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March 21, 2011

VIA EMAIL AND HAND DELIVERY

David W. Danner
Executive Director and Secretary
Washington Utilities and Transportation Commission
P. O. Box 47250
Olympia, WA 98504-7250

Re: Complaint and Petition of Stericycle of Washington, Inc.; Docket No. TG-110506
Immediate Suspension of Proposed Tariff Requested

Dear Secretary Danner:

Enclosed for filing please find the Complaint and Petition of Stericycle of Washington, Inc. ("Stericycle") in Docket No. TG-110506. Stericycle has electronically filed this document and filed one hard copy with the Commission pursuant to WAC 480-07-140(1)(b).

Stericycle's Complaint and Petition challenges the authority of Waste Management of Washington, Inc. ("Waste Management") to engage in biomedical waste collection and transportation for compensation under G-237 without a specific grant of such authority by the Washington Utilities and Transportation Commission on the ground, among others, that Waste Management has long since abandoned any authority once provided by G-237 for such services and that the initiation of such services by Waste Management is therefore unauthorized and unlawful. Stericycle seeks an order from the Commission amending and restricting G-237 to expressly exclude biomedical waste collection and transportation services.

On March 18, 2011, Waste Management filed its Tariff No. 1 for approval by the Commission, stating proposed rates and rules for Waste Management's proposed biomedical waste collection and transportation services and requesting a March 21, 2011 effective date; i.e., on one day's notice. Waste Management's proposed Tariff No. 1 has been docketed under Docket No. TG-110506. Although Waste Management asserted in its cover letter that it has customers that are requesting its proposed services, no generator statements were filed to support this claim. Waste Management's request for Commission approval of Tariff No. 1 on one day's notice is therefore improper and should be rejected in any event.



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Stericycle previously filed a Petition challenging Waste Management's authority to initiate biomedical waste collection and transportation services, *see* Docket No. TG-110287, which was determined by the Director of the Commission's Administrative Law Division to be premature, because at that time Waste Management had not yet filed a tariff or started the proposed services. *See* Decision Not to Initiate Adjudicative Proceeding, Docket No. TG-110287, March 10, 2011. In Stericycle's view, the Director's order and the Petition in Docket No. TG-110287 are now moot.

Thank you for your immediate attention to this matter.

Very truly yours,

GARVEY SCHUBERT BARER

By

Stephen B. Johnson

Enclosures

cc: Waste Management of Washington, Inc., dba WM Healthcare Solutions
Polly McNeill
Brad Lovaas
James K. Sells
Stericycle of Washington, Inc.

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Complaint and Petition of)) STERICYCLE OF WASHINGTON, INC.,)) For an Order Suspending Tariff Filing and) Initiating an Adjudicatory Proceeding concerning) the Abandonment of Authority Under G-237) and Proposed Biomedical Waste Collection and) Transportation Services of Waste Management of) Washington, Inc., dba WM Healthcare) Solutions (G-237)) _____))	Docket No. Complaint and Petition of Stericycle of Washington, Inc. <u>Request for Investigation and Immediate Suspension of Proposed Tariff</u>
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Stericycle of Washington, Inc. (“Stericycle”), through its attorneys Garvey
Schubert Barer, Stephen B. Johnson and Donald B. Scaramastra, respectfully submits this
Complaint and Petition, as follows:

A. Identification of Complainant and Complainant’s Representative

Stericycle of Washington, Inc. (G-244)
20320 80th Avenue S.
Kent, WA 98032

Stephen B. Johnson
Donald B. Scaramastra
Garvey Schubert Barer
1191 Second Avenue, Suite 1800
Seattle, WA 98101
Attorneys for Complainant and Petitioner

B. Relief Requested

1. Stericycle provides specialized biomedical waste collection services throughout the state of Washington under certificate G-244. Stericycle’s authority under G-244 is limited to biomedical waste. Waste Management of Washington, Inc. (“Waste

Management”) has been soliciting Stericycle customers for biomedical waste collection services that Waste Management has indicated it would offer imminently in the limited territories in which it holds general solid waste authority under certificate G-237. On Friday, March 18, 2011 Waste Management filed a proposed tariff for its proposed biomedical waste collection and transportation services, seeking Commission approval to begin operations under the proposed tariff on one day’s notice -- i.e., on March 21, 2011.

