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BEFORE THE WASHINGTON STATE?

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UTILITIES AND TRANSPORTATION COMMISSION

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In the Matter of the Application of) Docket TG-120033

) Pages 152-184

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WASTE MANAGEMENT OF WASHINGTON, INC. D/B/A)

WM HEALTHCARE SOLUTIONS OF WASHINGTON)

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For an Extension of Certificate G-237 for)

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a Certificate of Public Convenience and)

Necessity to Operate Motor Vehicles in)

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Furnishing Solid Waste Collection Service)

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PREHEARING CONFERENCE, VOLUME IV

11

Pages 152-184

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ADMINISTRATIVE LAW JUDGE GREGORY J. KOPTA

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1:33 P.M.

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NOVEMBER 28, 2012

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Washington Utilities and Transportation Commission

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OLYMPIA, WASHINGTON, NOVEMBER 28, 2012

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1:34 P.M.

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P R O C E E D I N G S

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JUDGE KOPTA: Let's be on the record, then, in Docket
7 TG-120033, entitled "In re: Application of Waste Management of
8 Washington, Inc., d/b/a WM Healthcare Solutions of Washington."

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We are here today on Wednesday, November 28, 2012,
for a prehearing conference in advance of the evidentiary
11 hearings in this docket that are scheduled to begin on Monday.

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I'm Gregory J. Kopta, the administrative law judge
presiding in this proceeding, and we will now take appearances
beginning with the company, Waste Management.

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MS. MCNEILL: Thank you, Your Honor. Polly McNeill
with Summit Law Group for Waste Management, with my co-counsel
Jessica Goldman, for Summit Law Group. And with us today is
Andrew Kenefick, who is in-house counsel, for Waste Management
of Washington.

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JUDGE KOPTA: Thank you. And for Stericycle?

MR. VAN KIRK: Jared Van Kirk, with Garvey Schubert
Barer for Stericycle, and Steve Johnson is here as well.

MR. JOHNSON: Hello, Your Honor.

JUDGE KOPTA: Good morning -- or afternoon, whatever
it is.

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1 And for WRRRA and other companies?

2 MR. SELLS: James Sells, appearing on behalf of WRRRA
3 and Rubatino Refuse, Murrey's Disposal, Inc., Consolidated
4 Disposal, Inc., and Pullman Disposal. All addresses and numbers
5 are the same as previously.

6 JUDGE KOPTA: Okay. Thank you.

7 And for Commission Staff?

8 MS. WOODS: Good afternoon, Your Honor. I'm Fronda
9 Woods, Assistant Attorney General, for Commission Staff. With
10 me in the hearing room is Penny Ingram from Commission Staff,
11 and Gene Eckhardt is on the bridge line, I understand.

12 JUDGE KOPTA: Great. Thank you.

13 All right. The first thing that I wanted to talk
14 about is the schedule. We are currently scheduled for
15 evidentiary hearings all of next week, but there's a slight
16 modification to that. We will not have hearings in the
17 afternoon on Monday. Governor Gregoire will be visiting the
18 Commission and so bumped us from this room. But, otherwise, we
19 will be here for -- or at least available to be here for this
20 week. I have hopes that it won't take that long, but that's as
21 long as we have, which kind of goes to the next issue which is
22 based on cross estimates, there's 27 1/2 hours of
23 cross-examination that's been estimated by all of the parties.
24 And given that we generally get about six hours of cross each
25 day, given the breaks and everything else, that means we're

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1 going to be really tight when it comes to getting this in,
2 especially if people's cross estimates are too low.

3 So we're going to have a zero-sum game here. I'm
4 going to hold you to your cross estimates, and if you take
5 longer with one witness than you expect that you will take, then
6 you'll just need to take shorter with another witness. I don't
7 know another way to do it. If the parties want to come up with
8 another way, then I'm fine with that.

9 But as I said, we will be finished at the end of the
10 day on Friday, whether we are, in fact, completed with all
11 witnesses, so that's sort of your warning at this point.

12 MR. JOHNSON: Your Honor, what time will we start the
13 hearing, and what time do you anticipate concluding daily?

14 JUDGE KOPTA: Generally, we will start at nine or
15 9:30. It's really up to you and whether the court reporter has
16 any issues with that. We will generally start at 9:30. That's
17 the standard start time. I'm willing to start earlier, but
18 that's kind of the default.

19 I think on Monday it would be nice if everyone got
20 here at nine so that we can take care of any stuff that needs to
21 get taken care of before the hearings begin, so that we're ready
22 to go at 9:30 with the first witness, but...

