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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

STERICYCLE OF WASHINGTON, INC.,

Complainant,

v.

WASTE MANAGEMENT OF WASHINGTON,
INC., d/b/a WM Healthcare Solutions of
Washington,

Respondent.

Docket No. TG-121597

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

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I. RELIEF REQUESTED

1. 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 and grant Waste Management’s Cross-Motion for Summary Determination.

II. STATEMENT OF FACTS

2. On February 10, 2011, Stericycle filed a petition requesting that the Commission initiate an adjudicatory proceeding to consider imposing certain conditions and restrictions on Waste Management in response to Waste Management’s intention to re-enter the business of collecting and transporting biomedical waste for disposal in Washington.¹ It urged the Commission to require that Waste Management obtain statewide authority to perform biomedical waste collection, arguing that it was unfairly disadvantaged by having to serve the entire state while Waste Management would be able to operate only within the confines of its authority under Certificate No. G-237.² Stericycle alleged, among other things, that Waste Management was engaged in efforts, including solicitation of Stericycle biomedical waste service customers, without appropriate authority from the Commission.³ The Commission recognized that filing a tariff including rates, terms and conditions of biomedical waste services would be a necessary step for Waste Management to take before it could actually conduct such operations. Considering this, the Commission exercised its discretion not to conduct an adjudicative proceeding in response to Stericycle’s petition.⁴

3. On March 30, 2011, Waste Management filed a proposed tariff governing biomedical waste services within Waste Management’s existing solid waste collection territory authorized by Certificate No. G-237.⁵ Realizing Waste Management’s tariff filing was imminent, on March 21, 2011,

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¹ *In the Matter of the Petition of Stericycle of Washington, Inc.*, Docket No. TG-110287.

² *In the Matter of the Petition of Stericycle of Washington, Inc.*, Docket No. TG-110287, Petition of Stericycle of Washington, Inc., p. 2.

³ *Id.*

⁴ *In the Matter of the Petition of Stericycle of Washington, Inc.*, Docket No. TG-110287, Decision Not to Initiate Adjudicative Proceeding (March 10, 2011).

⁵ *Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions*, Docket No. TG-110552.

1 Stericycle filed a complaint and petition with the Commission challenging Waste Management's
2 authority to engage in biomedical waste collection and transportation for compensation under its
3 Certificate G-237.⁶ Stericycle again argued that Waste Management should be required to seek
4 statewide authority.⁷ Following briefing on motions for summary determination by both parties, the
5 Commission dismissed Stericycle's complaint.⁸

6 4. In response to Stericycle's invitation, on December 30, 2011, Waste Management filed
7 an application to extend its biomedical waste authority to the areas of Washington that are outside its
8 solid waste collection territory authorized by Certificate No. G-237 (the "Application Proceeding").⁹
9 Predictably, Stericycle protested Waste Management's application for statewide authority to perform
10 biomedical waste collection, notwithstanding its now patently disingenuous prior position. For almost a
11 year, tortuous administrative litigation has ensued.¹⁰ The hearing is scheduled for December 3 through
12 December 7, 2012.

13 5. Meanwhile, on October 1, 2012, Stericycle initiated yet another round of administrative
14 adjudication.¹¹ In this further iteration of its aggressive opposition to meaningful competition,
15 Stericycle's Complaint and Petition for Declaratory Relief challenges services and pricing for
16 unregulated commercial recycling performed by Waste Management in two ways. Among other alleged
17 regulatory misdeeds, Stericycle contends that Waste Management "solicited generators of biomedical
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20 ⁶ *Stericycle of Washington, Inc. v. Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington*,
Docket No. TG-110553 (restating in large part the allegations in its earlier petition in Docket No. TG-110287).

21 ⁷ *Stericycle of Washington, Inc. v. Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington*,
Docket No. TG-110553, Complaint and Petition of Stericycle of Washington, Inc., ¶ 11.

22 ⁸ Order 02, *Stericycle of Washington, Inc. v. Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of*
23 *Washington*, Docket No. TG-110553 (July 13, 2011) ("There being no material facts in dispute and the facts failing to
24 establish that Waste Management has been unavailable to serve biomedical waste customers or has refused to serve potential
25 customers during the 12 month period preceding the filing of Stericycle's complaint, Stericycle's Motion for Summary
Determination should be denied, Waste Management's cross-motion for summary determination should be granted.
Stericycle's Complaint and Petition accordingly should be dismissed.")

26 ⁹ *In re Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington, Inc.*, Docket No. TG-120033.

27 ¹⁰ The voluminous record in *Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington, Inc.*,
Docket No. TG-120033 is incorporated herein by this reference.

28 ¹¹ *Stericycle of Washington, Inc. V. Waste Management of Washington, Inc., d/b/a/ d/b/a WM Healthcare Solutions of*
Washington, Docket No. TG-121597.

