

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of:

**WASTE MANAGEMENT OF WASHINGTON,
INC. D/B/A WM HEALTHCARE SOLUTIONS
OF WASHINGTON**

For an Extension of Certificate G-237 for a
Certificate of Public Convenience and Necessity
to Operate Motor Vehicles in Furnishing Solid
Waste Collection Service

Docket No. TG-120033

**WASTE MANAGEMENT'S
OPPOSITION TO STERICYCLE'S
MOTION FOR SUMMARY
DETERMINATION RE WASTE
MANAGEMENT'S UNLAWFUL
BIOMEDICAL WASTE COLLECTION
OPERATIONS OUTSIDE ITS
CERTIFICATED TERRITORY**

TABLE OF CONTENTS

1

2 I. RELIEF REQUESTED..... 1

3 II. STATEMENT OF FACTS 1

4 III. STATEMENT OF ISSUES 3

5 IV. EVIDENCE RELIED UPON 3

6 V. ARGUMENT 3

7 A. Stericycle Failed to Timely File the Motion for Summary Determination..... 4

8 B. This Proceeding Is Not the Proper Forum to Resolve the Motion for Summary Determination. . 4

9 C. The Motion for Summary Determination is Baseless..... 4

10 1. Under Relevant State Statutes, Waste Management’s Commercial Recycling Services Are

11 Not Regulated as Solid Waste Collection..... 5

12 2. Contrary to Stericycle’s Assertions, There Is No Quantitative Minimum for the Amount of

13 Recyclables Diverted to Define Commercial Recycling, But There Are Qualitative Factors

14 With Which Waste Management’s Program Comports..... 6

15 a. In *Drop Boxes R Us*, the Commission Established Qualitative Standards Which

16 Demonstrate That Waste Management’s Commercial Recycling Services Are Legitimate.

17 7

18 b. The Commission’s Rules Set Forth Objective Factors Which Demonstrate Waste

19 Management’s ecoFinity Program Is Not Solid Waste Collection..... 8

20 c. Under the Department of Ecology’s Regulations, Waste Management Is Legally

21 Performing Commercial Recycling. 10

22 3. Stericycle Relies On Outdated Laws and Imaginary Rules, But Waste Management’s

23 ecoFinity Recycling Program Is Lawful Commercial Recycling Under More Recent and

24 Precedential Authority. 11

25 a. Waste Management Collects Only the Sharps Waste That Is Source-Separated,

26 Objectively Manifesting the Shipper’s Intention to Recycle..... 11

27 b. Waste Management Handles the Collected Sharps in a Manner Reflecting the Intent to

28 Recycle and the Amount of Diversion Is Not a Deciding Factor. 14

c. Waste Management’s ecoFinity Program Is Collection of “Recyclable Materials” from a

Commercial Customer as Evidenced by Objective Manifestations of the Intent of the

Shipper, the Transporter, and the Ultimate Receiving Entity..... 17

VI. CONCLUSION..... 19

TABLE OF AUTHORITIES

1

2 **Cases**

3 *C&C Transfer Co., Inc.*, Order M.V. No. 143632, App. No. E-74249 (July 12, 1991)..... 6

4 *Clark County Disposal, Inc. d/b/a Vancouver Sanitary Serv., et al. v. Envtl. Waste Sys., Inc.*,

5 Cause No. TG-2194 (October 19, 1989)..... 6

6 *In re Lowell Haugen, d/b/a/ Med. Waste Mgmt. Sys., Inc.*, Order M.V. No. 148396,

7 Hearing No. H-5024 (December 16, 1994) 7, 15

8 *In re Med. Res. Recycling Sys., Inc.*, Order M.V.G. No. 1707, App. No. GA-76820

9 (May 25, 1994)..... 7

10 *In re Rissler Contracting Co.*, Order M.V. No. 144941, App. No. E-75297 (May 01, 1992)..... 6

11 *In re Ryder Distribution Sys., Inc.*, Order M.V.G. No. 1536, App. No. GA-75563

12 (January 30, 1992) 6, 17

13 *In re Safco Safe Transport*, Order M.V. No. 143916, App. No. P-73623 (October 1991)..... 6, 13

14 *In re Sunshine Disposal, Inc.*, Order M.V. No. 133753, Hearing No. E-19104 (April 25, 1986)..... 6

15 *In the Matter of Glacier Recycle, Hungry Buzzard, and T&T Recovery*, Order 06 on Motions for

16 Summary Determination, Docket No. TG-072226 (June 3, 2008)..... 8, 9, 18

17 Order M.V.G. No. 1840 – Commission Decision and Order Denying Administrative Review; Affirming

18 and Adopting Initial Order, Docket Nos. H-5039/4040 (October 8, 1998)..... passim

19 **Statutes**

20 Chapter 81.80 RCW 6

21 Laws of 2005 ch. 394..... 10

22 RCW 35.21.158 5

23 RCW 36.58.160 5

24 RCW 70.95.020(4)..... 10

25 RCW 70.95.030(18)..... 17

26 RCW 70.95.030(19)..... 8

27 RCW 70.95.400(1)..... 10

28 RCW 70.95.400(2)..... 10

1	RCW 70.95.410	10
2	RCW 70.95.903	5
3	RCW 81.77.010(8).....	5, 6
4	RCW 81.77.010(9).....	5
5	RCW 81.77.140	5
6	RCW 81.80.470	6
7	RCW 81.80.470(2).....	16
8		
9	Regulations	
10	Chapter 173-345 WAC	10
11	WAC 173-345-040.....	11
12	WAC 173-345-060.....	11
13	WAC 173-350-100.....	12, 17
14	WAC 173-350-310(2).....	17
15	WAC 480-07-011.....	9
16	WAC 480-07-380(2)(b)	4
17	WAC 480-70-011(2)(b)	5
18	WAC 480-70-016(4).....	9
19	WAC 480-70-041.....	8
20	WSR 08-10-094 (May 7, 2008) Docket TG-080591	10
21	WSR 11-01-059 filed Dec. 8, 2010	10
22		
23		
24		
25		
26		
27		
28		

1
2
3
4
5
6

I. RELIEF REQUESTED

1. Applicant Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington (“Waste Management”) requests that the Commission deny Stericycle of Washington, Inc.’s (“Stericycle”) Motion for Summary Determination Re Waste Management’s Unlawful Biomedical Waste Collection Operations Outside Its Certificated Territory.