23 MS. McNEILL: Do you go until five?

24 JUDGE KOPTA: Yes.

25 MR. VAN KIRK: And on Monday, what time do we end?

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1 JUDGE KOPTA: We will end around noon on Monday.

2 MR. VAN KIRK: Okay.

3 JUDGE KOPTA: And that will give the facilities folks
4 enough time to arrange the room and get everything all set up
5 for the Governor who will be here, I think, at two or 2:30.

6 MS. GOLDMAN: Your Honor, we also want -- sorry.
7 We wanted to make a suggestion given how many of us,
8 including yourself, are traveling south, and that is a proposal
9 to conduct the hearing in Seattle. And I recognize that that
10 inconveniences Staff, but we just wanted to put that out there
11 that we can make conference rooms available for the hearing if
12 that was something that would be of interest to Your Honor.

13 JUDGE KOPTA: Well, it's always personally of
14 interest, but given where we are in this stage of the
15 proceedings, I think it's probably best to go ahead and have it
16 here. We've already announced it as being here, given notice of
17 it being here. And while I can't imagine anyone else will care,
18 we have to pretend like they do.

19 MS. McNEILL: They're selling tickets to this.

20 JUDGE KOPTA: I'm sure. Well, that's why I wanted to
21 make sure you didn't have more than 25 people on the bridge
22 line.

23 And while we were off the record, I had discussions
24 with counsel in terms of getting me what I need for the exhibit
25 list. I intend to circulate a draft exhibit list on Monday

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1 morning so that everyone will have a copy and can make notations
2 when testimony and exhibits are offered and either admitted into
3 the record or objected to or withdrawn or whatever disposition
4 there is made when it's offered. And also I think it helps the
5 court reporter, because she will need to keep track of
6 everything's that admitted.

7 And I want to make sure that I also -- that I and the
8 parties all have copies of cross-examination exhibits. One of
9 the things that we try to avoid is delays while exhibits get
10 passed out, and this helps to do that when we predistribute
11 cross-examination exhibits. Plus we don't have to worry about a
12 witness taking 10 or 15 minutes to read a document, but,
13 hopefully, they're familiar with since it's been designated to
14 them has an exhibit that he or she is going to have to take a
15 look at.

16 I think next in order on my list is disposition of
17 motions, because I think that's going to impact who the
18 witnesses are going to be that are going to be testifying next
19 week, and I will start with Stericycle's motion for summary
20 determination.

21 I think I have enough based on the pleadings to know
22 what that is about, and I note that this motion was also made in
23 the companion docket in which Stericycle filed a complaint
24 against Waste Management on these same issues. And as I believe
25 I indicated earlier in this docket, that is the appropriate

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1 place for these issues to be resolved, and, therefore, I am
2 denying the motion and instead will allow Judge Torem in the
3 other docket to handle the issues raised in this motion.

4 MR. VAN KIRK: Your Honor, before you move on to
5 another issue, I just wanted to speak to this briefly.

6 JUDGE KOPTA: You may.

7 MR. VAN KIRK: Okay. We understood, and, of course,
8 your ruling was not entirely unexpected. However, we -- you
9 know, we continue -- and I would like to make this clear on the
10 record -- we continue to believe that Waste Management's
11 willingness and ability to comply with the law in this case is a
12 relevant subject in this application proceeding and has been
13 considered in several past applications cases and has been
14 considered on the protest of Protestants in several past
15 application cases and so the reason for the motion was to have
16 what we believe to be a relevant issue resolved in this case.

17 You can correct me if I'm wrong, but I'm taking it
18 from your ruling on the motion that you are also ruling -- or
19 plan to rule that you will not reach any decision on the issues
20 that are loosely clumped under regulatory fitness, both the
21 issues surrounding the ecoFinity program and service outside of
22 Waste Management's certificate, as well as the rebating issue
23 we've raised. I take it that you're going to rule that you will
24 not reach those issues in this proceeding at all; is that a
25 correct assumption?

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1 JUDGE KOPTA: That is a correct assumption.

2 MR. VAN KIRK: Okay. And maybe you were planing to
3 get to this, but as long as we're on this issue, to the extent
4 that it has an effect on which testimony you're going to allow,
5 we'd ask that -- this is an issue that we're going to continue
6 through the case, so basically we'd ask that you make your
7 ruling and your decisions for very plain on the record so then
8 on review, the review can be adequate and effective.