1 waste by offering them unlawful rebates” and provided “unauthorized service and offers of service at
2 below-tariff rates.”¹²

3 6. On November 7, 2012, Stericycle filed the instant Motion for Summary Determination
4 Re Waste Management’s Unlawful Biomedical Waste Collection Operations Outside Its Certificated
5 Territory (“Motion for Summary Determination”) and requested that “the Commission determine that
6 Waste Management’s ecoFinity sharps waste collection service is a solid waste collection service
7 subject to authorization and regulation by the Commission and ... that Waste Management has operated
8 unlawfully by providing the ecoFinity service in Bellingham outside its certificated authority”¹³

9 7. Although Stericycle’s Complaint and Petition for Declaratory Relief alleges two different
10 causes of action related to Waste Management’s commercial recycling, its Motion for Summary
11 Determination focuses solely on the ecoFinity recycling program. The ecoFinity program is a sharps
12 recycling program rolled out to hospitals in 2011 by Waste Management and Becton Dickenson. Waste
13 Management collects full sharps containers weekly from St. Joseph Medical Center in Bellingham. The
14 sharps containers are delivered to the Seattle processing facility and are loaded to 1-yard Gaylord’s,
15 placed on a 53’ trailer and transported to Vernon, California for processing in a Red Bag Solutions
16 machine. The sterilized, washed and shredded sharps containers and their contents are then sent to
17 Talco Corporation where the material is separated utilizing float/sink technology. The plastics
18 recovered in this process are pelletized and used in the remanufacturing of sharps containers. In May
19 and June 2012, recycled sharps and sharps containers yielded between 17% and 28% of the recycled
20 product. Waste Management accepts all approved sharps and sharps containers under both its BD
21 ecoFinity program and its regulated biomedical waste program. Waste Management charges
22 competitive market rates for its BD ecoFinity program and tariff rates for its regulated biomedical waste
23 program.¹⁴

24 _____
25 ¹² *Id.* ¶¶ 6, 12.

26 ¹³ Motion for Summary Determination ¶ 45. Stericycle filed an identical motion in the Application Proceeding. *See*
27 *Protestant Stericycle of Washington, Inc.’s Motion for Summary Determination Re Waste Management’s Unlawful*
28 *Biomedical Waste Collection Operations Outside Its Certificated Territory*, Docket No. TG-10033 (November 6, 2012).

¹⁴ Van Kirk Declaration in Support of Complainant Stericycle of Washington, Inc.’s Motion for Summary Determination re
Waste Management’s Unlawful Biomedical Waste Collection Operations Outside Its Certificated Territory (“Van Kirk
Decl.”), Ex. E at 2.

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III. STATEMENT OF ISSUES

8. With regard to the entirety of Stericycle's Complaint and Petition for Declaratory Relief, should the litigation be dismissed because it was not properly pled?

9. With regard to classification of Waste Management's ecoFinity collection program for St. Joseph's Medical Center in Bellingham:

a. Should Stericycle's Motion for Summary Determination be denied because its argument that Waste Management's ecoFinity program should be classified as regulated solid waste collection is groundless?

b. Should Waste Management's Cross-Motion for Summary Determination be granted because the ecoFinity program should be classified as unregulated commercial recycling?

IV. EVIDENCE RELIED UPON

10. Waste Management relies on the Declaration of Jessica L. Goldman filed herewith, the Declaration of Jared Van Kirk in Support of Complainant Stericycle of Washington, Inc.'s Motion for Summary Determination re Waste Management's Unlawful Biomedical Waste Collection Operations Outside Its Certificated Territory, the record herein, and the record in the Application Proceeding.

V. ARGUMENT

11. For reasons set forth below, Stericycle should not be permitted to pursue a procedurally defective administrative lawsuit. Because Stericycle has failed to comport with the strictures of the Administrative Procedure Act ("APA"), and because the APA cannot be manipulated to achieve complainant's desired outcome, the Complaint as a whole should be dismissed.¹⁵ Even if Stericycle's Complaint and Petition for Declaratory Relief were not fatally flawed on procedural grounds, its Motion for Summary Determination should nonetheless be denied on the merits, and Waste Management's Cross-Motion should be granted. Once again, in yet another docket matter, Stericycle advances arguments that are plainly contrary to law in an attempt to needlessly protract administrative proceedings.

¹⁵ Chapter 34.05 RCW; RCW 34.05.240.

1 **A. Stericycle's Complaint and Petition for Declaratory Relief Is Fatally Flawed.**

2 12. The Washington Legislature has plainly set forth a comprehensive regulatory and
3 enforcement scheme which Stericycle ignores. The relevant statutes and regulations neither offer
4 Stericycle the ability to pursue a declaratory order; nor do they permit Stericycle to pursue
5 administrative litigation for the purpose of a "cease and desist" order or penalties.

6 13. WAC 480-70-930 governs the Commission's procedures for declaratory orders brought
7 under the APA. A filing party must choose the appropriate process or else the Commission "will reject
8 a single pleading that seeks a declaratory order or, in the alternative, an adjudicative order."¹⁶ Having
9 failed to elect which process applies to its litigation, Stericycle's pleading is fatally flawed and,
10 therefore, its Complaint and Petition for Declaratory Relief should be dismissed.