2. Waste Management has abandoned any authority it may have had at one time under certificate G-237 to provide biomedical waste collection and transportation services for compensation. Thus, Waste Management’s proposed biomedical waste collection and transportation services are unauthorized and unlawful in violation of RCW 81.77.040. Waste Management’s request for approval of its proposed tariff must be rejected by the Commission and the proposed tariff must be suspended until Waste Management submits an application for biomedical waste collection authority pursuant to RCW 81.77.040 and authority for the proposed services is granted by this Commission. Although Stericycle does not oppose fair competition that is in the public interest, Waste Management must be required to demonstrate that the statutory criteria specified in RCW 81.77.040 for such a grant of authority have been satisfied.

3. Accordingly, Stericycle respectfully requests the Washington Utilities and Transportation Commission to issue an order:

a. immediately suspending Waste Management’s proposed tariff for biomedical waste collection and transportation services pending an investigation by the Commission pursuant to RCW 81.04.510 and RCW 81.77.040 of Stericycle’s complaint

that Waste Management has abandoned its authority under certificate G-237 to provide biomedical waste collection and transportation services and that the proposed services are therefore unauthorized and unlawful;

b. immediately initiating an adjudicative proceeding to consider Stericycle's complaint that Waste Management has abandoned its authority under certificate G-237 to provide biomedical waste collection and transportation services and that the proposed services are therefore unauthorized and unlawful;¹

c. amending and restricting Waste Management's certificate G-237 to expressly exclude the collection and transportation of biomedical waste on the grounds that Waste Management has abandoned its authority to provide such services and is no longer authorized by G-237 or the Commission to provide such services;

d. requiring Waste Management to apply to the Commission for authority pursuant to RCW 81.77.040 to amend G-237 to include biomedical waste collection and transportation services if Waste Management wishes to provide such services; and

e. in the event that Waste Management seeks authority from the Commission to provide the proposed services, initiating an adjudicative proceeding to determine (1) whether the criteria of RCW 81.77.040 have been met, including whether existing carriers are providing services to the satisfaction of the Commission, whether there is a public need for the proposed services (and, if so, the terms and conditions on which the proposed services should be authorized by the Commission in the public interest), and whether Waste Management is fit, willing and able to provide the proposed services in compliance

¹ If the Commission believes that expedited proceedings are necessary, a brief adjudicative proceeding may be appropriate. *See* WAC 480-07-610.

with the requirements of applicable law, (2) whether Waste Management's proposed rates and terms of service are just and reasonable; (3) whether tying arrangements and/or rate discounts offered by Waste Management for combined biomedical waste collection and general solid waste collection and disposal services are just and reasonable; (4) whether revenues from Waste Management's general solid waste collection services will be used to subsidize Waste Management's biomedical waste collection services; (5) whether Waste Management should be permitted to offer biomedical waste collection and transportation services limited to the territories covered by G-237; and (6) whether Waste Management and its affiliates should be required to allow disposal of processed biomedical waste in landfills they operate on a non-discriminatory basis in order to ensure that Stericycle and other competitors are not placed at an unfair and unreasonable competitive disadvantage.

4. This Complaint and Petition is based on RCW 81.04.110, RCW 81.04.130, RCW 81.04.510, RCW 81.77.030, RCW 81.77.040, RCW 34.05.413, RCW 34.05.482, WAC 480-07-305, WAC 480-70-339, WAC 480-07-612, and other applicable law.