9 JUDGE KOPTA: I think that's a fair request, and
10 that's what I intend to do.

11 MR. VAN KIRK: Okay.

12 JUDGE KOPTA: I think one of the -- I understand your
13 position. Mr. Johnson has previously explained the position,
14 and the concern that I have is twofold: One is that these
15 issues have been sort of lingering before the Commission for a
16 substantial period of time without resolution and require a more
17 thorough examination than I think is appropriate in an
18 application proceeding and it's issues that go beyond Waste
19 Management, but, in fact, implicate all carriers of solid waste
20 and recycling potentially in terms of what is and is not within
21 the jurisdiction of the Commission. And so I don't think that
22 this is the appropriate venue for -- or the appropriate docket
23 for trying to resolve those kind of issues even if it's
24 specifically with respect to Waste Management.

25 And the other concern that I have is just that the

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1 focus, as I see it in this proceeding, is on the application and
2 the impacts of the application and the entry of Waste Management
3 whether -- if it were to be allowed into the service territory
4 for which they have applied to serve, and that's what I want to
5 focus on in this proceeding. And I think that we have
6 legitimate issues in terms of the competitive impact, and
7 that's, in my view under the statute, what is the primary focus
8 of this proceeding, which is why I encouraged you to bring your
9 other issues separately so that the Commission can deal with
10 them. I mean, we're not trying to shovel them off to the side
11 and ignore them. We do want to deal with them. And you have
12 filed that complaint case, and the Commission will deal with
13 those issues in that docket, so it's not as if it's now or
14 never.

15 So I think given that there is another opportunity to
16 address those issues and that the focus of this proceeding is on
17 the impact of the application in the areas requested, that it's
18 most appropriate not to address those issues in this docket.

19 MR. VAN KIRK: Okay. This will be my last question,
20 I promise, but one point of clarification. I just want to be
21 clear. It seems to me like your ruling is also -- or is as a
22 matter of law that the issues we've all been calling "regulatory
23 fitness" is sort of a euphemism, but regulatory fitness -- Waste
24 Management's willingness and ability to comply with the law as
25 evidenced by whatever evidence is out there that -- that you're

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1 ruling that as a matter of law, that is not either relevant or
2 appropriate to this proceeding?

3 JUDGE KOPTA: I'm only issuing a decision on the two
4 issues that you phrased in your motion for summary determination
5 and then the testimony of Mr. Ryan.

6 MR. VAN KIRK: Okay. Fair enough. But on those two
7 issues, then, you're ruling them as a matter of law, and it's
8 not relevant to this proceeding?

9 JUDGE KOPTA: I wouldn't say "as a matter of law." I
10 would say that as a matter of discretion that the Commission
11 will not entertain those particular issues in this docket but
12 instead will entertain them in a separate proceeding.

13 All right. The next motion is --

14 MS. McNEILL: Excuse me, Your Honor?

15 JUDGE KOPTA: Yes, Ms. McNeill?

16 MS. McNEILL: Excuse me, Your Honor. Polly McNeill
17 for Waste Management.

18 May I follow up with one further clarification
19 question?

20 JUDGE KOPTA: Yes, you may.

21 MS. McNEILL: I would take it, then, that you are not
22 ruling as a matter of law that regulatory fitness is irrelevant,
23 and if there were evidence of known actual violations, that that
24 might be acceptable evidence to present; is that correct?

25 JUDGE KOPTA: Yes, that is correct.

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1 MS. McNEILL: Thank you.

2 MR. VAN KIRK: Well, that, I -- I think, then, from
3 our side, we find that confusing because that's the kind of
4 evidence that we have been trying to present.

5 So to the extent you're saying that you will consider
6 such evidence -- I think we have presented it to you in the
7 motion and in with the testimony, so if you're going to agree
8 with Polly on that point, I don't understand how the issue can
9 be excluded from the hearing and excluded from your decision.
10 Those two positions don't seem compatible.

11 MS. McNEILL: Well, let me clarify, if I may. What I
12 mean by "known evidence" would be a determination by a
13 governmental entity with oversight that has determined that
14 there have been actual evidence as opposed to speculative
15 accusations of the competitor, which I think are at play and
16 subject to dispute in the complaint proceeding and can be
17 resolved in that but at this point in time do not qualify as
18 what I referred to as "known evidence," again, by which I mean
19 an actual finding by a regulatory body or governmental entity
20 that has authority and responsibility for implementing certain
21 laws.

22 JUDGE KOPTA: Well, I -- I think before we get back
23 and forth between counsel on this, let me tell you what my
24 intention is --

25 MS. McNEILL: Thanks.

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1 JUDGE KOPTA: -- which is that I am not going to
2 consider evidence on these two issues that are raised in this
3 declaration and in Mr. Ryan's testimony not solely because it
4 has to with regulatory fitness, but instead because these are
5 unsettled issues. There's not a clear delineation. There's not
6 something in the rule that says, "Thou shall do 'x,' and Waste
7 Management did 'y.'"