7
8
9
10
11
12

II. STATEMENT OF FACTS

2. In its latest motion, Stericycle (again) addresses the method by which Waste Management performs the pilot ecoFinity sharps recycling service for St. Joseph Medical Center in Bellingham. Stericycle alleges that Waste Management’s off-tariff billing is improper and its collection outside of its certificate territory is unauthorized, as evidence that Waste Management lacks the regulatory fitness to expand its regulated biomedical waste (“RMW”) services statewide. However, the Presiding Officer has repeatedly held that Stericycle has **no** interest in Waste Management’s fitness and that this application proceeding is **not** the proper forum for Stericycle to raise and seek resolution of its allegations regarding the legality of Waste Management’s ecoFinity services.

3. In his first Order, the Presiding Officer prohibited Stericycle from conducting any discovery into Waste Management’s fitness including “Waste Management’s prior experience in the field.”¹ In a subsequent Order, he held that Stericycle had failed to identify any “legitimate interest” Stericycle “has in whether Waste Management is fit to provide the requested service.”² When Stericycle nonetheless moved to compel discovery as to Waste Management’s regulatory fitness, the Presiding Officer ruled that the claims of regulatory fitness raised by Stericycle are “farther afield than we are going here. If you have concerns about what Waste Management is doing, you can always file a complaint. This is not an opportunity to provide every problem or objection [Stericycle] ha[s] to what Waste Management is doing. I’m not going to allow us to fall that far afield....”³ Still unmoved, Stericycle’s counsel responded: “So, Your Honor, just so that I understand your ruling. This goes

25
26

¹ Order 01 ¶ 8.

27

² Order 03 ¶ 17.

28

³ Declaration of Jessica L. Goldman in Opposition to Stericycle’s Motion for Summary Determination re Waste Management’s Unlawful Biomedical Waste Collection Operations Outside Its Certificated Territory (“Goldman Decl.”), Ex. 1 at 92:14-20.

1 directly to regulatory fitness, if they are violating the tariff requirements.”⁴ The Presiding Officer
2 reiterated:

3 I don’t see that it is sufficiently relevant. This is not an occasion to air every complaint.
4 I don’t want to hear from Waste Management about your profitability and your
5 overearning. And I don’t want to hear from you about what you think Waste
6 Management is doing wrong in its current service territory. That’s not what we are here
to talk about.⁵

7 4. Apparently pursuant to the Presiding Officer’s suggestion, on October 1, 2012, Stericycle
8 filed with the Commission a “Complaint and Petition for Declaratory Relief.”⁶ Among other alleged
9 regulatory misdeeds, Stericycle contends that Waste Management provided “unauthorized service and
10 offers of service at below-tariff rates.”⁷ In that complaint proceeding, Stericycle alleges that “WM has
11 unlawfully provided and continues to provide biomedical waste collection services outside the territory
12 in which it is authorized to provide biomedical waste collection services under its certificate G-237,”
13 because Stericycle disagrees with Waste Management’s contention that its services to St. Joseph
14 Medical Center under the “ecoFinity” program constitute “commercial recycling collection services”
15 that are not subject to the requirements of RCW 81.77.040.⁸

16 5. In the first several go-rounds on this issue in the present proceeding, the Presiding Officer
17 indicated that he had not yet decided whether he would permit Stericycle to offer testimony regarding
18 Waste Management’s regulatory fitness at the evidentiary hearing.⁹ However, by the time Stericycle
19 filed its third motion to compel discovery regarding Waste Management’s alleged failure to comply with
20 Commission regulations, the Presiding Officer ruled that Stericycle’s allegations of Waste
21 Management’s regulatory conduct would not be determined in this proceeding. He reiterated that
22 “[d]iscovery into whether Waste Management is complying with its legal and regulatory obligations also
23

24 ⁴ *Id.* at 92:16-21.

25 ⁵ *Id.* at 93:2-6, 93:14-21.

26 ⁶ *Stericycle v. Waste Management*, Docket TG-121597 (“Complaint Proceeding”).

27 ⁷ *Id.*

28 ⁸ *Id.*

⁹ Goldman Decl., Ex. 1 at 93:2-6.

1 is outside the bounds of Stericycle’s legitimate interest in this docket.”¹⁰ The Presiding Officer ruled
2 that “[a]s suggested in that prior ruling, Stericycle has filed a complaint against Waste Management
3 alleging the same or similar conduct into which Stericycle seeks to inquire here, and **that docket is the**
4 **appropriate proceeding to address those issues.**”¹¹

5 6. The very next day, Stericycle filed the instant Motion for Summary Determination Re
6 Waste Management’s Unlawful Biomedical Waste Collection Operations Outside Its Certificated
7 Territory (“Motion for Summary Determination”) and requested that “the Commission determine that
8 Waste Management’s ecoFinity sharps waste collection service is a solid waste collection service
9 subject to authorization and regulation by the Commission and ... that Waste Management has operated
10 unlawfully by providing the ecoFinity service in Bellingham outside its certificated authority ...”¹²
11 One day later, Stericycle filed an identical motion with an identical request for relief in its complaint
12 proceeding.¹³

13 III. STATEMENT OF ISSUES

14 7. Should Stericycle’s Motion for Summary Determination be denied because it was not
15 timely made, this is not the proper proceeding in which to resolve the issue raised, and because the
16 Motion is groundless?

17 IV. EVIDENCE RELIED UPON

18 8. Waste Management relies on the Declaration of Jessica L. Goldman filed herewith, the
19 Declaration of Jared Van Kirk in Support of Protestant Stericycle of Washington, Inc.’s Motion for
20 Summary Determination re Waste Management’s Unlawful Biomedical Waste Collection Operations
21 Outside Its Certificated Territory, and on the record herein.

22 V. ARGUMENT

23 9. Stericycle’s Motion for Summary Determination should be denied because it was not
24 timely filed, was brought in the wrong proceeding, and is legally groundless.