C. Overview

5. On March 18, 2011, Waste Management filed a proposed tariff for the collection and transportation of biomedical waste for Commission approval with a proposed effective date of March 21, 2011. The Commission's approval of the proposed tariff is the final step which Waste Management believes will allow it to initiate biomedical waste collection and transportation services. In its tariff filing Waste Management indicates that it intends to offer such services within the limited geographic

area of its certificate G-237 and it asks the Commission for approval on a single day's notice.²

6. Moreover, during the past year, Waste Management has hired former Stericycle managers with access to Stericycle's confidential and proprietary business information and intimate knowledge of Stericycle's business and customers in Washington. For several months, one of these ex-Stericycle managers has been approaching Stericycle customers and soliciting them for the new biomedical waste collection and transportation service to be offered by Waste Management and made these solicitations on the basis of representations concerning the rates Waste Management will offer for the proposed service even before the recent tariff filing. These solicitations adversely impacted Stericycle's business well before Waste Management's proposed rates were submitted to the Commission for approval.

7. Stericycle has provided specialized biomedical waste collection and transportation services to Washington hospitals, healthcare facilities and others under rates that have been substantially unchanged since 1993. Stericycle is the only solid waste collection company that offers biomedical waste collection services throughout the state. Stericycle recognizes that the Commission may welcome additional competition in biomedical waste collection and does not oppose fair competition if in the public interest and initiated in accordance with the requirements of applicable law.

² Waste Management insists that "we have customers that are requesting this new service," apparently in an effort to secure approval on a single day's notice. *Compare* WAC 480-70-261 *with* WAC 480-70-262. However, Waste Management offers no customer statements in support of this assertion and it should be given no weight by the Commission.

8. However, Waste Management is currently seeking to commence services based on purported authority that it has long since abandoned. In 1996, Waste Management abandoned biomedical waste collection and transportation operations under its certificate G-237 when it sold its nationwide biomedical waste collection business to Stericycle's parent company, Stericycle, Inc. As a part of that sale, Waste Management agreed not to provide competing biomedical waste collection services. Since that time Waste Management has been neither willing nor able to offer these services to generators within the service territory covered by G-237. After abandoning biomedical waste collection for 15 years, Waste Management may not now reclaim biomedical waste collection authority under G-237 without applying for authority pursuant to the requirements of RCW 81.77.040, establishing its fitness, establishing a need for the proposed services and demonstrating that the proposed services are in the public interest. With its tariff filing Waste Management is, therefore, seeking de facto Commission approval of services for which Waste Management holds no valid authority without submitting to the type of review by the Commission that any other company seeking such authority would be required to undergo.

9. Moreover, any appropriate evaluation will reveal that Waste Management's proposed services in the limited territories covered by G-237 will have unfair competitive advantages that will harm Stericycle and generators of biomedical waste, including most immediately generators in the more rural areas of the state beyond the territorial scope of G-237. These effects can be avoided only by exercise of the Commission's authority to require that Waste Management apply for authority to conduct biomedical waste collection

services pursuant to RCW 81.77.040 and to initiate an adjudicative proceeding to investigate the terms and conditions on which Waste Management proposes to offer biomedical waste collection services, the need for such services and the potential effects of the proposed services on existing carriers and the public interest.

10. Waste Management and its affiliates propose to offer their new biomedical waste collection service in limited areas within Washington where Waste Management holds general solid waste authority under G-237 – principally in urban areas or areas along major transportation corridors. Waste Management’s certificate G-237 covers portions of only 16 of Washington’s 39 counties but over 80% of the biomedical waste generated in the state. Waste Management’s entry into the biomedical waste collection business in these limited, relatively high density areas will give Waste Management an unfair competitive advantage over Stericycle, which must serve the entire state under Stericycle’s certificate G-244.

11. Waste Management seeks to initiate biomedical waste collection services limited to relatively high-density, low cost/high profit areas of the state, while Stericycle is required to serve the whole state, including high cost/low profit generators in small towns and rural areas. The effect will be to give Waste Management an unfair cost advantage in areas of the state where both carriers compete, because only Stericycle will be required to absorb the higher costs of service to small towns and rural areas. Ultimately, Waste Management’s unfair cost advantage could adversely affect Stericycle’s ability to serve its healthcare customers statewide or require it to impose drastic service cut-backs and/or rate increases on healthcare facilities in rural counties and small towns. To ensure fair

competition and to preserve necessary services throughout the state, Waste Management should be required to successfully prosecute an application for statewide biomedical waste collection authority if it wishes to enter the biomedical waste collection business, rather than limiting its service to the state's higher density urban areas and transportation corridors.³