8 Instead you're asking me to interpret Commission
9 rules and determine whether or not certain types of behavior is
10 unlawful under Commission rules that don't specifically preclude
11 what Waste Management is currently doing, which is a much
12 broader and much more involved process than simply saying,
13 "Commission rules require that you have a tariff that has this
14 particular provision in it, and they don't."

15 So as I read the testimony -- as I see the exhibits
16 in here, there are -- there's one exhibit that has to do with
17 complaints that have been filed against the company with the
18 Commission claiming violations of whatever Commission rules. I
19 have no intention to exclude those, and I will consider those as
20 part of regulatory fitness.

21 MR. VAN KIRK: I understand that distinction. I
22 think I have two brief responses. One is that in past
23 proceedings, the Commission has considered issues like serving
24 outside the scope of the certificate and has served them with
25 those issues and the law that applies to those issues is

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1 contested, is equally contested as it is here. I understand
2 it's a hot issue, but that doesn't -- that's sort of a
3 distinction without a difference when it comes to whether the
4 law is settled or not, and, again, we think that should be
5 resolved.

6 The second point is we don't understand that argument
7 you just made or the explanation you just gave me is -- would
8 apply equally to rebating, the law on rebating. It, as far as I
9 know, is not under similar flux or in similar debate that would
10 support the same sort of ruling.

11 JUDGE KOPTA: Well -- and that's a fair point. But
12 at this particular juncture, that one is much more convoluted
13 from a factual standpoint as opposed to a legal standpoint.
14 And, again, I believe that the focus of this proceeding is on
15 the impact of the application in the service territory. The
16 issue that you raise goes far beyond what the service territory
17 is that they're asking to apply for, and, indeed, applies
18 throughout their service territory, which is why I think and my
19 ruling is that it's better dealt with in a separate proceeding
20 in which that can be the focus of the proceeding as opposed to
21 this docket in which it is not.

22 MR. VAN KIRK: Okay. I just want to make clear when
23 we're contesting this that we're contesting it correctly as
24 either a matter of discretion or a ruling as a matter of law and
25 that we present the issue appropriately.

1 (Mr. Van Kirk confers with Mr. Johnson.)

2 MR. VAN KIRK: And then the last point, which has
3 been whispered in my ear, is that we should -- you know, and I
4 agree -- if it's a question of on a more appropriate proceeding
5 being the place to resolve this, then -- and the complaint
6 proceeding is on the way, and the results of that proceeding
7 should factor into the decision in this case. If we're not
8 saying that it's irrelevant to this case but that it's better,
9 the decision is better made in another proceeding, then let the
10 decision be made in that proceeding and reserve final decision
11 in this case until we have those results.

12 JUDGE KOPTA: Well, at this point, I'm not sure what
13 the track is going to be for the other proceeding or when there
14 will be a decision rendered in this particular docket.

15 At this point, I am not inclined to delay this one
16 until the other docket is finished. I don't know that -- and
17 perhaps you could include this in your briefing, your
18 post-hearing briefing, that there has ever been an instance in
19 which the Commission has denied an application purely because
20 there is some finding that a company has violated some other
21 rules in its existing service territory.

22 I'm aware that there are instances in which there
23 have been conditions placed on their ability to operate, but I
24 don't see why a ruling coming out of a complaint proceeding
25 requiring a company to take particular action is any different

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1 than putting conditions on their application. And, again, if
2 that's -- if you see a distinction there, then you're certainly
3 welcome to brief that after the hearing in this case. And I
4 will consider whether or not there may be some implications
5 arising from the complaint proceeding on what kind of authority,
6 if any, is extended to Waste Management as a result of this
7 docket.

8 MR. VAN KIRK: Okay. So advocating for conditions is
9 still something you're going to consider in this case if we have
10 sufficient arguments to put forward?

11 JUDGE KOPTA: Yes.

12 MR. VAN KIRK: Okay. And that would include
13 advocating for conditions on the basis of our -- of these issues
14 as opposed to having decided the issues?

15 JUDGE KOPTA: Well, I'm not going to suppose what
16 might or might not be an appropriate condition. I will not
17 preclude you from recommending a condition such as if there's a
18 finding in the complaint case that they are doing "x" that they
19 be precluded from doing "x" as a condition of their being able
20 to enter into this other service territory. I mean, I think
21 that that is an appropriate type of recommendation. If you want
22 to make it, we'll see whether it's appropriate and whether it's
23 something that the Commission would be willing to do, but I
24 would not preclude it if you wanted to make that kind of a
25 recommendation.

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1 MR. VAN KIRK: Okay. And then I think my initial
2 question that started this might not have fully gotten answered,
3 but that is I'm understanding that your ruling is indeed on the
4 basis of a discretionary ruling under the part about which
5 proceeding is best to answer these questions as opposed to a
6 ruling as a matter of law about what is relevant in this -- to
7 this application proceeding, correct?

