor exception to its general practice and is offering the

reduced rate for charitable reasons? That result would not seem to comport with the intent of the statute. While it may be unlikely that any biomedical waste carrier would be motivated by charitable impulses to offer reduced rates on a regular basis to a non-profit hospital, is it consistent with the statute to preclude that possibility? The only distinction the statute creates is based upon the hauler's purpose in offering reduced rates. Perhaps it would be better not to create further distinctions in trying to define circumstances when a charitable purpose presumptively does not exist.

**b. Argument that free or reduced service must be conducted under tariff**

The second reduced-rate issue that this discussion will comment upon is Commission Staff's reply-memorandum contention that if carriers wish to provide "regular" waste collection service to non-profit organizations, governmental units, or charitable organizations at reduced rates, they must have on file a Commission-approved tariff that includes the reduced rates.

Commission Staff's position is supported by a 1939 advisory opinion of the Washington Attorney General interpreting the same paragraph in the context of common carriers providing service at reduced rates to governmental units.<sup>6</sup> The Director of Public Service had written the Attorney General requesting the following advisory opinion with regard to the interpretation and application of the public service laws insofar as they relate to common carriers transporting goods for specified categories of governmental units at free or reduced rates:

We have also held that no matter what rate is charged to and paid by the governmental agency such rate must be incorporated in a tariff, in view of Section 14 of the Act [currently RCW 81.28.040, requiring that tariff schedules be filed with the Commission], which tariff must be filed in accordance with the rules and regulations established by the Department. Are we correct in this holding?

The Attorney General's Office answered in the affirmative. After setting out the statute that requires the filing of tariffs, the statute that prohibits rate discrimination, and the predecessor to the present RCW 81.28.080 (which had the same language as the present statute for all purposes relevant to this proceeding), the Attorney opined as follows:

The public service laws are as much for the prevention of discriminations between localities as for the prevention of

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<sup>6</sup> Opinion of the Attorney General, October 20, 1939. A copy of the opinion is attached to this Declaratory Order as Attachment A.

overcharging or undercharging any particular person or class of persons. The plain inference of the statutes is that if common carriers desire to haul goods for the United States, the State, counties, cities or towns, it must file a tariff under the above cited sections with the department of public service and also keep the same open to inspection in the carrier's own offices, plainly stating the rate to be charged to each class of governmental agencies above mentioned and between what points such carriage is to be made. By filing such tariff it may carry property for the above agencies without compensation or at a reduced rate, but such rates or free transportation we believe must be stated in the filed and published tariff or schedule.

. . . .

Allowing the carrier to carry free or at reduced rates for governmental agencies when and how it sees fit, changing its charges whenever it sees fit, regardless of its filed and published tariffs, would destroy all restraint upon discrimination between public agencies and between localities and commodities where such agencies are concerned. We cannot believe that such was the intent of the above cited statutes and we are of the opinion that any common carrier desiring to haul at reduced rates or free for any of the governmental agencies mentioned in Rem. Rev. Stat., Sec. 10354 [predecessor to RCW 81.28.080], must file a schedule or tariff stating such reduced or waived rates, charges, etc.

In the absence of such a tariff it would be the duty of the carrier to charge the full rate to all governmental agencies and between all localities the same as if the carrier was dealing with private individuals. . . .

This interpretation appears to be consistent with the statutory scheme viewed as a whole. It would allow a carrier to provide reduced-rate or free service in the circumstances set out in the second paragraph of RCW 81.28.080, without removing the restraints against secret rates, unapproved rates, and discriminatory rates. It would avoid a result that the statutes surely did not intend -- that common carriers would be free to keep their rates secret, and to discriminate among governmental entities or among charitable institutions with regard to price, when they provide service to those entities.<sup>7</sup>

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<sup>7</sup> WSHA's contention that by its plain meaning, the allowance for reduced rates for charitable purposes found in the second paragraph of RCW 81.28.080 creates an exception to the nondiscrimination requirements of RCW 81.28.180, appears to be incorrect. The charitable purposes provision appears to create an exception to the requirements of RCW 81.28.180 and RCW 81.28.190 only to the extent that