11 14. Stericycle alludes to the APA declaratory order provisions in reciting a panoply of
12 possible statutory grounds.¹⁷ Notably, it does not reference the Commission's duly adopted procedural
13 regulation that establishes the filing requirements for a petition seeking a declaratory order. Stericycle
14 plows right through such procedural niceties. Far from choosing the appropriate process, Stericycle
15 simply enumerated a litany of potential grounds, and filed a single pleading that seeks a declaratory
16 order along with a wide variety of possible adjudicative orders.

17 15. Stericycle should be required to choose which proceeding it wishes to pursue. The
18 election is a Hobson's choice for Stericycle. It really wants a bit of both. In truth, it qualifies for
19 neither.

20 **1. Stericycle's Complaint Is Not Eligible for the Declaratory Order Process.**

21 16. Despite its shotgun approach, the desire for a declaratory order is clearly in Stericycle's
22 sights. The caption reveals Stericycle's true intent: the pleading is called, "Complaint and **Petition for**
23 **Declaratory Relief.**" Three of the nine requests for relief seek "an order" from the Commission
24 "declaring" pronouncements about Waste Management's unregulated commercial recycling

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¹⁶ WAC 480-07-930(1)(b).

28 ¹⁷ Complaint and Petition for Declaratory Relief ¶ 5.

1 operations.¹⁸ However, the declaratory order process is not a tool for adjudicating specific allegations of
2 so-called statutory violations by a competitor.

3 17. The declaratory order process is a means for asking the Commission to declare the
4 application of its rules and statutes to particular practices.

5 The origin of declaratory orders in the administrative process lay in regulated
6 companies' frustration at being unable to secure a binding decision by a
7 regulatory agency as to what it would do in circumstances of interest to the
8 companies. The declaratory order process was created to allow a process for such
9 predictive decisions that would allow the companies to make decisions consistent
10 with the agencies' future actions.¹⁹

11 A declaratory order proceeding is a tool to determine prospective course of action for a regulated
12 company, not a means of classifying a competitor's non-regulated activities.

13 18. Stericycle is familiar with the appropriate use of a declaratory order proceeding. In 1998,
14 the Commission staff petitioned for a declaratory ruling seeking clarification about certain competitive
15 practices of biohazardous carriers.²⁰ In the context of that proceeding, Stericycle's own rebating
16 practices were among the topics addressed – but not until the Commission gave notice of an opportunity
17 to participate to all solid waste companies and other interested stakeholders.²¹ The Commission found
18 that Stericycle's practice of offering reduced rates for regular biomedical waste collection services to
19 nonprofit hospitals was being conducted for the purpose of competition rather than charity, and hence
20 constituted an illegal rebate.²² The Commission allowed for a transition period to file tariff corrections
21 and discontinue the illegal services.²³ There were other topics considered besides Stericycle's rebate
22 practices, including minimum terms and discontinuance conditions of service agreements that were
23 being used by the industry.²⁴

24 ¹⁸ Complaint and Petition for Declaratory Relief ¶¶ 21(b), 21(c), 21(d).

25 ¹⁹ Wash. Administrative Law Practice Manual, Ch. 9, §9.07(C) (Mathew Bender December 2011).

26 ²⁰ Declaratory Order, *In the Matter of the Petition of Commission Staff for a Declaratory Ruling [Regarding Biomedical
27 Waste Carriers]*, Docket No. TG-970532 (August 14, 1988).

28 ²¹ *Id.* (the Order does not have page numbers or paragraph numbers.)

²² *Id.*

²³ *Id.*

²⁴ *Id.*

1 19. Even if Stericycle’s Complaint and Petition for Declaratory Relief were susceptible to
2 processing as a declaratory order, the Commission has found that declaratory orders are not appropriate
3 for resolving policy questions.²⁵ The Complaint and Petition for Declaratory Relief implicates policy
4 questions about the boundaries between commercial recycling and regulated solid waste, which was the
5 subject of a failed rulemaking. If the Commission abandoned the 2008 rulemaking because of its
6 frustration in coming up with clear definitions, then surely this proceeding is not the proper forum for
7 resolving those issues. At the very least, if Stericycle’s request for declaratory orders is allowed to go
8 forward, the proceeding must be broadened to allow all stakeholders to participate.

9 20. Although it would like the Commissions to issue an order “declaring” Waste
10 Management’s practices illegal, Stericycle has not presented a claim that qualifies for a declaratory
11 order as that concept is allowed for under the APA and the Commission’s procedural rules. Stericycle’s
12 Complaint and Petition for Declaratory Relief should be dismissed. Stericycle should be required
13 instead to comply with the Commission’s procedural directives for initiating litigation.

14 **2. Stericycle Fails to Articulate a Request for Relief Which Can Be Granted in**
15 **Administrative Adjudication.**

16 21. The Commission has authority to “convert” Stericycle’s distorted pleading into an
17 adjudicative proceeding.²⁶ Still, the relief requested by Stericycle is not conducive to an administrative
18 adjudication, either, because none of the remedies sought could be granted.