8 JUDGE KOPTA: That's correct.

9 MR. VAN KIRK: Okay.

10 JUDGE KOPTA: Okay. The next motion now?

11 MR. VAN KIRK: Yes. Thank you.

12 JUDGE KOPTA: You're welcome.

13 MR. JOHNSON: Thank you, Your Honor.

14 JUDGE KOPTA: No. Let's get this hashed out now.

15 This one is Waste Management's motion to strike
16 particular testimony that Stericycle has filed. And what I
17 would like to do at this point -- I don't know that I actually
18 need to hear from Stericycle. I mean, I'm not going to preclude
19 you from saying something, and I fully expect that you will want
20 to. But let me tell you where I'm coming from, and then you can
21 decide what and how much you want to say. I'm going to go down
22 each witness.

23 First, there's the testimony of Christopher Dunn. I
24 am inclined to deny the motion as to Mr. Dunn's testimony. A
25 lot of the argument that I read in the motion has to do with

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1 credibility and extent of knowledge, and those are the things
2 that I think are best examined as a result of having Mr. Dunn
3 available for cross-examination. The Commission generally errs
4 on the side of including information and testimony and gives it
5 the weight that it merits. And if Mr. Dunn is -- has minimal
6 knowledge of the information in his testimony, then that will be
7 something that the Commission takes into consideration when it
8 weighs that testimony. But as I read it, they are -- with the
9 exception of the exhibit on fairly basic concepts, that, I can
10 probably testify to, and I'm a theater major.

11 So I recognize that if you had somebody who had a
12 Ph.D. in economics and, you know, taught at Harvard, then it
13 would be a different kind of thing than someone who happens to
14 have driven truck and risen his way up to work for Stericycle.

15 But at this point, I'm -- I don't believe that there
16 is enough of an indication that Mr. Dunn's testimony has no
17 basis in his personal knowledge or his background that I'm
18 willing to exclude it at this point.

19 I guess I'll stop here and allow Waste Management, if
20 you want to say anything in response, to.

21 MS. GOLDMAN: The only thing I would raise is that
22 you seem to be distinguishing how you plan to deal with Exhibit
23 A to his testimony. I'm not clear if you meant to be
24 distinguishing it or not.

25 JUDGE KOPTA: I'm not distinguishing it. I am

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1 troubled to the extent that the exhibit was not prepared by the
2 witness, and the witness does not really know how those numbers
3 were calculated.

4 At this point I'm not willing to exclude it, but I
5 will certainly be open to an objection from Waste Management to
6 inclusion of it in the record, at least until such time as
7 Mr. Dunn is examined on his knowledge of that exhibit. And if
8 it's demonstrated that he doesn't know the numbers and can't
9 answer questions about the numbers, then I may very well decide
10 to exclude it. But I leave that until after Mr. Dunn is
11 examined.

12 MS. GOLDMAN: That's all, Your Honor.

13 JUDGE KOPTA: Did you want to say anything?

14 MR. VAN KIRK: No, thank you.

15 JUDGE KOPTA: Okay. The second witness's testimony
16 is James Ryan. Mr. Ryan has both direct and response testimony.
17 As I read the motion, it's directed toward Mr. Ryan's direct
18 testimony and not his response testimony, and I will grant the
19 motion as to his direct testimony, again, on the same basis that
20 we've just had our discussion on Stericycle's motion for summary
21 determination. It deals with the same issues, and, therefore,
22 it's not testimony that I think should be considered in this
23 docket.

24 So I will not admit into the record Mr. Ryan's direct
25 testimony. I will, however, allow Stericycle to offer that

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1 testimony and to have it be -- remain in the docket so that if
2 Stericycle should wish to seek administrative review of my
3 decision, that the Commission will have the testimony and will
4 be able to review that testimony and make a ruling on review.

5 MR. VAN KIRK: Okay. So at the hearing we should
6 offer it, even though we said that there is no reason for James
7 Ryan to be here in person to submit to cross-examination on that
8 testimony?

9 JUDGE KOPTA: On that testimony; that's correct.

10 MR. VAN KIRK: Yeah.

11 JUDGE KOPTA: He will be here, I'm assuming --

12 MR. VAN KIRK: Of course.

13 JUDGE KOPTA: -- in any event because he has other
14 testimony.

15 MR. VAN KIRK: Yeah.

16 JUDGE KOPTA: But, yes, as to that testimony, I will
17 not admit it, and we will not have cross-examination on it.

18 MR. VAN KIRK: Okay. And I understand our previous
19 discussion applies to this, and I'm not going to reopen it.

20 Jeff Norton's responsive testimony, if memory serves,
21 was responsive entirely to James Ryan's direct testimony. And
22 if -- I believe that to be the case. We can check for sure.
23 But if that's the case, I don't see any reason to include
24 responsive testimony to testimony that's now being stricken.