This interpretation also is consistent with the view expressed by the Commission in Order M.V.G. No. 1402, In re R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, Cause No. GA-845; Seattle Disposal Company, d/b/a Rabanco Companies, Cause No. GA-851 (July 1989), at footnote 14. In discussing the provision of “free” services to a municipal government, the Commission stated that it “requires all service to be conducted under tariff and it retains jurisdiction to approve or disapprove such tariffs in the public interest under appropriate standards.”

There are some difficulties with this interpretation. It would appear to be inconsistent with the language of the first paragraph of RCW 81.28.080, if the second paragraph of that statute merely states an exception to the requirements of the first paragraph. Under that view, the Attorney General’s interpretation would take us in a circle -- the first paragraph of RCW 81.28.080 requires that charges for all services be filed in a tariff, the second paragraph would except charges for some services from that requirement, but a carrier would not be able to use the exception unless the excepted charges were in the filed tariff. However, the second paragraph of RCW 81.28.080 appears not to merely state an exception to the rule set out in the first paragraph. The paragraph appears to stand alone, and to create an exception to any requirements of the title that are inconsistent with the simple rule set out in the paragraph -- that common carriers may handle property free or at reduced rates in certain circumstances.

Another difficulty with the interpretation has to do with differences between governmental entities and objects of charitable giving. The Attorney General’s interpretation appears to require a tariff for all service. That may not be a problem in the governmental context, where a tariff probably could simply set out “governmental rates” to cover most or all circumstances. However, the circumstances of objects of charity may vary substantially from individual to individual. A single charitable-entity tariff is less likely to be appropriate in all circumstances. Also, charitable giving is more likely to be a one-time occurrence. Requiring that reduced or free rates always be filed in a tariff and approved by the Commission before service is provided would seem to be an impractical and burdensome requirement. It is unlikely that the statutes intend such a result.

Commission Staff’s proposed regular service versus special or unusual service distinction suggests a way to avoid this problem, if the distinction is carefully drawn. Commission Staff proposes that carriers be required to file a tariff stating their reduced charges when they are providing “regular service.” Commission Staff

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those statutes are inconsistent with the charitable purposes provision. For example, while a carrier could offer a reduced rate to a charitable entity without violating RCW 81.28.080 or RCW 81.28.190 if its purpose in offering the lower rate were charitable, it could not offer different rates to different charitable entities of the same class without having a rational basis for doing so.



proposes that when carriers provide “special or unusual” services to charitable organizations, they be required to demonstrate a charitable purpose for the below-tariff rate.

RCW 81.28.040 (the statute that requires tariffs to be filed) empowers the Commission to modify the requirements of that statute “in respect to publishing, posting, and filing of schedules either in particular circumstances or by general rule or order applicable to special or peculiar circumstances or conditions.” That provision would appear to give the Commission power to enter an order or to adopt a rule to the effect that biomedical waste collection companies (and other carriers, if appropriate) are not required to file tariffs for service that is provided at reduced rates for charitable purposes on a one-time or occasional basis. The rule or order could require the carrier to notify the Commission that it has provided such service and the terms thereof, or provide other safeguards to allow Commission overview.

While this order concludes that a biomedical waste carrier wishing to haul at reduced rates or for free for charitable purposes must file a tariff stating the reduced or waived rates, and that the Commission can by rule or order create an exception to that requirement for one-time or occasional service, it does not appear appropriate to enter a declaratory order to that effect in this proceeding, for reasons set out above.

### **3. The equal protection argument**

BFI contends that in the competitive atmosphere that exists in the medical waste collection and transportation industry, the legislative distinction between customers created by the second paragraph of RCW 81.28.080 appears to violate the Equal Protection Clause.