25 ¹⁰ Order 06 ¶ 10.

26 ¹¹ *Id.* (fn omitted; emphasis added).

27 ¹² Motion for Summary Determination ¶ 45.

28 ¹³ Complainant Stericycle of Washington, Inc.’s Motion for Summary Determination re Waste Management’s Unlawful
Biomedical Waste Collection Operations Outside Its Certificated Territory ¶ 45 (11/7/2012) (Complaint Proceeding).

1 **A. Stericycle Failed to Timely File the Motion for Summary Determination.**

2 10. Pursuant to WAC 480-07-380(2)(b), motions for summary determination must be filed
3 more than 30 days prior to the hearing. The hearing in this matter will begin on December 3, 2012.
4 Hence, any dispositive motion had to be filed no later than November 2, 2012. Stericycle did not file
5 its Motion for Summary Determination until November 6, 2012. The Commission should deny the
6 Motion as untimely.

7 **B. This Proceeding Is Not the Proper Forum to Resolve the Motion for Summary**
8 **Determination.**

9 11. On November 5, 2012, the Presiding Officer ruled that “[a]s suggested in that prior
10 ruling, Stericycle has filed a complaint against Waste Management alleging the same or similar conduct
11 into which Stericycle seeks to inquire here, and that docket is the appropriate proceeding to address
12 those issues” regarding Waste Management’s alleged violation of Commission rules.¹⁴ Undeterred,
13 Stericycle filed the instant Motion **the following day**. The Presiding Officer has ruled that this
14 proceeding is not the proper venue for resolving Stericycle’s contention that Waste Management’s
15 ecoFinity recycling service to St. Joseph Medical Center is subject to Commission oversight.
16 Consequently, the pending Motion should be denied.

17 **C. The Motion for Summary Determination is Baseless.**

18 12. Even if Stericycle’s Motion for Summary Determination were not fatally flawed on
19 procedural grounds, it should nonetheless be denied on the merits. There is no basis for concluding that
20 Waste Management’s ecoFinity program violates the Commission’s laws or that Waste Management is
21 “unlawfully providing biomedical waste collection services beyond the limits of its authorized service
22 territory under certificate.”¹⁵ Contrary to Stericycle’s claims, the ecoFinity program is consistent with
23
24
25
26

27 ¹⁴ Order 06 ¶ 10 (fn omitted). The Motion for Summary Determination **does not** address any competitive service issue, such
28 as whether ecoFinity is different from Stericycle’s recycling services.

¹⁵ Motion for Summary Determination ¶ 1.

1 statute, Commission precedent, and agency rules.¹⁶ Stericycle is wrong in suggesting otherwise and its
2 Motion should be denied.¹⁷

3 **1. Under Relevant State Statutes, Waste Management’s Commercial Recycling**
4 **Services Are Not Regulated as Solid Waste Collection.**

5 13. Washington law restricts regulation of the collection of commercial recyclables. State
6 statutes enacted in 1989 provide:

7 Nothing in this chapter shall prevent a recycling company or nonprofit entity from
8 collecting and transporting recyclable materials from a buy-back center, drop-box, or
9 from a commercial or industrial generator of recyclable materials, or upon agreement
with a solid waste collection company.

10 Nothing in this chapter shall be construed as prohibiting a commercial or industrial
11 generator of commercial recyclable materials from selling, conveying, or arranging
for transportation of such material to a recycler for reuse or reclamation.¹⁸

12 14. Therefore, the statutory definition of “solid waste collection” used by the Commission
13 does not include collecting or transporting recyclable materials for a commercial generator.¹⁹ The
14 Commission also adopted a rule exempting from regulation “a carrier collecting or transporting
15 recyclable materials from a drop box or recycling buy-back center, or collecting or transporting
16 recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a
17 recycler for use or reclamation.”²⁰ Additionally, a companion statute moved the Commission’s
18 authority to regulate commercial recycling from the solid waste laws in Chapter 81.77 RCW to the
19
20
21

22 ¹⁶ *Id.* ¶ 41.

23 ¹⁷ In its capacity as a universal solid waste collection company operating under the Commission’s jurisdiction, Waste
24 Management has opposed sham recycling statewide. Waste Management believes the ecoFinity program is legitimately
25 performed as commercial recycling. If the Commission were to conclude otherwise through a final adjudication or
rulemaking, Waste Management would immediately discontinue the program.

26 ¹⁸ RCW 81.77.140; *see also* RCW 35.21.158 (cities); RCW 36.58.160 (counties); RCW 70.95.903 (Ecology). These
provisions were codified in each of the statutory titles applicable to governmental entities which oversee solid waste
collection.

27 ¹⁹ RCW 81.77.010(8); *see also* RCW 81.77.010(9) (excluding commercial recyclables from the definition of “solid waste”).

28 ²⁰ WAC 480-70-011(2)(b).

1 general motor carrier laws in Chapter 81.80 RCW.²¹ These codified provisions work in alignment to
2 implement the statutory exemption.

3 15. As a result, transportation of recyclable materials from commercial generators is no
4 longer subject to economic regulation by the Commission. Waste Management does not have tariff
5 rates for its commercial recycling collection and it is not constrained by the geographic limits of its
6 certificated territory. Collecting recyclable sharps from St. Joseph Medical Center in Bellingham for
7 recycling and charging negotiated rates for the service is completely consistent with these statutes.
8 Notably, Washington legislation does not articulate any guidance about when a load from a commercial
9 or industrial generator qualifies as “recyclable materials,” and the Commission’s implementing
10 regulation merely restate the statutory language. However, Waste Management’s pilot program for
11 sharps comports with the Commission’s qualitative standards for commercial recycling which have
12 evolved since those statutes were enacted.