25 JUDGE KOPTA: I agree, and so that was the other

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1 thing that I was going to add.

2 MR. VAN KIRK: Oh. Sorry I jumped the gun.

3 JUDGE KOPTA: Thank you for raising it.

4 But, yes, to the extent that there is any response
5 testimony to this testimony that's not going to be entered into
6 the record, then I would ask Waste Management, particularly as
7 the company or the party that is requesting that Mr. Ryan's
8 testimony not be included, to identify the portions of its
9 witness's or witness testimony that addresses this same subject
10 matter and to propose revisions preferably in advance of the
11 hearings, if possible, so that we'll know what portions of the
12 testimony that Waste Management is offering that will not be
13 included in the record as well or will be included, at least, to
14 the extent -- the same extent as the testimony that Mr. Ryan has
15 included. I would make that same provision there that if
16 Stericycle wants to preserve its right to have the Commission
17 review my decision, then all of the testimony is offered on
18 that -- on those two issues should be available to the
19 Commission for consideration.

20 All right. And I will deal with Mike Philpott and
21 Ron Adams together, because the basis for Waste Management's
22 motion is the same for both, that the information is
23 impermissible hearsay. I will deny the motion as to the
24 provisions specified in those two witnesses' testimony. The
25 Commission generally allows hearsay and gives it whatever weight

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1 it merits to the extent that during the hearing Waste Management
2 wants to point out that a witness doesn't know the identity of
3 the individuals or substance of the conversations or whatever,
4 I'm perfectly willing to allow that to demonstrate how much
5 weight should be accorded this particular testimony.

6 But I note in anticipation of Stericycle's motion --
7 and you can expect the same ruling -- that everybody has hearsay
8 and I can either exclude it all or I can include it all. And as
9 I indicated earlier, the Commission tends to err on the side of
10 inclusion, and so to the extent that I err, I will do so
11 consistent with Commission practice.

12 Anything further on Waste Management's motion?

13 MS. GOLDMAN: Nothing further.

14 JUDGE KOPTA: Thank you.

15 And then we move to Stericycle's motion to strike.

16 As I just indicated, we'll go witness by witness.

17 The first is Jeff Norton. Again, the basis for
18 seeking to strike was hearsay, and my ruling on that is the same
19 as it was for Waste Management. The motion is denied. I won't
20 explain further. The same explanation.

21 Then the deposition excerpts of Mike Philpott and
22 Chris Dunn that Waste Management has proffered as prefiled
23 testimony, I agree with Stericycle that that's not how we do
24 things here. I won't necessarily strike it. I will allow Waste
25 Management to include those as cross-examination exhibits for

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1 those witnesses with the caution that it needs to be related to
2 whatever the testimony is that they have prefiled. If it's
3 outside of that, then, as with any other cross-examination
4 exhibit, then it's not something that would be appropriate even
5 as a cross-examination exhibit.

6 So I leave to Waste Management the decision about
7 whether to designate -- redesignate those rather than prefiled
8 testimony, rather to designate them as cross-examination
9 exhibits. And you may do that as part of the exhibit lists that
10 you're going to provide to me tomorrow. So your decision
11 whether to drop them entirely or to include them as cross
12 exhibits. It's up to you.

13 MS. GOLDMAN: Thank you, Your Honor.

14 JUDGE KOPTA: And that, I believe, takes care of the
15 motions.

16 MR. VAN KIRK: I'm sorry. One point of
17 clarification.

18 JUDGE KOPTA: Yes.

19 MR. VAN KIRK: We had in that, in our motion, we had,
20 you know, as an alternative you should accept designated
21 portions of Jeff Norton.

22 I'm wondering if we can have the same option with
23 his, too, included as a -- as an exhibit subject to the same
24 limitations that you discussed.

25 JUDGE KOPTA: Yes.

1 MR. VAN KIRK: Okay.

2 JUDGE KOPTA: I would appreciate that you confer with
3 Waste Management. There's no sense in designating it as a cross
4 exhibit if they're not going to designate those excerpts as
5 cross exhibits. But, hopefully, you can have that conversation
6 and -- so we don't have to worry about being surprised one way
7 or the other.

8 All right. So then we come to which witnesses are
9 going to testify. In Order 05, I directed the parties to
10 include as declarations testimony on financial and operational
11 fitness and, in fact, any other issues other than those that
12 implicated competitive concerns and to file the latter type of
13 issues as testimony. Waste Management filed four declarations
14 having to do with operational and financial fitness. There were
15 no other declarations filed by any party.