The Commission does not have the power to declare unconstitutional a law which affects it. Order M.V.G. No. 1402, R.S.T. Disposal Company, Inc., d/b/a Tri-Star Disposal, supra; Bare v. Gorton, 84 Wn.2d 380, 526 P.2d 379 (1974).

#### **D. BFI’s and Commission Staff’s Request that the Commission “Grandfather” Existing Service Agreements**

It would be improper for the Commission to “grandfather” existing below-tariff rate agreements with non-profit hospitals and allow the present practice in the industry to continue for several years. The Commission has no authority to waive the requirements of RCW 81.28.080. Nor does the Commission have the authority to authorize the rate discrimination that would occur between hospitals and clinics that are required to pay tariff rates and those that are permitted to continue to pay reduced rates. If a contract provision is illegal, implementing an interpretation to that effect does not violate the impairment of contract prohibitions in the state and federal

constitutions.

Commission Staff's and BFI's argument in support of allowing existing reduced rate agreements to run their course incorrectly implies that the Commission has accepted the existing practice of providing service to non-profit hospitals and clinics at reduced (non-tariff) rates. In the two instances that are cited as evidencing past Commission "interpretation," or acquiescence, it does not appear that the issue of whether a carrier may offer reduced rates for competitive purposes was raised. The November 22, 1997, Commission Secretary letter is not an official ruling of the Commission, and at best appears to be an initial guess based upon limited facts. Moreover, all the letter actually states is that a non-profit hospital qualifies for free or reduced rates, and a carrier may choose "to contribute to a charitable institution by offering free or reduced rates" (emphasis added). The reference to the practice in the 1995 Stericycle decision is not in the context of the legality of the practice, and expresses no view on that question. At any rate, administrative interpretation which is out of harmony with the statute interpreted is inoperative.

On the other hand, there clearly has been uncertainty in the solid waste industry and at the Commission regarding the proper interpretation of the second paragraph of RCW 81.28.080 and its application to particular circumstances. There also has been uncertainty regarding the applicability of the Commission's discontinuance of service rule. This is the first time the Commission has formally interpreted the statute and the rule. For purposes of application of Commission penalty statutes, RCW 81.04.380 and 81.04.450, prospective application of the interpretations is appropriate.

If the Commission's discontinuance of service rule, WAC 480-70-710(1), is inappropriate for this specialized area of service, carriers may seek a waiver, or seek to initiate a rulemaking.

#### **E. The Stericycle Marketing Arrangement**

The issue of the legality or appropriateness of the marketing agreement between Stericycle and Washington Hospital Services is beyond the scope of issues raised by the Commission Staff's petition, and insufficient facts are before the Commission concerning this agreement and its alleged impacts on the marketplace. The Commission will not examine the marketing agreement in this proceeding.

Based upon the record submitted, the Commission makes the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. On March 27, 1997, the Staff of the Washington Utilities and Transportation Commission filed a Petition for Declaratory Ruling requesting resolution of issues relating to service agreements and rates of carriers of biomedical waste.

2. On April 2, 1997, the Commission gave notice of receipt of the petition and of opportunity to participate to all certificated solid waste companies and to other persons that the Commission identified as possibly having an interest in the rates and practices of biomedical waste carriers.

3. Two prehearing conferences were held. All requests for party status were granted. The parties subsequently agreed to submit a statement of agreed facts for the Commission's review.

4. The parties filed stipulated facts. The facts are as recited above in section IV. The Commission adopts the Stipulated Facts filed on September 22, 1997, as the factual basis for its declaratory ruling.

5. The parties submitted legal memoranda or briefs.

6. The parties agreed that the matter be submitted to the Commission on a record including the Stipulated Facts and the briefs. The parties agreed that the presiding officer should enter an initial order, which should be subject to review and entry of a final order as in adjudicative proceedings.

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction to issue a declaratory order with respect to the applicability of Commission statutes and rules to service agreements and practices presently employed by carriers of biomedical waste.