19 22. The Transportation Act, Title 81 RCW, sets forth a comprehensive administrative
20 mechanism for regulating public service companies and entities acting as public service companies,
21 authorizing broad authority and multiple enforcement tools to the Commission and the State of
22 Washington. The Commission itself may initiate a complaint proceeding against any company acting as
23 a public service company “in violation, or claimed to be in violation, of any provision of law or of any
24 order or rule of the commission.”²⁷ Furthermore, the Commission may bring a classification proceeding

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26 ²⁵*In the Matter of the Petition of Puget Sound Energy, Inc. For a Declaratory Order on the Extra Credits for Apprentice*
27 *Labor Provision of RCW 19.285.040(2)(h)*, Docket U-111663 Order 01 (November 30, 2011) 2011 WL 6034495 (a policy
28 question is inappropriate for determination in a declaratory judgment proceeding).

²⁶ WAC 480-07-930(4).

²⁷ RCW 81.04.110.

1 and issue cease and desist orders.²⁸ The State may prosecute as a gross misdemeanor unlawful conduct
2 by anyone acting as a public service company.²⁹ The State also may bring an action for penalties against
3 a company acting unlawfully as a public service company.³⁰ None of those provisions is pertinent here.
4 The Commission did not initiate this proceeding.

5 23. In contrast to the Commission’s panoply of enforcement tools, the Legislature provided
6 private parties only limited means of recourse for business harms caused by the alleged misconduct of
7 entities claimed to be acting as competitors. The Commission considers a private complaint to be an
8 “enforcement action.”³¹ Other persons or entities outside the Commission have standing to bring a
9 complaint to enforce the law.³² However, private parties do not enjoy enforcement powers equal to
10 those of the Commission.³³ The anticompetitive complaint statute permits a regulated business to
11 pursue an enforcement action against an entity allegedly acting as a public service company in violation
12 of law – but allows only a limited scope of relief.³⁴ If such a complaint by a public service company is
13 substantiated, the relief the Commission may provide is limited to establishing “rates, charges, rules,
14 regulations or practices” that are intended to “correct the abuse complained of.”³⁵

15 24. The remedies Stericycle seeks are not available to a private competitor seeking to enforce
16 the law. RCW 81.04.110, pled by Stericycle, authorizes only the setting of new “uniform rates, charges,
17 rules, regulations or practices” in a private complaint action – but that is not what Stericycle asks for.

18 25. It primarily wants a declaratory order, but for reasons discussed above, its pleading is
19 flawed for that purpose. RCW 81.04.110 does not authorize declaratory relief. As a related alternative
20 remedy, Stericycles wants the Commission to order that Waste Management “cease and desist” certain

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22 ²⁸ RCW 81.04.510.

23 ²⁹ RCW 81.04.385.

24 ³⁰ RCW 81.04.387; RCW 81.04.400; RCW 81.04.405.

25 ³¹ Order 07, *Waste Connections of Washington, Inc. v. Enviro/Con & Trucking, Inc. and Waste Management Disposal
Services Of Oregon, Inc.*, Docket No. TG-071194, Initial Order Denying Motion For Leave To File Amended Complaint
(November 19, 2009).

26 ³² *Id.*

27 ³³ *Id.*

28 ³⁴ RCW 81.04.110.

³⁵ RCW 81.04.110.

1 practices that offend Stericycle.³⁶ Stericycle does not have statutory authority for obtaining a cease and
2 desist order from the Commission. Three of its nine requests for relief seek a cease and desist order
3 regarding Waste Management's services and pricing for commercial recycling, an activity that is
4 unregulated.³⁷ In essence, Stericycle is trying to initiate a classification proceeding, and goes so far as to
5 describe its Second Claim as one of "Misclassification." RCW 81.04.510 reserves to the Commission
6 the question of whether or not an entity is conducting business requiring operating authority from the
7 Commission.³⁸

8 26. Alternatively, Stericycle requests the Commission impose penalties, but RCW 81.04.110
9 also does not authorize Stericycle's request for penalties. The Legislature allowed penalties only in
10 RCW 81.04.405, and that statute authorizes prosecution for penalties only by the Commission.³⁹

11 **B. The Motion for Summary Determination is Baseless.**

12 27. There is no basis for concluding that Waste Management's ecoFinity program violates
13 the Commission's laws or that Waste Management is "unlawfully providing biomedical waste collection
14 services beyond the limits of its authorized service territory under certificate."⁴⁰ Contrary to Stericycle's
15 claims, the ecoFinity program is consistent with statute, Commission precedent, and agency rules.⁴¹
16 Stericycle is wrong in suggesting otherwise. Its Motion for Summary Determination should be denied,
17 and Waste Management's Cross Motion should be granted.⁴²

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20 ³⁶ Complaint and Petition for Declaratory Relief ¶¶ 21(a), 21(e), 21(f).

21 ³⁷ *Id.*

22 ³⁸ *In re the Matter of the Petition of San Juan Express, Inc., for a Cease and Desist Order*, Docket TS-940956, 4th
Supplemental Order (Nov 4, 1994) and 5th Supplemental Order (Dec 20, 1994).