12. Biomedical waste collection, transportation and disposal services present particular regulatory compliance challenges and require specialized expertise and specialized equipment, as well as access to a permitted biomedical waste incinerator or another permitted biomedical waste processing facility. As the Commission's rules make clear, "It is a matter of statewide concern that biomedical waste be handled in a manner that protects the health, safety, and welfare of the public, the environment, and the workers who handle the waste." WAC 480-70-426. Waste Management has made no showing to the Commission of its ability or fitness to provide the proposed services in compliance with applicable law. Before approving Waste Management authority or any tariff for biomedical waste collection and transportation services, the Commission should require Waste Management to demonstrate its fitness and ability to provide the proposed services in compliance with applicable regulatory requirements, in a manner that is protective of public health and safety, and in a manner that is consistent with the public interest.

³ Stericycle does not argue that every solid waste collection company that wishes to provide biomedical waste collection and transportation services must serve the entire state. However, where (as here) a company proposes to serve most of the major urban centers within the state, it should be required to serve the entire state. Any other result would ensure that the potential benefits of increased competition are unsustainable.

13. As the Commission well knows, Waste Management is a subsidiary of a massive corporation engaged in solid waste collection and disposal within this state and throughout the United States. If the public is to benefit from Waste Management's entry into the biomedical waste collection business, it is imperative that the Commission exercise its authority to ensure that Waste Management does not destroy its smaller competitors through unfair competition. To prevent unfair competition, the Commission should require Waste Management to seek authority to serve the entire state, if it wishes to provide biomedical waste collection services in this state. In addition, the Commission must take steps to ensure that Waste Management does not use profits from its general solid waste operations to subsidize its biomedical waste collection services. The Commission must make sure that rates offered for combined solid waste and biomedical waste collection services fairly reflect the costs of each. The Commission must ensure that Waste Management does not use its monopoly power with respect to general solid waste collection services to obtain unfair competitive advantage over Stericycle or other competitors. Finally, the Commission should not permit Waste Management's exclusive access to landfills operated by its affiliates in Washington, which would guarantee it an unfair competitive advantage. Waste Management's affiliates currently prohibit disposal by Stericycle of processed biomedical waste at their landfills, thus imposing additional costs on Stericycle for waste disposal. If Waste Management wishes to use these landfills for disposal of its processed medical waste, the Commission should require Waste Management to ensure that its competitors have equal, non-discriminatory access to these landfills.

D. Waste Management Has Abandoned its Authority to Conduct Biomedical Waste Collection and Transportation Services Under G-237

14. Waste Management has abandoned the authority to conduct biomedical waste collection and transportation services under G-237. For over a half-century, the Washington Supreme Court has recognized that the authority granted in a certificate of public convenience and necessity will lapse and be extinguished if not exercised and that the Commission can bar use of certificate authority that has been abandoned. In 1958, the Supreme Court affirmed the Commission's authority to deny the transfer of a "dormant" permit, which the Commission defined to include a permit that was not "in active and regular use." Lee & Eastes, Inc. v. Public Service Comm'n, 52 Wn. 2d 701, 702 (1958).

15. It is equally well established that this principle applies to the partial abandonment of services authorized by a carrier's certificate. In Herrett Trucking Company v. Public Service Comm'n, 61 Wn. 2d 234 (1963), the Supreme Court held that a portion the authority granted in a common carrier permit had lapsed as a result of non-exercise by the permit holder. The Court reviewed the Commission's grant of a request to transfer a permit authorizing the transportation of building materials, heavy machinery, and bulk cement. The Commission held that the permit's authorization to transport heavy machinery and building materials had not lapsed or become "dormant" as a result of non-exercise. The Supreme Court reversed the Commission as to the portion of the permit dealing with building materials, finding that this portion of the permit had lapsed and could not be transferred. Thus, the Supreme Court in Herrett Trucking clearly recognized that a

permit holder could allow parts of a certificate of public convenience and necessity to lapse and become ineffective.

