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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

Docket No. TG-120033

PROTESTANT STERICYCLE OF
WASHINGTON, INC.'S MOTION TO
STRIKE PREFILED TESTIMONY OF JEFF
NORTON AND PREFILED DEPOSITION
EXCERPTS OF MIKE PHILPOTT AND
CHRIS DUNN, AND IN THE
ALTERNATIVE TO FILE PREFILED
DEPOSITION EXCERPTS OF JEFF
NORTON

MOTION TO STRIKE PREFILED TESTIMONY OF J. NORTON AND
DEPOSITION EXCERPTS OF M. PHILPOTT AND C. DUNN; IN THE
ALTERNATIVE TO FILE DEPOSITION EXCERPTS OF J. NORTON

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2 **I. Introduction**

3 1. Stericycle of Washington, Inc. ("Stericycle") respectfully requests that the
4 Commission strike certain prefiled testimony of Jeff Norton proffered by Waste Management
5 of Washington, Inc. ("Waste Management"). The testimony discussed below is Mr. Norton's
6 attempt to introduce alleged unsworn and "out of court" declarations of unnamed customers
7 regarding two aspects of Stericycle's biomedical waste collection services. These alleged
8 declarations are highly prejudicial because Mr. Norton's generic restatements of alleged
9 customer comments are rephrased to assert as fact the precise conclusions that Waste
10 Management would like the Commission to draw. These statements usurp the role of actual
11 generator testimony in this application proceeding and are not supported by the testimony of
12 the few generators who have filed testimony.

13 2. Stericycle also asks the Commission to strike the excerpts of deposition
14 testimony improperly proffered by Waste Management as prefiled "response" testimony. This
15 purported prefiled testimony is not permitted by Order No. 01 or Commission rule. In addition,
16 these excerpts are not testimony in response to any direct testimony proffered by Stericycle and
17 are, therefore, improper and untimely under Order No. 01. In the alternative, if Order No. 01 is
18 expanded to accommodate broad deposition excerpts as prefiled testimony, Stericycle moves to
19 offer deposition excerpts of Jeff Norton as prefiled response testimony.

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

22 **II. Discussion**

23 A. The Commission should strike and exclude unsworn, unsupported, and
24 prejudicial hearsay from Mr. Norton's testimony.

25 4. In the Direct Testimony of Jeff Norton, Mr. Norton offers as statements of fact
26 the alleged declarations of biomedical waste generators. These alleged declarations are hearsay
and should be excluded from the hearing on Waste Management's application. The

1 inadmissible hearsay proffered by Mr. Norton is particularly prejudicial in this hearing for two
2 reasons. First Mr. Norton offers only his generic paraphrasing of generators' alleged
3 statements, obviously tailored to match Waste Management's arguments and lacking in any
4 detail that would allow for any judgment as to the credibility of the declarations or the weight
5 they should be given in this proceeding. Second, generator testimony as to Stericycle's existing
6 services and Waste Management's proposed services is a critical aspect of this proceeding.
7 Waste Management has not offered the testimony of any generator that Mr. Norton purports to
8 speak for and the generator testimony that has been filed does not support Mr. Norton's hearsay
9 statements.

10 5. In his direct testimony Mr. Norton states "I knew that Stericycle's black
11 'Steritubs' were disliked by most of the customers that used them because they stick together
12 when they nest, customers in some cases could not get them apart, and the lids rarely fit
13 properly." Direct Testimony of J. Norton, p.3:10-13. Mr. Norton testified that this testimony is
14 his summary of communications he received from customers allegedly reporting that they do
15 not like the Steritub containers. Van Kirk Decl. Ex. A, 97:14-98:2. Mr. Norton is, therefore,
16 offering through his testimony the alleged declarations of customers that they dislike Steritubs
17 for the purpose of proving that "most" customers dislike Steritubs. This reporting of unsworn
18 and "out of court" declarations to prove the truth of the alleged declarations is hearsay and
19 should be excluded.

20 6. Mr. Norton also states that "Many smaller doctor's and dentist's offices do not
21 generate enough waste to warrant a monthly pickup and dislike Stericycle's minimum fee."
22 Direct Testimony of J. Norton, p.5:14-15. Mr. Norton testified that this testimony is a
23 statement of what customers have told him. Van Kirk Decl. Ex. A, 171:20-172:7. Again, he is
24 reporting alleged unsworn and "out of court" declarations of customers that they dislike the
25 minimum monthly fee for the purpose of proving that "many" small doctor and dentist offices,
26 in fact, dislike the minimum monthly fee. Such hearsay should be excluded.