23 ³⁹ *Glick v. Verizon Northwest, Inc.*, 2005 WL 484651, Docket No. UT-040535, Order 03 (WUTC Jan. 28, 2005) (analyzing a
24 private complaint brought under Chapter 80.04, the Commission said that allowing private parties to seek penalties "could
lead to vigilantism"...). See also Order 07, *Waste Connections of Washington, Inc. v. Enviro/Con & Trucking, Inc. and
Waste Management Disposal Services Of Oregon, Inc.*, Docket No. TG-071194, Initial Order Denying Motion For Leave To
File Amended Complaint (November 19, 2009).

25 ⁴⁰ Motion for Summary Determination ¶ 1.

26 ⁴¹ *Id.* ¶ 41.

27 ⁴² In its capacity as a universal solid waste collection company operating under the Commission's jurisdiction, Waste
28 Management has opposed sham recycling statewide. Waste Management believes the ecoFinity program is legitimately
performed as commercial recycling. If the Commission were to conclude otherwise through a final adjudication or
rulemaking, Waste Management would immediately discontinue the program.

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

3 28. Washington law restricts regulation of the collection of commercial recyclables. State
4 statutes enacted in 1989 provide:

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

9 Nothing in this chapter shall be construed as prohibiting a commercial or industrial
10 generator of commercial recyclable materials from selling, conveying, or arranging
11 for transportation of such material to a recycler for reuse or reclamation.⁴³

12 29. 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.⁴⁴ 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."⁴⁵ 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 general motor carrier laws in Chapter 81.80 RCW.⁴⁶ These codified provisions work in alignment to
20 implement the statutory exemption.

21 30. As a result, transportation of recyclable materials from commercial generators is no
22 longer subject to economic regulation by the Commission. Waste Management does not have tariff rates
23 for its commercial recycling collection and it is not constrained by the geographic limits of its
24 certificated territory. Collecting recyclable sharps from St. Joseph Medical Center in Bellingham for

25 ⁴³ RCW 81.77.140; *see also* RCW 35.21.158 (cities); RCW 36.58.160 (counties); RCW 70.95.903 (Ecology). These
26 provisions were codified in each of the statutory titles applicable to governmental entities which oversee solid waste
27 collection.

28 ⁴⁴ RCW 81.77.010(8); *see also* RCW 81.77.010(9) (excluding commercial recyclables from the definition of "solid waste").

⁴⁵ WAC 480-70-011(2)(b).

⁴⁶ RCW 81.80.470 ("The collection or transportation of recyclable materials from a drop box or recycling buy-back center, or
collection or transportation of recyclable materials by or on behalf of a commercial or industrial generator of recyclable
materials to a recycler for use or reclamation is subject to regulation under this chapter."); *see also* RCW 81.77.010(8)
(acknowledging that transportation of commercial recyclables is regulated under Chapter 81.80 RCW).

1 recycling and charging negotiated rates for the service is completely consistent with these statutes.
2 Notably, Washington legislation does not articulate any guidance about when a load from a commercial
3 or industrial generator qualifies as “recyclable materials,” and the Commission’s implementing
4 regulation merely restates the statutory language. However, Waste Management’s pilot program for
5 sharps comports with the Commission’s qualitative standards for commercial recycling which have
6 evolved since those statutes were enacted.

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

10 31. Over the years, the Commission has wrestled with the distinction between regulated solid
11 waste collection and unregulated commercial recycling. In all of these cases, the Commission struggled
12 with identifying the appropriate indicia for determining whether the customer intended its materials to
13 be recycled and whether the collection company truly intended to transport the material for recycling.
14 The Commission considered a wide variety of factually unique situations and addressed each in a case-
15 by-case effort to ascertain what the shippers intended, and how the materials were handled.⁴⁷

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

19 32. When the building industry boomed in the late 1990s and early 2000s, an increasing
20 number of contractors and demolition companies engaged in unregulated transportation, sometimes
21 unknowingly but sometimes claiming that they were performing commercial recycling. In the context
22 of this controversy and uncertainty, the Commission decided *In the Matter of Determining the Proper*

23 ⁴⁷ *In re Sunshine Disposal, Inc.*, Order M.V. No. 133753, Hearing No. E-19104 (April 25, 1986) (the “operative distinction is
24 the purpose of the transportation”); *Clark County Disposal, Inc. d/b/a Vancouver Sanitary Serv., et al. v. Env’tl. Waste Sys.,*
25 *Inc.*, Cause No. TG-2194 (October 19, 1989) (transporting for disposal is incidental to the private recycling business); *C&C*
26 *Transfer Co., Inc.*, Order M.V. No. 143632, App. No. E-74249 (July 12, 1991) (for agricultural sludge, depending on the
27 destination and end use of the commodity); *In re Safco Safe Transport*, Order M.V. No. 143916, App. No. P-73623 (October
28 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)
(dump truck transporting contaminated soil for disposal); *In re Med. Res. Recycling Sys., Inc.*, Order M.V.G. No. 1707, App.
No. GA-76820 (May 25, 1994) (properly seeking a certificate to collect and transport unsorted waste for disposal); *In re*
Lowell Haugen, d/b/a/ Med. Waste Mgmt. Sys., Inc., Order M.V. No. 148396, Hearing No. H-5024 (December 16, 1994) (the
purpose of transporting unsorted biomedical waste was disposal).