16. In addressing solid waste companies the law is even more explicit. RCW 81.77.030(6) specifically provides that the Commission may, on its own authority or in response to a complaint, alter or amend a certificate when it is shown that the certificate holder has “failed to operate as a solid waste collection company for a period of at least one year” The Commission has expressly held that “[w]hen a certificate holder fails to operate a portion of its authority during the test year, the certificate may be altered or amended to reflect that fact and a portion of the authority may be deleted.” Order M. V. G. No. 1403, Mason County Garbage Co., v. Harold LeMay Enterprises, Cause No. TG-2163 (August 1989) (amending G-certificate to exclude residential solid waste collection services) (reversed in part on other grounds, Harold LeMay Enterprises v. UTC, 67 Wn. App 878 (1992)). Indeed, “[t]he very existence of statutory authority to ‘amend or alter’ certificates contemplates less-than-total geographic or commodity abandonment. Amendment recognizing major service types is appropriate.” Id. A certificate holder has abandoned a portion of its authority when it can be shown, based on objective evidence, that for at least one year the holder was unable or unwilling to provide the relevant services to customers within its territory. Harold LeMay Enterprises v. UTC, 67 Wn. App. 878 (1992).

17. Waste Management ceased providing biomedical waste collection services in Washington in 1996 and, since that time, has been unable and unwilling to provide those services to customers within its certificated area. Indeed, Waste Management entered into

a non-competition agreement with Stericycle's parent under which it affirmatively agreed not to provide such services for a term of years. In paragraphs 6 and 8 of its recently-filed comments regarding the Commission's jurisdiction in Docket No. TG-110287, Waste Management admits that for this long period of time it has been unable to provide biomedical waste services by asserting that it intends to "take steps necessary to collect and transport biomedical waste in Washington at some point in time," that it "has not yet filed a tariff rate for collection of biomedical waste," and that it "is indeed planning to enter the market" sometime in the future.

18. Accordingly, Waste Management's authority to provide biomedical waste collection and transportation services has lapsed, its proposed tariff for such services should be rejected and its G-certificate should be amended to preclude Waste Management from providing such services absent a new grant of authority by the Commission pursuant to the criteria of RCW 81.77.040. Waste Management has had no tariff for such services for the past 15 years. Without an approved tariff, Waste Management was unable to provide such services to customers within the territory covered by G-237. Moreover, Waste Management deliberately and intentionally discontinued offering biomedical waste collection services within the territory covered by G-237 in 1996 and since that time has had neither the facilities and equipment necessary to provide biomedical waste services in compliance with the Commission's regulations nor the willingness to provide such services. On these facts, the Commission must conclude that Waste Management has abandoned any authority it once had under G-237 to provide biomedical waste collection services and enter an order amending and limiting certificate G-237 to expressly exclude

such services from the services authorized by G-237. Waste Management must, therefore, apply for new certificate authority for any new biomedical waste collection service it proposes to offer, subject to the requirements of RCW 81.77.040, including a demonstration of its fitness, public need and the public interest.

E. The Commission Must Act to Prevent Unfair Competition

19. If the Commission permits Waste Management to enter the marketplace for biomedical waste collection services on a selective, limited basis, the result will be to harm Stericycle without long-term benefits for the state's biomedical waste generators. "Cream skimming" is the classic description of Waste Management's strategy. By offering its biomedical waste collection services only in the limited territory where it has general solid waste collection authority, Waste Management proposes to limit its new services to the state's urban centers and major transportation corridors. If Waste Management is permitted to enter the market on this basis, Waste Management will have a significant cost advantage over Stericycle, an advantage which over time will threaten Stericycle's ability to serve to the extent of its authority under G-244. The Commission has repeatedly held that "cream skimming" is not in the public interest and contrary to public policy." *See, e.g., In re Superior Refuse Removal Corporation*, Order M.V.G. No. 1335, June 1, 1988.