13 **2. Contrary to Stericycle’s Assertions, There Is No Quantitative Minimum for the**
14 **Amount of Recyclables Diverted to Define Commercial Recycling, But There Are**
15 **Qualitative Factors With Which Waste Management’s Program Comports.**

16 16. Over the years, the Commission has wrestled with the distinction between regulated
17 solid waste collection and unregulated commercial recycling. In all of these cases, the Commission
18 struggled with identifying the appropriate indicia for determining whether the customer intended its
19 materials to be recycled and whether the collection company truly intended to transport the material for
20 recycling. The Commission considered a wide variety of factually unique situations and addressed
21 each in a case-by-case effort to ascertain what the shippers intended, and how the materials were
22 handled.²²

23 ²¹ RCW 81.80.470 (“The collection or transportation of recyclable materials from a drop box or recycling buy-back center, or
24 collection or transportation of recyclable materials by or on behalf of a commercial or industrial generator of recyclable
25 materials to a recycler for use or reclamation is subject to regulation under this chapter.”); *see also* RCW 81.77.010(8)
26 (acknowledging that transportation of commercial recyclables is regulated under Chapter 81.80 RCW).

27 ²² *In re Sunshine Disposal, Inc.*, Order M.V. No. 133753, Hearing No. E-19104 (April 25, 1986) (the “operative distinction is
28 the purpose of the transportation”); *Clark County Disposal, Inc. d/b/a Vancouver Sanitary Serv., et al. v. Envtl. Waste Sys.,*
Inc., Cause No. TG-2194 (October 19, 1989) (transporting for disposal is incidental to the private recycling business); *C&C*
Transfer Co., Inc., Order M.V. No. 143632, App. No. E-74249 (July 12, 1991) (for agricultural sludge, depending on the
destination and end use of the commodity); *In re Safco Safe Transport*, Order M.V. No. 143916, App. No. P-73623 (October
1991) (hazardous “waste” recycling based on the shipper’s intention deduced from its tender); *In re Ryder Distribution Sys.,*
Inc., Order M.V.G. No. 1536, App. No. GA-75563 (January 30, 1992) (tendering unsorted biomedical waste, the intention of
the shippers was for disposal); *In re Rissler Contracting Co.*, Order M.V. No. 144941, App. No. E-75297 (May 01, 1992)

1 **a. In *Drop Boxes R Us*, the Commission Established Qualitative Standards**
2 **Which Demonstrate That Waste Management’s Commercial Recycling**
3 **Services Are Legitimate.**

4 17. When the building industry boomed in the late 1990s and early 2000s, an increasing
5 number of contractors and demolition companies engaged in unregulated transportation, sometimes
6 unknowingly but sometimes claiming that they were performing commercial recycling. In the context
7 of this increasing controversy and uncertainty, the Commission decided *In the Matter of Determining*
8 *the Proper Classification of Drop Boxes R Us, Inc.*²³ In *Drop Boxes R Us*, a classification proceeding
9 initiated by the Commission to resolve whether a self-professed recycling company was actually
10 engaged in the business of solid waste collection for which certificate authority would be required, the
11 Commission set forth functional criteria. The *Drop Boxes R Us* analytic provides the most definitive
12 guidance to evaluating whether a particular service is regulated solid waste collection or unregulated
13 commercial recycling.

14 18. The Commission first addressed the definition of “recyclable materials” and summarized
15 the plain meaning according to several benchmarks:

16 [I]n terms of their sources (*i.e.*, commercial or industrial generation (RCW
17 81.77.010(8))), how they are collected (*i.e.*, source separate or not; collected at central
18 drop boxes or recycling buy-back center (RCW 81.77.010(8)), how they are handled after
19 collection (*i.e.*, separated for transformation, remanufacture, or reuse (RCW
20 70.95.030(17))), and where they are taken (*i.e.*, other than to landfill disposal or
21 incineration sites (RCW 70.95.030(18)).²⁴

22 The Commission held that the proper classification of commodities turned on “questions of commercial
23 value, destination, and end use” and that the “handling, destination, and disposition” of the material
24 collected decided whether the transportation was commercial recycling or not. The Commission

25 (dump truck transporting contaminated soil for disposal); *In re Med. Res. Recycling Sys., Inc.*, Order M.V.G. No. 1707, App.
26 No. GA-76820 (May 25, 1994) (properly seeking a certificate to collect and transport unsorted waste for disposal); *In re*
27 *Lowell Haugen, d/b/a/ Med. Waste Mgmt. Sys., Inc.*, Order M.V. No. 148396, Hearing No. H-5024 (December 16, 1994) (the
28 purpose of transporting unsorted biomedical waste was disposal).

²³ Order M.V.G. No. 1840 – Commission Decision and Order Denying Administrative Review; Affirming and Adopting
Initial Order, Docket Nos. H-5039/4040 (October 8, 1998) (“*Drop Boxes R Us*”).

²⁴ *Id.* at 6.

1 concluded that “waste ... transported solely for the purpose of disposal” is not “property” under the
2 Interstate Commerce Commission regulations.²⁵

3 19. The Commission, however, decided that the distinction between solid waste collection
4 and recycling **was not susceptible to quantitative analysis**. Rather, the Commission ruled that how
5 the material is treated is determinative: “But without proper separation and handling, these same
6 materials are not ‘recyclable material’ as defined in our statutes or as a matter of plain common sense;
7 they are, in fact, solid waste destined for permanent disposal.”²⁶ This important precedent established
8 the Commission’s focus on “the various intentions of generator, transporter, and receiver of the
9 materials in question.”²⁷ Through the lens of this analysis, as further described below, objective
10 evidence shows that all the participants in Waste Management’s ecoFinity service intend to recycle.

11 **b. The Commission’s Rules Set Forth Objective Factors Which Demonstrate**
12 **Waste Management’s ecoFinity Program Is Not Solid Waste Collection.**

13 20. Consistent with the principles articulated in *Drop Boxes R Us*, the Commission’s rules
14 require consideration of the handling, destination, and disposition of materials in evaluating
15 commercial recycling. “Recyclable materials” means “materials that are transported for recycling,
16 reprocessing, reclamation, or for any process that extracts or modifies the commodity for reuse or
17 another commercially valuable purpose,” reflecting a functional orientation to the actual handling,
18 destination, and disposition of the materials.²⁸ “Recycling” means transforming or remanufacturing
19 materials into usable or marketable materials for use other than landfill disposal or incineration and also
20 evidences a practical view towards the ultimate outcome of materials collected.²⁹

21 21. The Commission’s regulations do not require any specific amount of recovery to
22 demarcate the line between regulated solid waste and commercial recycling. In classifying
23

24 _____
25 ²⁵ *Id.* at 9 (citation omitted).