1 *Classification of Drop Boxes R Us, Inc.*⁴⁸ In *Drop Boxes R Us*, a classification proceeding initiated by
2 the Commission to resolve whether a self-professed recycling company was actually engaged in the
3 business of solid waste collection for which certificate authority would be required, the Commission set
4 forth functional criteria. The *Drop Boxes R Us* analytic provides the most definitive guidance to
5 evaluating whether a particular service is regulated solid waste collection or unregulated commercial
6 recycling.

7 33. The Commission first addressed the definition of “recyclable materials” and summarized
8 the plain meaning according to several benchmarks:

9 [I]n terms of their sources (*i.e.*, commercial or industrial generation (RCW
10 81.77.010(8))), how they are collected (*i.e.*, source separate or not; collected at central
11 drop boxes or recycling buy-back center (RCW 81.77.010(8))), how they are handled after
12 collection (*i.e.*, separated for transformation, remanufacture, or reuse (RCW
70.95.030(17))), and where they are taken (*i.e.*, other than to landfill disposal or
incineration sites (RCW 70.95.030(18))).⁴⁹

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

16 34. The Commission, however, decided that the distinction between solid waste collection
17 and recycling **was not susceptible to quantitative analysis**. Rather, the Commission ruled that how the
18 material is treated is determinative: “But without proper separation and handling, these same materials
19 are not ‘recyclable material’ as defined in our statutes or as a matter of plain common sense; they are, in
20 fact, solid waste destined for permanent disposal.”⁵⁰ This important precedent established the
21 Commission’s focus on “the various intentions of generator, transporter, and receiver of the materials in
22 question.”⁵¹ Through the lens of this analysis, as further described below, objective evidence shows that
23 all the participants in Waste Management’s ecoFinity service intend to recycle.

24
25 ⁴⁸ 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*”).

26 ⁴⁹ *Id.* at 6.

27 ⁵⁰ *Id.* at 10.

28 ⁵¹ *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 ¶ 32.

1 **b. The Commission's Rules Set Forth Objective Factors Which Demonstrate**
2 **Waste Management's ecoFinity Program Is Not Solid Waste Collection.**

3 35. Consistent with the principles articulated in *Drop Boxes R Us*, the Commission's rules
4 require consideration of the handling, destination, and disposition of materials in evaluating commercial
5 recycling. "Recyclable materials" means "materials that are transported for recycling, reprocessing,
6 reclamation, or for any process that extracts or modifies the commodity for reuse or another
7 commercially valuable purpose," reflecting a functional orientation to the actual handling, destination,
8 and disposition of the materials.⁵² "Recycling" means transforming or remanufacturing materials into
9 usable or marketable materials for use other than landfill disposal or incineration and also evidences a
10 practical view towards the ultimate outcome of materials collected.⁵³

11 36. The Commission's regulations do not require any specific amount of recovery to
12 demarcate the line between regulated solid waste and commercial recycling. In classifying
13 transportation activities, the Commission uses qualitative factors for determining whether a company's
14 operations require a solid waste certificate under Chapter 81.77 RCW:

- 15 (a) The intent of the shipper;
16 (b) The intended destination of the shipment;
17 (c) The actual destination of the shipment;
18 (d) Special handling or conditions placed on the shipment by the shipper and/or
19 receiver;
20 (e) The value of the commodity being transported;
21 (f) Whether the carrier is primarily engaged in the business of providing solid waste
22 collection or is primarily engaged in the business of providing a service other than
23 the collection of solid waste; and
24 (g) Whether the carrier holds itself out to the public as a transporter of solid waste.⁵⁴

25 These regulatory standards determine whether any potentially exempt transportation requires a motor
26 carrier permit or a solid waste certificate, be it a dump truck operator, or a private carrier whose primary

27 ⁵² WAC 480-70-041.

28 ⁵³ *Id.*; see also RCW 70.95.030(19).

⁵⁴ WAC 480-70-016(4).

1 business is not solid waste collection – or, as in the instant case, a commercial recycler.⁵⁵ So, for
2 example, these qualitative regulatory factors were applied to conclude that material transported to a
3 landfill for disposal cannot qualify as “recyclable material,” even if used at the landfill “waste
4 stabilization.”⁵⁶ For purposes of evaluating the statutory exemption for commercial recycling, these
5 regulatory factors allow the intentions of the generator, the transporter, and the receiver to be considered
6 in qualitative fashion but do not impose any numeric standards for diversion or percentages of loads.

7 37. Moreover, in 2010, the Commission abandoned rulemaking efforts to establish a bright
8 line distinction between recycling and solid waste. In 2008, in an attempt to resolve disagreement
9 among regulated solid waste collection companies, commercial recycling companies, waste/recycling
10 generators, and the Department of Ecology as to what activities the Commission should regulate as solid
11 waste collection under Chapter 81.77 RCW and what the Commission should regulate as common
12 carriage of property under Chapter 81.80 RCW, the Commission initiated rulemaking.⁵⁷ Two and a half
13 years later, the Commission withdrew its proposal.⁵⁸ After publishing two different drafts and
14 conducting multiple workshops, the Commission was saved from the frustration of further
15 administrative proceedings by the Governor’s moratorium on rulemaking. It abandoned efforts to
16 quantify a demarcation by reference to volume.