16 I do not see any issues joined with respect to those
17 declarations and, therefore, the Commission will consider those
18 declarations as filed and the declarants will not be required to
19 be present at the hearing or subject to cross-examination.

20 Instead, the Commission will, as the statute
21 provides, will note that information will be considered on the
22 statutory factors based on the declarations as they have been
23 submitted. I will, however, admit them into the record, which
24 is why I want to make sure that they're included on the exhibit
25 list, unless there is some basis for objection, in which case I

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1 will entertain that before inputting them. But the declarants
2 need not be present. I see that only two of them don't have
3 testimony, so there will obviously be two who do, and those
4 witnesses will be subject to cross-examination on their
5 testimony but not on their declarations.

6 MR. VAN KIRK: I have one point of clarification. I
7 know in our -- in your second and most recent order on the
8 request for depositions, you indicated that Mr. Daub's
9 declaration would be considered solely for the purpose of making
10 the operational -- or the fitness requirements because a
11 deposition was allowed, and I -- I think the same thing should
12 be applied to all the declarations to the extent that the
13 witnesses are appearing live; that the totality of those
14 declarations should be considered only on the issues of
15 operational or financial fitness.

16 JUDGE KOPTA: I agree that is how they will be
17 considered. I will not consider them for evidence of anything
18 other than operational and technical financial fitness.

19 So order of witnesses at the hearing. I think we
20 would all benefit from knowing who's going to go when. I don't
21 know whether the parties have had any discussions in terms of
22 agreed witness order. If there have been those discussions,
23 then perhaps we can go off the record and get a rough list of
24 who's going to go when. Generally, I'm assuming that Waste
25 Management witnesses will go first, followed by the Intervenors.

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1 But that's as far as I have gotten in terms of who's going to go
2 when.

3 So have you had those discussions?

4 Ms. Goldman, I see you reaching for the microphone.

5 MS. GOLDMAN: No, Your Honor, we have not. And it is
6 also our assumption that we would be putting on our witnesses
7 first. And when you say "our witnesses," I'm assuming you mean
8 more than just the Waste Management employees, but all of the
9 witnesses we'll be offering, correct?

10 JUDGE KOPTA: That is correct.

11 MS. GOLDMAN: We have the issue of generators who
12 will be testifying. And it's my understanding from your
13 previous ruling that you would permit that testimony to come in
14 telephonically, and so I wanted to confirm that that is the case
15 and have -- our witnesses are standing by to proceed with the
16 precise scheduling of those witnesses. So we would request
17 leave, then, for those witnesses to appear by phone.

18 JUDGE KOPTA: I have no problem with that, as long as
19 there's no objection from any of the other parties. We have
20 discussed that earlier, as you mentioned, and I think the
21 Commission tries to accommodate witnesses, particularly those
22 that are not employees or retained experts of the party to.
23 Even in those circumstances, we try and address travel issues,
24 and, you know, Olympia is not the center of the world, and so we
25 recognize that sometimes it's easier by phone.

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1 MR. VAN KIRK: If now is the time, we definitely
2 understand those constraints. I think we have taken the
3 position before, and continue to take the position that for the
4 purposes of cross-examination credibility and weight, live
5 testimony is preferable to telephonic testimony.

6 JUDGE KOPTA: I agree "preferable," but if -- unless
7 there's objection, then I would allow testimony by telephone to
8 accommodate witnesses' schedules, and I'll just take into
9 consideration whether there's any basis on which to view their
10 testimony as less credible, less weighty as a result of being on
11 the telephone than if they have been in person. I have not seen
12 that happen yet, but I remain open to the possibility.

13 MR. JOHNSON: I guess, Your Honor -- this is Steve
14 Johnson for Stericycle. Just one question: Is there some
15 possibility that these witnesses would not be available in
16 person?

17 MS. GOLDMAN: I think there's probably a 99 percent
18 chance that they will not be available. We don't have subpoenas
19 issued. And it's my understanding that Your Honor is not
20 inclined to issue subpoenas. These are Stericycle's customers,
21 and it is an incredible burden for them to come here. We have
22 Stericycle customers in Port Angeles. We have them all over the
23 State of Washington, and it will be an incredible burden and
24 they likely will not appear if they are forced to appear here
25 for testimony.

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1 JUDGE KOPTA: Well, that is not my inclination.

2 Did you want to make a formal objection, Mr. Johnson?

3 MR. JOHNSON: Your Honor, I don't think we do. I
4 think your -- I think I see where this is headed, and I -- we
5 sympathize with the problem.