26 ²⁶ *Id.* at 10.

27 ²⁷ *In the Matter of Glacier Recycle, Hungry Buzzard, and T&T Recovery*, Order 06 on Motions for Summary Determination,
28 Docket No. TG-072226 (June 3, 2008) at 10 ¶ 32.

²⁸ WAC 480-70-041.

²⁹ *Id.*; see also RCW 70.95.030(19).

1 transportation activities, the Commission uses qualitative factors for determining whether a company's
2 operations require a solid waste certificate under Chapter 81.77 RCW:

- 3 (a) The intent of the shipper;
- 4 (b) The intended destination of the shipment;
- 5 (c) The actual destination of the shipment
- 6 (d) Special handling or conditions placed on the shipment by the shipper and/or
7 receiver;
- 8 (e) The value of the commodity being transported;
- 9 (f) Whether the carrier is primarily engaged in the business of providing solid waste
10 collection or is primarily engaged in the business of providing a service other than
11 the collection of solid waste; and
- (g) Whether the carrier holds itself out to the public as a transporter of solid waste.³⁰

12 These regulatory standards determine whether any potentially exempt transportation requires a motor
13 carrier permit or a solid waste certificate, be it a dump truck operator, or a private carrier whose primary
14 business is not solid waste collection – or, as in the instant case, a commercial recycler.³¹ So, for
15 example, these qualitative regulatory factors were applied to conclude that material transported to a
16 landfill for disposal cannot qualify as “recyclable material,” even if used at the landfill for certain
17 operational purposes as waste stabilization.³² For purposes of evaluating the statutory exemption for
18 commercial recycling, these regulatory factors allow the intentions of the generator, the transporter, and
19 the receiver to be considered in qualitative fashion but do not impose any numeric standards for
20 diversion or percentages of loads.

21 22. Moreover, in 2010, the Commission abandoned rulemaking efforts to establish a bright
22 line distinction between recycling and solid waste. In 2008, in an attempt to resolve disagreement
23 among regulated solid waste collection companies, commercial recycling companies, waste/recycling
24 generators, and the Department of Ecology as to what activities the Commission should regulate as

25 _____
26 ³⁰ WAC 480-70-016(4).

27 ³¹ WAC 480-07-011. For instance, the nature of a carrier's primary business is obviously relevant more to the determination
of private carriage than it is to the question of commercial recycling.

28 ³² *In the Matter of Glacier Recycle, Hungry Buzzard, and T&T Recovery*, Order 06 on Motions for Summary Determination,
Docket No. TG-072226 (June 3, 2008).

1 solid waste collection under Chapter 81.77 RCW and what the Commission should regulate as common
2 carriage of property under Chapter 81.80 RCW, the Commission initiated rulemaking.³³ Two and a
3 half years later, the Commission withdrew its proposal.³⁴ After publishing two different drafts and
4 conducting multiple workshops, the Commission was saved from the frustration of further
5 administrative proceedings by the Governor’s moratorium on rulemaking. It abandoned efforts to
6 quantify a demarcation by reference to volume.

7 **c. Under the Department of Ecology’s Regulations, Waste Management Is**
8 **Legally Performing Commercial Recycling.**

9 23. In 2005, the Legislature enacted “An Act Relating to ensuring the lawful transport and
10 handling of recyclable materials...”³⁵ Among other general policy goals, it was specifically intended
11 to “improve recycling, eliminate illegal disposal of recyclable materials, [and] protect consumers from
12 sham recycling...”³⁶ The amendment articulated the legislative purpose “to ensure that recyclable
13 materials diverted from the waste stream for recycling are routed to facilities in which recycling
14 occurs...”³⁷ The statute requires all “transporters” of commercial or industrial generators to register
15 with the Department of Ecology.³⁸ “Transporter” includes commercial recycling operations of
16 certificated solid waste collection companies.³⁹ The law strictly states that “[a] transporter may not
17 deliver any recyclable materials for disposal to a transfer station or landfill” and imposes civil penalties
18 for violating the prohibition.⁴⁰

19 24. The Department of Ecology subsequently adopted regulations implementing this
20 legislation.⁴¹ A transporter is not permitted to collect nonrecyclable solid waste and must ensure that

21
22 ³³ WSR 08-10-094 (May 7, 2008) Docket TG-080591.

23 ³⁴ WSR 11-01-059 filed Dec. 8, 2010.

24 ³⁵ Laws of 2005 ch. 394, Preface.

25 ³⁶ *Id.* § 1.

26 ³⁷ *Id.* § 2; RCW 70.95.020(4).

27 ³⁸ *Id.* § 4; RCW 70.95.400(2).

28 ³⁹ *Id.*; RCW 70.95.400(1).

⁴⁰ *Id.* § 5; RCW 70.95.410.

⁴¹ Chapter 173-345 WAC.

1 all sites at which it collects recyclable materials provide a separate container for solid waste.⁴² Ecology
2 reasoned that all generators have some solid waste and therefore only if a generator has made
3 arrangements for disposal of its non-recyclable material can it objectively evidence an intent to recycle.
4 A legitimate transporter may not deliver any recyclable materials for disposal to a transfer station or
5 landfill.⁴³ The destination to which a hauler delivers the collected material is an objective
6 manifestation of the transportation goals.

7 25. Waste Management of Washington, Inc. is a registered transporter.⁴⁴ As analyzed
8 further below, when evaluated for compliance with the Department of Ecology's regulations along with
9 the other relevant state laws and Commission precedent, the legitimacy of its ecoFinity program is
10 readily apparent.

11 **3. Stericycle Relies On Outdated Laws and Imaginary Rules, But Waste**
12 **Management's ecoFinity Recycling Program Is Lawful Commercial Recycling**
13 **Under More Recent and Precedential Authority.**

14 26. The Commission's decisions and rules regarding commercial recycling are far more
15 nuanced than Stericycle gives credit, and while volume is not a basis for a bright line demarcation,
16 there are "principled differences" which make the distinction.⁴⁵ The analytic in *Drop Boxes R Us* and
17 the factors set forth in the rules and regulations of the Commission and of the Department of Ecology
18 establish the grounds for evaluating legitimate commercial recycling. Unless or until the Commission
19 adopts more definitive or restrictive regulations, Waste Management's ecoFinity program complies
20 with all relevant principles and precedence.