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

19 38. In 2005, the Legislature enacted “An Act Relating to ensuring the lawful transport and
20 handling of recyclable materials...”⁵⁹ Among other general policy goals, it was specifically intended to
21 “improve recycling, eliminate illegal disposal of recyclable materials, [and] protect consumers from
22 sham recycling...”⁶⁰ The amendment articulated the legislative purpose “to ensure that recyclable

23 ⁵⁵ WAC 480-07-011. For instance, the nature of a carrier’s primary business is obviously relevant more to the determination
24 of private carriage than it is to the question of commercial recycling.

25 ⁵⁶ *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).

26 ⁵⁷ WSR 08-10-094 (May 7, 2008) Docket TG-080591.

27 ⁵⁸ WSR 11-01-059 filed Dec. 8, 2010.

28 ⁵⁹ Laws of 2005 ch. 394, Preface.

⁶⁰ *Id.* § 1.

1 materials diverted from the waste stream for recycling are routed to facilities in which recycling
2 occurs....”⁶¹ The statute requires all “transporters” of commercial or industrial generators to register
3 with the Department of Ecology.⁶² “Transporter” includes commercial recycling operations of
4 certificated solid waste collection companies.⁶³ The law strictly states that “[a] transporter may not
5 deliver any recyclable materials for disposal to a transfer station or landfill” and imposes civil penalties
6 for violating the prohibition.⁶⁴

7 39. The Department of Ecology subsequently adopted regulations implementing this
8 legislation.⁶⁵ A transporter is not permitted to collect nonrecyclable solid waste and must ensure that all
9 sites at which it collects recyclable materials provide a separate container for solid waste.⁶⁶ Ecology
10 reasoned that all generators have some solid waste and therefore only if a generator has made
11 arrangements for disposal of its non-recyclable material can it objectively evidence an intent to recycle.
12 A legitimate transporter may not deliver any recyclable materials for disposal to a transfer station or
13 landfill.⁶⁷ The destination to which a hauler delivers the collected material is an objective manifestation
14 of the transportation goals.

15 40. Waste Management of Washington, Inc. is a registered transporter.⁶⁸ As analyzed further
16 below, when evaluated for compliance with the Department of Ecology’s regulations along with the
17 other relevant state laws and Commission precedent, the legitimacy of its ecoFinity program is readily
18 apparent.

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23 ⁶¹ *Id.* § 2; RCW 70.95.020(4).

24 ⁶² *Id.* § 4; RCW 70.95.400(2).

25 ⁶³ *Id.*; RCW 70.95.400(1).

26 ⁶⁴ *Id.* § 5; RCW 70.95.410.

27 ⁶⁵ Chapter 173-345 WAC.

28 ⁶⁶ WAC 173-345-040.

⁶⁷ WAC 173-345-060.

⁶⁸ <http://www.ecy.wa.gov/programs/swfa/transporter/pdf/pdf/WUTCTransporters.pdf>.

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

4 41. The Commission's decisions and rules regarding commercial recycling are far more
5 nuanced than Stericycle gives credit, and while volume is not a basis for a bright line demarcation, there
6 are "principled differences" which make the distinction.⁶⁹ The analytic in *Drop Boxes R Us* and the
7 factors set forth in the rules and regulations of the Commission and of the Department of Ecology
8 establish the grounds for evaluating legitimate commercial recycling. Unless or until the Commission
9 adopts more definitive or restrictive regulations, Waste Management's ecoFinity program complies with
10 all relevant principles and precedence.

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

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

16 43. The marketing materials presented to St. Joseph Medical Center describe the proposed
17 "Sharps Recycling Program/Partnership with Becton Dickinson (BD)."⁷⁰ The flyer sets out the price for
18 the "Sharps Recycling Container" along with the price for "Regulated Medical Waste (non
19 pathological)" and "Boxes for Incineration."⁷¹ An exhibit to the flyer shows a schematic of the sharps
20 recycling process.⁷² Another exhibit describes St. Joseph Medical Center as a "Sharps-only – Pilot
21 Facility."⁷³ The generator was plainly presented with a proposal for commercial recycling. The
22 Customer Service Agreement clearly states that it is a "Master Agreement for Sharps Recycling
23 Program."⁷⁴ There can be little doubt about what the customer intended.

24 ⁶⁹ Motion for Summary Determination ¶ 44 ("There is no principled difference between (1) a sharps waste service in which
25 a small portion of the sharps waste is recycled, (2) a full service biomedical waste collection service in which a small
26 portion of the waste is recycled, and (3) a general solid waste service in which a small portion of the waste is recycled.").

27 ⁷⁰ Van Kirk Decl., Ex. E at 2.

28 ⁷¹ *Id.* at 3.