2. The Commission should enter a declaratory order on the following issues:

(a) Whether provisions in a service agreement for the collection and transportation of biomedical waste relating to minimum period of service and notice of discontinuance of service are subject to the requirements of WAC 480-70-710(1);

(b) whether requirements in a service agreement for the collection and transportation of biomedical waste requiring a customer to give more than three business days' notice to the carrier to discontinue service, or that require a minimum length term of service of more than three business days, or that provide liquidated damages on violation of such provisions, violate WAC 480-70-710(1).

(c) whether a liquidated damages provision in a service agreement for the collection and transportation of biomedical waste is subject to the tariff filing requirements of RCW 81.28.080;

(d) whether the current practice in the solid waste industry of biomedical waste carriers charging reduced rates to non-profit hospitals and clinics is illegal.

3. Provisions in a service agreement for the collection and transportation of biomedical waste relating to minimum period of service and notice of discontinuance of service are subject to the requirements of WAC 480-70-710(1).

4. Requirements in a service agreement for the collection and transportation of biomedical waste requiring a customer to give more than three business days' notice to the carrier to discontinue service, or that require a minimum length term of service of more than three business days, or that provide liquidated damages on violation of such provisions, violate WAC 480-70-710(1).

5. A liquidated damages provision in a service agreement for the collection and transportation of biomedical waste is subject to the tariff filing requirements of RCW 81.28.080.

6. The current practice in the solid waste industry of biomedical waste carriers charging reduced rates to non-profit hospitals and clinics is illegal. Because the reduced rates are offered for competitive rather than charitable purposes, they are not authorized by the second paragraph of RCW 81.28.080. The current practice violates RCW 81.28.040's requirement that rates be filed in tariffs; violates RCW 81.28.080's requirement that no common carrier shall charge less or different rates than those specified in its filed tariffs; violates RCW 81.28.180's prohibition against rate discrimination; and violates RCW 81.28.190's prohibition against unreasonable preferences.

Based upon the above findings of fact and conclusions of law, the Commission enters the following declaratory order.

**ORDER**

THE COMMISSION ORDERS That, pursuant to RCW 34.05.240 and WAC 480-09-230, the Commission issues a declaratory order that:

1. Provisions in a service agreement for the collection and transportation of biomedical waste relating to minimum period of service and notice of discontinuance of service are subject to the requirements of WAC 480-70-710(1).

2. Requirements in a service agreement for the collection and transportation of biomedical waste that require a customer to give more than three business days' notice to the carrier to discontinue service, or that require a minimum length term of service of more than three business days, or that provide liquidated damages on violation of such provisions, violate WAC 480-70-710(1).

3. A liquidated damages provision in a service agreement for the collection and transportation of biomedical waste is subject to the tariff filing requirements of RCW 81.28.080.

4. The current practice in the solid waste industry of biomedical waste carriers charging reduced rates for service to non-profit hospitals and clinics, for competitive rather than charitable purposes, is illegal.

DATED at Olympia, Washington, and effective this 29th day of October 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

JOHN PRUSIA  
Administrative Law Judge

**NOTICE TO PARTIES:**

The parties agreed that this order be entered as an initial order, and that it be subject to administrative review and entry of a final order as in adjudicative proceedings. Accordingly, the action proposed in this order is not effective until a final order of the Utilities and Transportation Commission is entered. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within a time limit as outlined below.

Any party to this proceeding has twenty (20) days after the service date of this initial order to file a Petition for Administrative Review, under WAC 480-09-780(2). Requirements of a Petition are contained in WAC 480-09-780(4). As provided in WAC 480-09-780(5), any party may file an Answer to a Petition for Administrative Review within ten (10) days after service of the Petition.

In accordance with WAC 480-09-100, all documents to be filed must be addressed to: Office of the Secretary, Washington Utilities and Transportation Commission, 1300 South Evergreen Park Drive S.W., PO BOX 47250, OLYMPIA, WA 98504-7250. After reviewing the Petitions for reopening or Administrative Review, Answers, briefs, and oral arguments, if any, the Commission will by final order affirm, reverse, or modify this initial order.