21 **a. Waste Management Collects Only the Sharps Waste That Is Source-**
22 **Separated, Objectively Manifesting the Shipper's Intention to Recycle.**

23 27. Pursuant to the Commission's governing standards and recently-decided rulings, the
24 ecoFinity program qualifies as commercial recycling. First, the intent of the parties to the pilot
25 program clearly reflects an expectation that sharps waste will be recycled.

26 ⁴² WAC 173-345-040.

27 ⁴³ WAC 173-345-060.

28 ⁴⁴ <http://www.ecy.wa.gov/programs/swfa/transporter/pdf/pdf/WUTCTransporters.pdf>.

⁴⁵ Motion for Summary Determination ¶ 44 ("There is no principled difference between (1) a sharps waste service in which a small portion of the sharps waste is recycled, (2) a full service biomedical waste collection service in which a small portion of the waste is recycled, and (3) a general solid waste service in which a small portion of the waste is recycled.").

1 28. The marketing materials presented to St. Joseph Medical Center describe the proposed
2 “Sharps Recycling Program/Partnership with Becton Dickinson (BD).”⁴⁶ The flyer sets out the price
3 for the “Sharps Recycling Container” along with the price for “Regulated Medical Waste (non
4 pathological)” and “Boxes for Incineration.”⁴⁷ An exhibit to the flyer shows a schematic of the sharps
5 recycling process.⁴⁸ Another exhibit describes St. Joseph Medical Center as a “Sharps-only – Pilot
6 Facility.”⁴⁹ The generator was plainly presented with a proposal for commercial recycling. The
7 Customer Service Agreement clearly states that it is a “Master Agreement for Sharps Recycling
8 Program.”⁵⁰ There can be little doubt about what the customer intended.

9 29. Whatcom County’s comprehensive solid waste plan, which governs solid waste
10 generated at St. Joseph Medical Center, defines recyclable materials as: “[T]hose solid wastes that are
11 separated for composting, recycling, or reuse into usable or marketable materials.... Materials disposed
12 of in a landfill or through incineration are not considered recyclable materials, nor are residual material
13 remaining after recyclables have been removed.”⁵¹ The sharps material separated by St. Joseph for
14 recycling squarely fits into this definition. The sharps material that is the subject of the pilot recycling
15 program is sorted from the other biomedical waste at St. Joseph. Under regulations adopted by the
16 Department of Ecology, “source separation” means “the separation of different kinds of solid waste at
17 the place where the waste originates.”⁵² As with solid waste programs, under this definition,
18 recyclables that are “source-separated” from the other solid waste destined for disposal do not have to
19 be further sorted by individual commodity type. Contrary to Stericycle’s assertion, the objective
20 evidence demonstrates that ecoFinity sharps waste is “separated for recycling or reuse.”⁵³ The fact that
21

22 ⁴⁶ Van Kirk Declaration in Support of Protestant Stericycle of Washington, Inc.’s Motion for Summary Determination re
23 Waste Management’s Unlawful Biomedical Waste Collection Operations Outside Its Certificated Territory (“Van Kirk
24 Decl.”), Ex. E at 2.

24 ⁴⁷ *Id.* at 3.

25 ⁴⁸ *Id.*, Ex. 2.

26 ⁴⁹ *Id.*, Ex. 3.

27 ⁵⁰ Goldman Decl., Ex. 2.

28 ⁵¹ Van Kirk Decl., Ex. H, §2, p. 20; Motion for Summary Determination ¶ 28.

⁵² WAC 173-350-100.

⁵³ Motion for Summary Determination ¶ 27.

1 the sharps waste materials themselves “contain mixed plastics, glass, metals, and other materials that
2 are only sorted by an outside reclamation company after the waste is treated” is neither determinative
3 nor relevant.

4 30. It means nothing that paperwork including the bill of lading, waste tracking, and labels
5 for ecoFinity sharps material refer to “biohazardous waste” and “regulated medical waste.”⁵⁴ These are
6 preprinted forms, and a pilot program of this size hardly warrants having special labels prepared.⁵⁵
7 And, in fact, until the sharps waste is rendered inert in California, it must be handled as “regulated
8 medical waste.”⁵⁶ The fact that paperwork used for the sharps collected at St. Joseph describes the
9 material as “biohazardous waste” and the need for special handling prior to the waste being rendered
10 inert does not preclude categorizing the material as commercial recycling. The Commission classified
11 transportation as commercial recycling for “recyclable hazardous materials” consisting of regulated
12 dangerous waste, even though it was subject to special handling under strict environmental regulations
13 and manifest paperwork before being processed for recycling.⁵⁷ In that case, transporting solvents,
14 petroleum products, and anti-freeze to a storage site, then to a bulk processor, and finally to an out-of-
15 state recycler was commercial recycling regulated under the motor carrier laws, and not solid waste
16 collection. In this case, transporting “biohazardous waste” consisting of sharps recyclables from St.
17 Joseph’s is similar, and labels are irrelevant if all other factors are present.

18 31. That St. Joseph Medical Center does not receive payment for the recyclable sharps also
19 is inconclusive. Under *Drop Boxes R Us*, whether the material has commercial value is only one of the
20 indicators of commercial recycling. Recycling is not always profitable and sometimes it costs to
21 transport and process recyclable materials. Even still, some shippers may wish to recycle despite the
22 costs, and many customers are often willing to pay more for recycling services than disposal services.
23

24
25 _____
26 ⁵⁴ Van Kirk Decl., Exs. D (at 125:3-9) and F.

27 ⁵⁵ Van Kirk Decl., Ex. D at 125:12-20.

28 ⁵⁶ *Id.* at 116: 4-6.

⁵⁷ *In re Safco Safe Transport, Inc.*, Order M.V. No. 143916, Hearing No P-73623 (Oct. 11, 1991) (“Putting the label ‘waste’ on a commodity does not determine whether a solid waste collector or a motor carrier may transport it.”).