1 7. These hearsay statements are particularly prejudicial because they are no more
2 than vague summaries of alleged customer declarations. In neither case has Mr. Norton
3 attempted to recount customers exact statements or explain the context in which those
4 statements were made. The alleged statements are instead repackaged by Mr. Norton to fit the
5 precise argument that Waste Management would like to make in support of its application.

6 8. Instead of simply recounting alleged customer declarations about Steritubs, Mr.
7 Norton uses those declarations to state as fact, without any explanation or support, that “most”
8 customers that used Steritubs disliked them. Mr. Norton is not only offering hearsay of
9 unnamed customers to the Commission, he is offering that hearsay as a fact supposedly stated
10 by “most” customers that use Steritubs, which is the precise conclusion that Waste
11 Management would like to be drawn from the hearsay. Likewise, Mr. Norton has stated as a
12 fact communicated by “many” smaller doctor and dentist offices the alleged declaration of
13 unnamed offices that they dislike Stericycle’s minimum monthly fee. This supposed fact is
14 nothing more than Mr. Norton’s generic repurposing of alleged unsworn “out of court”
15 declarations.

16 9. Finally, these hearsay statements are highly prejudicial because they circumvent
17 the requirement of actual generator testimony and are not supported by the actual generator
18 testimony submitted by Waste Management. Not one of the eight biomedical waste generators
19 who have offered testimony in support of Waste Management’s application has testified that
20 they were dissatisfied with Stericycle’s Steritub containers, let alone “most” of the generators
21 who use Steritubs. Only one of the testifying generators, the representative of Providence
22 Medical Group, stated that she was dissatisfied in part because of Stericycle’s \$10 minimum
23 monthly fee. Other than disliking this small tariff fee, this generator has not offered any
24 testimony that the fee is not justified or appropriate. No representatives of the thousands of
25 small doctor or dentist offices Mr. Norton purports speak for have offered testimony that they
26

1 dislike the minimum monthly fee, let alone that they believe it is in some way unjustified or
2 inappropriate.

3 10. In this application proceeding the Commission must decide whether Stericycle
4 and other carriers are serving to the Commission's satisfaction, part of which is an assessment
5 of whether these existing carriers are meeting the generator's needs for specialized biomedical
6 waste collection services. Generator testimony is a key component of this inquiry, and it is
7 highly prejudicial to replace actual generator testimony, subject to cross examination and the
8 Commission's own judgments of credibility and weight, with generic restatements of alleged
9 customer declarations.

10 11. The testimony discussed above should be stricken from Mr. Norton's prefiled
11 testimony.

12 B. The Commission should strike deposition excerpts proffered as prefiled
13 testimony or, in the alternative, permit the filing of deposition excerpts by
14 Stericycle as prefiled testimony.

15 12. Waste Management has filed excerpts from the depositions of Stericycle
16 witnesses Mike Philpott and Chris Dunn that it purports to be prefiled "response testimony"
17 from those witnesses. Filing this deposition testimony as prefiled witness testimony is
18 improper under Order No. 01. In addition, the deposition excerpts are not responsive to any
19 direct prefiled testimony proffered by Stericycle and for this additional reason are improper and
20 untimely under Order No. 01. These deposition excerpts should be stricken. In the alternative,
21 if the scope of Order No. 01 is to be expanded to include deposition testimony filed as prefiled
22 testimony, Stericycle moves to file the attached excerpts of the deposition of Jeff Norton as
23 additional prefiled testimony to facilitate the presentation of evidence. *See* Van Kirk
24 Declaration Ex. B.

25 13. Order No. 01 does not provide for the filing of deposition excerpts as prefiled
26 testimony in this hearing. Stericycle has already filed the prefiled testimony of both Mr.

1 Philpott and Chris Dunn. The Commission's rules also contain no provision allowing the filing
2 of deposition excerpts as prefiled testimony. Waste Management's attempt to do so without
3 leave should be rejected.