20. Ultimately, it is the public that will be harmed if Waste Management is allowed to enter the market in a service territory limited to higher density population centers and transportation corridors. While generators in these areas may be offered lower prices for a time, ultimately the burden of serving the lower density areas of the state will increase Stericycle's costs and will either drive Stericycle from the marketplace or require

Stericycle to drastically reduce service or raise rates beyond what generators in the more rural areas of the state can pay. The upshot: Stericycle's ability to serve generators statewide will be adversely affected, generators in high density areas will lose any initial benefit from increased competition and many generators outside of urban areas and major transportation corridors could be left without access to a critical service at an affordable price.

21. The Commission has ample authority to regulate all aspects of a biomedical waste collection carrier's business to ensure that the public interest is served. The Commission is "vested by statute with the authority to regulate the rates, rules, regulations, practices, accounts and affiliated interests of public service companies, including solid waste companies. RCW 80.01.040, RCW 81.01, RCW 81.04, RCW 81.16, RCW 81.28 and RCW 81.77." Order No. 02, WUTC v. Harold Lemay Enterprises, Inc., Cause No. TG-101850, December 30, 2010. RCW 80.01.040 requires the Commission to "Regulate in the public interest . . . the rates, services, facilities, and practices of all persons engaging in the transportation of persons or property within this state for compensation." It is fundamental that common carriers "shall not make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality . . . in any respect whatsoever, or subject any particular person or corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." RCW 81.28.190. Of course, this is precisely what a selective market entry by Waste Management would do -- both prefer and disadvantage different localities and generators.

22. RCW 81.28.230 requires that, whenever the Commission finds that a common carrier's rates, or the regulations or practices of the common carrier affecting those rates, are "unjust, unreasonable, unjustly discriminatory, or unduly preferential," the Commission "shall determine and fix by order the just, reasonable, or sufficient rates, fares, or charges, or the regulations or practices to be thereafter observed and enforced." In support of this authority, the Commission is authorized to investigate all tariff filings by regulated carriers and to suspend the effect of such filings while its investigation is pending. RCW 81.04.130 (Commission may investigate any rate change filed by a public service company, either upon its own motion or upon complaint, and -- if the filing is made by a solid waste collection company -- may suspend the operation of the filing for a period not exceeding ten months); *see also* WAC 480-70-339 (Commission authorized to suspend tariffs of solid waste collection companies).

23. Under RCW 81.77.030, the Commission is authorized and directed to "supervise and regulate every solid waste collection company in this state." The Commission should use its authority to suspend any tariff filing made by Waste Management in support of its proposed biomedical waste collection and transportation services until the Commission is satisfied that Waste Management has applied for and obtained appropriate authority and that the proposed services will be provided without unfair competition, that the rates proposed are just and reasonable, that Waste Management is fit, willing and able to provide the proposed services in all respects in compliance with applicable law and that the proposed services will be provided in a manner that is in the public interest.

F. The Commission Must Ensure that the Collection and Transportation of Biomedical Waste Is Protective of the Public Health and Welfare

24. “It is a matter of statewide concern that biomedical waste be handled in a manner that protects the health, safety, and welfare of the public, the environment, and the workers who handle the waste.” WAC 480-70-426. The Commission’s plenary power to supervise and regulate solid waste collection imposes a special responsibility on the Commission to ensure that the public health and safety are protected by those who would offer biomedical waste collection and transportation services to Washington hospitals, healthcare facilities, health science laboratories and other generators of such wastes. Because the handling of biomedical waste involves unique risks, its handling is specially regulated by both the U.S. Department of Transportation and the Commission. Waste Management has made no showing of its fitness or ability to provide the proposed services in a manner that is protective of public health and in compliance with applicable law. Before authorizing Waste Management to provide biomedical waste collection services or approving a Waste Management tariff for such services, the Commission must require Waste Management to demonstrate its fitness and ability to provide the proposed services in compliance with applicable regulatory requirements and in a manner that is protective of public health and safety.

G. Conclusion

25. For the foregoing reasons Stericycle respectfully requests that the Commission issue an order granting the relief requested above.

Dated this 21st day of March, 2011.

Respectfully submitted,

GARVEY SCHUBERT BARER

By 

Stephen B. Johnson

Donald B. Scaramastra

Attorneys for Stericycle of Washington, Inc.