1 Stericycle’s reliance on its view that the recycled sharps waste is lacking in “commercial value” is
2 simplistically erroneous and unsupported.⁵⁸

3 32. Objective criteria evidence the shipper’s intention to recycle the sharps tendered to
4 Waste Management’s ecoFinity collection program. St. Joseph separates the recyclable sharps waste
5 from the rest of the biomedical waste. It has made arrangements for collection of its non-recyclable
6 biomedical waste - with Stericycle itself. Its communications with Waste Management personnel and
7 the paperwork document an intention to recycle. Stericycle has alleged no facts contradicting the
8 overwhelming indicia that the shipper and the transporter intend for recycling to take place.

9 **b. Waste Management Handles the Collected Sharps in a Manner Reflecting**
10 **the Intent to Recycle and the Amount of Diversion Is Not a Deciding Factor.**

11 33. Under the analytic established in *Drop Boxes R Us*, the intention of the shipper is
12 important, but the material also must be properly handled after it is collected with a goal to ultimate
13 recycling. Again, objective evidence demonstrates Waste Management’s intention to recycle the sharps
14 from St. Joseph Medical Center, in accordance with the expectations of the generator.

15 34. With regard to how they are handled, the generator expects the sharps to be transported
16 to a treatment facility, then recycled by Becton Dickinson, and then remanufactured into new
17 products.⁵⁹ And that is indeed what happens. The sharps are taken first to Seattle, where they are
18 placed in a refrigerated trailer before being transported to Vernon, California for processing.⁶⁰ The
19 sterilized, washed and shredded sharps containers and their contents are then sent to Talco Corporation
20 where the material is separated utilizing a float/sink technology.⁶¹ The plastics recovered are then
21 pelletized and used by Becton Dickinson in remanufacturing of sharps containers.⁶² Becton Dickinson
22 is the “recycler” and that is the final destination for the recyclable materials collected.⁶³ The
23

24 _____
25 ⁵⁸ Motion for Summary Determination ¶ 40.

26 ⁵⁹ Goldman Decl., Ex. 3.

27 ⁶⁰ Van Kirk Decl., Ex. C.

28 ⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

1 percentages recycled vary and are higher in some months than others.⁶⁴ But that is not because of
2 diversion to a landfill.

3 35. Waste Management's intention to transport the sharps for recycling is clearly evidenced
4 by this process. Indeed, in stating that the amount recycled is apparently limited by "throughput"
5 capacity at the California processing facilities, Waste Management's Washington personnel observed,
6 "So we've got to be able to process it and recycle the material, and if we can't do that, then it's not
7 recycling."⁶⁵

8 36. Further evidence of the transporter's intentions is that the sharps collected under the
9 ecoFinity program from the Bellingham hospital are not sent to Waste Management's Seattle autoclave,
10 where all the rest of the sharps material collected by the company is pre-treated for landfill disposal.⁶⁶
11 Instead, sharps waste collected under the pilot is processed through a different route that ultimately
12 remanufactures some portion of the recyclable materials into usable products.

13 37. Stericycle is inventing a new quantitative standard when it boldly states that a carrier is
14 only exempted from economic regulation if the material transported contains "more than incidental
15 recyclable content."⁶⁷ There is no such thing as a "*Haugen* rule."⁶⁸ In favor of its newly-announced
16 "*Haugen* rule," Stericycle ignores more recent and precedential Commission decisions and rules
17 governing commercial recycling.

18 38. Importantly, at issue in *Haugen* was a full service biomedical waste service collecting
19 both sharps and all other kinds of biomedical wastes.⁶⁹ Waste Management is not offering full service
20 biomedical waste collection service to St. Joseph Medical Center. Stericycle's attempts to apply the
21 *Haugen* decision are not applicable because Waste Management is not suggesting that its ecoFinity
22 program entitles it to collect all of the Bellingham hospital's biomedical waste; it is only collecting
23 source-separated recyclable materials. Stericycle itself collects the rest. Unlike the situation in the old

24 ⁶⁴ *Id.*, Ex. G; Goldman Decl., Ex. 4.

25 ⁶⁵ Goldman Decl., Ex.5 at 132:3-7.

26 ⁶⁶ Van Kirk Decl., Ex. D at 117:23-118:13.

27 ⁶⁷ Motion for Summary Determination ¶¶ 4, 25.

28 ⁶⁸ *Id.* ¶ 42.

⁶⁹ *In re Lowell Haugen d/b/a Med. Waste Mgmt. Sys., Inc.*, Order M.V. No. 148521, Hearing No. H-5024 (Apr. 27, 1995).

1 biomedical waste proceedings on which Stericycle relies, the pilot program is not an attempt to shoe-
2 horn a broader scope of services into the exemption for commercial recycling. St. Joseph tenders only
3 its sharps waste to Waste Management.⁷⁰ If there ever were a “Haugen rule,” it would not apply in this
4 case because source separation is one of the most important indicators of shipper intent to recycle.

5 39. Stericycle narrowly emphasizes a provision in the motor carrier statute as prohibiting
6 transportation by a commercial recycler of “incidental” amounts of recyclable materials without a solid
7 waste certificate.⁷¹ But that statute is nothing more than the complementary transfer of regulatory
8 authority over commercial recycling within the Commission’s Transportation Title 81 from the solid
9 waste chapter to the motor carrier chapter. The statute specifically cautions that, in making the
10 affirmative statement of motor carrier oversight, “[n]othing in this chapter changes RCW
11 81.77.010(8)....”⁷² And under RCW 81.77.010(8), regulated solid waste collection does not include
12 collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator.

13 40. The motor carrier statute does not stand for the proposition that diversion rates are the
14 benchmark for determining whether legitimate commercial recycling is being performed. Instead, it
15 incorporates by reference the Commission’s body of law under Ch. 81.77 RCW, making the deciding
16 factors the objective manifestations of the intentions of the shippers, the transporters, and the receiving
17 facilities. Conversely, the Commission’s motor carrier statutes, RCW 81.80.470, is not intended to
18 allow any motor carrier (lacking a G certificate) to collect solid waste that may incidentally contain
19 recyclable materials – but neither does it prohibit any entity from collecting recyclable materials that
20 may incidentally contain solid waste.