4 14. The deposition excerpts are also not "response" testimony. The excerpts of the
5 deposition of Mike Philpott address the following subjects:

- 6 • Stericycle's Steritub containers, customer satisfaction with Steritub containers,
7 and conversations with Jeff Norton about these subjects;
- 8 • Stericycle's selection of different container options;
- 9 • Stericycle's Rehrig containers, customer satisfaction with Rehrig containers, and
10 the introduction and pricing of those containers;
- 11 • Pricing of Stericycle's Biosystems sharps management program when it was
12 introduced;
- 13 • Mr. Philpott's review of tariff amendments and pricing related to changes to
14 container offerings, including the introduction of Biosystems and Rehrig
15 containers;
- 16 • Stericycle's tariff's \$10 minimum monthly fee and minimum pick-up charge;
- 17 • Mr. Philpott's review and knowledge of Stericycle's profits; and
- 18 • Mr. Norton's claims in his prefiled direct testimony.

19 15. The excerpts of the deposition of Chris Dunn that Waste Management purports
20 to file as "response testimony" address Stericycle's Rehrig containers and customer satisfaction
21 with Rehrig containers.

22 16. In its prefiled direct testimony Stericycle did not proffer testimony related to its
23 Steritub or Rehrig containers or customer satisfaction with those containers. Stericycle's
24 prefiled direct testimony did not address any communications between Mr. Norton and Mr.
25 Philpott about Steritub containers. Stericycle did not offer any testimony concerning the
26 introduction or pricing of its Reherig containers. Stericycle did not offer testimony on how it
decided to price its Biosystems sharps management program or on the review of any tariff

1 amendments. Stericycle's prefiled testimony does not address Mr. Philpott's knowledge or
2 review of Stericycle's profits. Stericycle's prefiled direct testimony did not address
3 Stericycle's minimum monthly charge or minimum pick-up charge. And, tellingly, Stericycle's
4 prefiled testimony of course did not address Mr. Norton's own prefiled testimony, which had
5 not even been filed yet. The deposition excerpts proffered by Waste Management are not a
6 response to any Stericycle direct testimony.

7 17. Order No. 01 provides for the filing of prefiled direct testimony and prefiled
8 response testimony. Each party was required to prefile direct testimony supporting its
9 contentions on October 1, 2012. Responsive testimony was filed on November 16, 2012.
10 Despite this clear direction to file separate direct and response testimony on specific dates,
11 Waste Management purported to file deposition excerpts as "responsive" prefiled testimony
12 that are not responsive to Stericycle's direct testimony. This attempt is improper and the
13 deposition excerpts should be struck.

14 18. In the alternative, if Order No. 01 is going to be expanded to accommodate the
15 filing deposition transcripts as prefiled testimony, including untimely prefiled direct testimony,
16 Stericycle moves to include as prefiled testimony Exhibit B to the Van Kirk Declaration,
17 excerpts of the deposition of Jeff Norton which support Stericycle's protest of Waste
18 Management's application. The admission of deposition excerpts by all parties may facilitate
19 the presentation of evidence at the hearing.

20 II. Conclusion

21 For the foregoing reasons, Stericycle respectfully requests that the Commission strike
22 certain prejudicial hearsay proffered by Jeff Norton, strike improper and out-of-time deposition
23 excerpts offered as prefiled testimony, or, in the alternative, include Stericycle's excerpts of
24 Mr. Norton's deposition as prefiled testimony under Order No. 01.
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1 DATED this 26th day of November, 2012.

2 Respectfully submitted,

3 GARVEY SCHUBERT BARER

4
5 By 

6 Stephen B. Johnson, WSBA #6196

7 Jared Van Kirk, WSBA #37029

8 Attorneys for Protestant Stericycle of
9 Washington, Inc.

1 **CERTIFICATE OF SERVICE**

2 I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of
3 Washington that, on November 26, 2012, I caused to be served on the person(s) listed below in
4 the manner shown a copy of PROTESTANT STERICYCLE OF WASHINGTON, INC.'S
5 MOTION TO STRIKE PREFILED TESTIMONY OF JEFF NORTON AND PREFILED
6 DEPOSITION EXCERPTS OF MIKE PHILPOTT AND CHRIS DUNN, AND IN THE
7 ALTERNATIVE TO FILE PREFILED DEPOSITION EXCERPTS OF JEFF NORTON:

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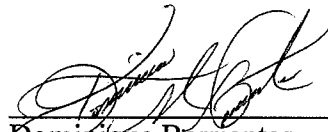
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Dated at Seattle, Washington this 26th day of November, 2012.



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