6 I just would say that when Stericycle applied and
7 showed up before the Commission, our people showed up in person.

8 JUDGE KOPTA: And that's great if you can do it. And
9 that's certainly preferable, but as I say, we try and
10 accommodate schedules so that we can hear from everyone who has
11 an interest in presenting testimony before the Commission.

12 MS. GOLDMAN: And, Your Honor, it's my understanding
13 that when Stericycle made its application, there was no prefiled
14 testimony, so it was a full trial on the merits. And we have
15 gone to the trouble, as have these Stericycle customers, of
16 submitting their statements. Their statements are not
17 voluminous, they go to very specific issues, and I'm confident
18 that they can be cross-examined effectively on these limited
19 issues by telephone.

20 JUDGE KOPTA: Well, and that, we certainly appreciate
21 having as much in writing as possible. And as you say,
22 generator testimony is often purely done orally, which is a
23 little more difficult by phone. But in any event, since there
24 is no objection and I don't have a problem with it, then we will
25 allow those witnesses to appear by telephone.

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1 But let's be off the record for a moment so that we
2 can discuss the order and who's going to go when, so we'll be
3 off the record.

4 (Discussion off the record.)

5 JUDGE KOPTA: Let's be back on the record.

6 We took a brief recess to discuss some procedural
7 issues, including the order of witnesses. As a result of that
8 discussion, Ms. Goldman, on behalf of Waste Management, is going
9 to check with her witnesses to come up with a proposed order of
10 witnesses that she will circulate informally to the parties and
11 to the Bench by the end of the day on Friday, and so we will all
12 be prepared for the first witness Monday morning at 9:30.

13 The parties will also discuss among themselves the
14 extent to which they can stipulate to admission of testimony and
15 exhibits. That is an issue we will address at nine a.m. on
16 Monday with the anticipation that at 9:30, we will begin the
17 evidentiary hearings.

18 And to the extent possible, we will allow witnesses'
19 flexibility in terms of their schedules to appear, including
20 telephonically and to the extent necessary, and to that end, I
21 believe Mr. Sells had a request that he wanted to make on the
22 record.

23 MR. SELLS: I do. Thank you, Your Honor.

24 As I indicated off the record, at least one of my
25 four witnesses is in Pullman, which is a long way from here.

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1 And it is a very small company and it would definitely be a
2 hardship for him to drive over here, although he will if it's
3 absolutely necessary. But I would be -- and the other three I
4 have been assured can make it in person, unless something highly
5 unusual happens.

6 So I'll limit my motion, if we even want to call it
7 that, to allow the testimony of Devon Felsted of Pullman
8 Disposal to be done telephonically.

9 JUDGE KOPTA: Well, I don't think a motion is
10 necessary. A request is fine. And since we had an earlier
11 discussion and no one seemed to have a problem with that, then I
12 believe that that request is granted.

13 MR. SELLS: Thank you.

14 JUDGE KOPTA: I don't remember anything else that we
15 were going to put on the record, but I will ask: Is there
16 anything else that we need to discuss while we were on the
17 record now that we took up while we were off the record?

18 MS. GOLDMAN: I think this happened off the record,
19 so pardon me if it did not. But I did seek leave to put on
20 witnesses that were Stericycle employees as part of our direct
21 testimony as identified in our witness list, and you indicated
22 in your ruling that that would not be permissible, and that they
23 would be subject only to cross-examination. So I just wanted to
24 make sure that was on the record. Thank you.

25 JUDGE KOPTA: That's fine. I have that on the

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1 record, and that is correct. The Commission practice is to have
2 witnesses that support a party's case prefile testimony, and we
3 don't have procedures in place to address the situation in which
4 you're asking adverse party witnesses to be part of your direct
5 case.

6 So anything else? Then we're off the record, and
7 we'll see you on Monday morning. Thank you.

8 MS. GOLDMAN: Thank you.

9 MS. McNEILL: Thank you.

10 MR. VAN KIRK: Thank you.

11 MR. JOHNSON: Thank you, Your Honor.

12 (Proceeding concluded at 2:45 p.m.)

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3 STATE OF WASHINGTON)

) ss

4 COUNTY OF KING)

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6 I, SHELBY KAY K. FUKUSHIMA, a Certified Shorthand Reporter
7 and Notary Public in and for the State of Washington, do hereby
8 certify that the foregoing transcript is true and accurate to
9 the best of my knowledge, skill and ability.

10 IN WITNESS WHEREOF, I have hereunto set my hand and seal
11 this 10th day of December, 2012.

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SHELBY KAY K. FUKUSHIMA, CCR

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20 My commission expires:

June 29, 2013

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