21 41. In its myopic emphasis on outcome quantities, Stericycle’s logic is alarming. Stericycle
22 reasons that because the Whatcom County definition explicitly states that “residual” material after
23 removing recyclables is not considered recyclable materials, any haul involving waste of any amount
24 that needs to be landfilled after processing would require a solid waste certificate from the Commission
25

26
27 ⁷⁰ Goldman Decl., Ex. 2.

28 ⁷¹ Motion for Summary Determination ¶ 24 (citing RCW 81.80.470).

⁷² RCW 81.80.470(2).

1 authorizing the service.⁷³ Stericycle’s logic would completely eviscerate the concept of unregulated
2 commercial recycling, since there are almost always some residuals remaining after processing
3 materials to be marketed to recyclers. Only 100% pure loads of recyclable material could be considered
4 commercial recycling, according to Stericycle’s reasoning.

5 42. Similarly, Stericycle’s contention that interim processing of the recyclable sharps waste
6 destroys the ability to collect it as commercial recycling would render even the most pure and
7 undeniably legitimate programs illegal.⁷⁴ Very few recyclables are delivered straight from the
8 generator to the recycler. Interim handling to sort and process the materials is commonly required.⁷⁵
9 The “recycler” is actually only the end-of-the-line entity that actually transforms or remanufactures the
10 material.⁷⁶ In this instance, Becton Dickinson is the recycler. Preparing the material for market at
11 Waste Management’s Vernon facility before delivering it to Becton Dickinson for reuse is not only
12 beside the point, it is common practice. The inquiry turns on where the material goes **after** being
13 processed by Talco. If all of it were disposed after treatment – which plainly is not the case here – then
14 it would not be recycling.⁷⁷

15 **c. Waste Management’s ecoFinity Program Is Collection of “Recyclable**
16 **Materials” from a Commercial Customer as Evidenced by Objective**
17 **Manifestations of the Intent of the Shipper, the Transporter, and the**
18 **Ultimate Receiving Entity.**

19 43. Under the standards set forth in the Commission’s regulations and its seminal decision in
20 *Drop Boxes R Us*, Waste Management’s ecoFinity program qualifies as commercial recycling. That
21 case requires looking to the source of the material, which in this case is clearly a commercial generator.
22 It demands analysis of how the materials are collected and the fact that the sharps are source separated
23 is key, as is the evidence that St. Joseph has other arrangements for collecting its non-recyclable waste.
24 Commission precedent calls for evaluating how the materials are handled after collection, and in this

25 ⁷³ Motion for Summary Determination ¶ 29.

26 ⁷⁴ *Id.* ¶ 39.

27 ⁷⁵ See WAC 173-350-310(2) (permits for interim solid waste handling facilities include material recovery facilities).

28 ⁷⁶ RCW 70.95.030(18); WAC 173-350-100.

⁷⁷ See, e.g., *In re Ryder Distribution Sys, Inc.*, Order M.V.G. No. 1536, App. No. GA-75563, at 6 (rejecting the contention that the applicant was recycling because “substances will be disposed after treatment and will not be regularly or exclusively recycled.”).

1 instance after being treated the sharps materials are separated for transformation, and delivered to a
2 recycler for remanufacture or reuse. And finally, under the Commission's order as well as the
3 Department of Ecology transporter regulations, a critical point is whether the material collected is taken
4 to a landfill or not. Unlike the majority of sharps collected by Waste Management in Washington,
5 which are treated in Seattle and then delivered to a landfill for disposal, the recyclable material from the
6 sharps waste is transported for processing and recycling. Only the residuals that cannot be processed or
7 recycled are taken to a landfill.

8 44. The Commission has not articulated a quantitative standard for commercial recycling,
9 and arguably that sort of certainty would be welcome (though this application proceeding would not be
10 the proper forum to determine an issue which such broad-ranging impact). But its authority to police
11 sham recycling is nonetheless broad. Allowing Waste Management to continue its sharps recycling
12 program as commercial recycling will not create a new loophole, as Stericycle suggests. It would not,
13 for instance, allow a new entrant to evade regulation by claiming that its reuse of containers constitutes
14 recycling. Indeed, every solid waste company in the state reuses its garbage cans and drop boxes.
15 Despite Stericycle's histrionics, its sharps waste collection service, involving reusable sharps
16 containers, would not qualify as "recycling."⁷⁸ Neither new entrants nor existing carriers can "adapt
17 their service offerings to include a minimal recycling component" to evade the Commission's authority
18 and rules.⁷⁹

19 45. Under current laws, the "handling, destination, and disposition" of the waste is
20 determinative of "the various intentions of generator, transporter, and receiver of the materials in
21 question."⁸⁰ Waste Management's ecoFinity program comports with the Commission's laws and
22 applicable regulations.

23
24
25
26 ⁷⁸ Motion for Summary Determination ¶ 43.

27 ⁷⁹ *Id.*

28 ⁸⁰ *In the Matter of Glacier Recycle, Hungry Buzzard, and T&T Recovery*, Order 06 on Motions for Summary Determination, Docket No. TG-072226 (June 3, 2008) at 10 (citing to *Drop Boxes R Us*).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VI. CONCLUSION

For each of these reasons, Waste Management requests that the Commission deny the Motion for Summary Determination.

DATED this 26th day of November, 2012.

SUMMIT LAW GROUP PLLC

By 

Polly L. McNeill, WSBA #17437
Jessica L. Goldman, WSBA #21856
pollym@summitlaw.com
jessicag@summitlaw.com

*Attorneys for Waste Management of
Washington, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by the method indicated below, pursuant to WAC 480-07-150.

Table with 2 columns: Recipient Information and Service Method. Rows include Washington Utilities and Transportation Commission, Gregory J. Kopta, Fronda Woods, Stephen B. Johnson, and James K. Sells.

DATED at Seattle, Washington, this 26th day of November, 2012.

Handwritten signature of Deanna L. Schow

Deanna L. Schow