⁷² *Id.*, Ex. 2.

⁷³ *Id.*, Ex. 3.

⁷⁴ Goldman Decl., Ex. 2.

1 44. Whatcom County’s comprehensive solid waste plan, which governs solid waste
2 generated at St. Joseph Medical Center, defines recyclable materials as: “[T]hose solid wastes that are
3 separated for composting, recycling, or reuse into usable or marketable materials.... Materials disposed
4 of in a landfill or through incineration are not considered recyclable materials, nor are residual material
5 remaining after recyclables have been removed.”⁷⁵ The sharps material separated by St. Joseph for
6 recycling squarely fits into this definition of recyclables. St. Joseph sorts the sharps material which is
7 handled by the pilot recycling program from the other biomedical waste at St. Joseph. Under regulations
8 adopted by the Department of Ecology, “source separation” means “the separation of different kinds of
9 solid waste at the place where the waste originates.”⁷⁶ As with solid waste programs, under this
10 definition, recyclables that are “source-separated” from the other solid waste destined for disposal do not
11 have to be further sorted by individual commodity type. Contrary to Stericycle’s assertion, the objective
12 evidence demonstrates that ecoFinity sharps waste is “separated for recycling or reuse.”⁷⁷ The fact that
13 the sharps waste materials themselves “contain mixed plastics, glass, metals, and other materials that are
14 only sorted by an outside reclamation company after the waste is treated” is neither determinative nor
15 relevant.⁷⁸

16 45. It means nothing that paperwork including the bill of lading, waste tracking, and labels
17 for ecoFinity sharps material refer to “biohazardous waste” and “regulated medical waste.”⁷⁹ These are
18 preprinted forms, and a pilot program of this size hardly warrants having special labels prepared.⁸⁰ And,
19 in fact, until the sharps waste is rendered inert in California, it must be handled as “regulated medical
20 waste.”⁸¹ The fact that paperwork used for the sharps collected at St. Joseph describes the material as
21 “biohazardous waste” and the need for special handling prior to the waste being rendered inert does not
22 preclude categorizing the material as commercial recycling. The Commission has classified

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24 ⁷⁵ Van Kirk Decl., Ex. H, §2, p. 20; Motion for Summary Determination ¶ 28.

25 ⁷⁶ WAC 173-350-100.

26 ⁷⁷ Motion for Summary Determination ¶ 27.

27 ⁷⁸ *Id.*

28 ⁷⁹ Van Kirk Decl., Exs. D (at 125:3-9) and F.

⁸⁰ Van Kirk Decl., Ex. D at 125:12-20.

⁸¹ *Id.* at 116: 4-6.

1 transportation as commercial recycling for “recyclable hazardous materials” consisting of regulated
2 dangerous waste, even though it was subject to special handling under strict environmental regulations
3 and manifest paperwork before being processed for recycling.⁸² In that case, transporting solvents,
4 petroleum products, and anti-freeze to a storage site, then to a bulk processor, and finally to an out-of-
5 state recycler was commercial recycling regulated under the motor carrier laws, and not solid waste
6 collection. In this case, transporting “biohazardous waste” consisting of sharps recyclables from St.
7 Joseph is similar, and labels are irrelevant if all other factors are present.

8 46. That St. Joseph Medical Center does not receive payment for the recyclable sharps also is
9 inconclusive. Under *Drop Boxes R Us*, whether the material has commercial value is only one of the
10 indicators of commercial recycling. Recycling is not always profitable and sometimes it costs to
11 transport and process recyclable materials. Even still, some shippers may wish to recycle despite the
12 costs, and many customers are often willing to pay more for recycling services than disposal services.
13 Stericycle’s reliance on its view that the recycled sharps waste is lacking in “commercial value” is
14 simplistically erroneous and unsupported.⁸³

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

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

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

27 _____
28 ⁸² *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 49. With regard to how they are handled, the generator expects the sharps to be transported to
2 a treatment facility, then recycled by Becton Dickinson, and then remanufactured into new products.⁸⁴
3 And that is indeed what happens. The sharps are taken first to Seattle, where they are placed in a
4 refrigerated trailer before being transported to Vernon, California for processing.⁸⁵ The sterilized,
5 washed and shredded sharps containers and their contents are then sent to Talco Corporation where the
6 material is separated utilizing a float/sink technology.⁸⁶ The plastics recovered are then pelletized and
7 used by Becton Dickinson in remanufacturing of sharps containers.⁸⁷ Becton Dickinson is the
8 “recycler” and that is the final destination for the recyclable materials collected.⁸⁸ The percentages
9 recycled vary and are higher in some months than others.⁸⁹ But that is not because of diversion to a
10 landfill.

11 50. Waste Management’s intention to transport the sharps for recycling is clearly evidenced
12 by this process. Indeed, in stating that the amount recycled is apparently limited by “throughput”
13 capacity at the California processing facilities, Waste Management’s Washington personnel observed,
14 “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
15 recycling.”⁹⁰

16 51. Further evidence of St. Joseph’s intention to recycle is that the sharps Waste Management
17 collects under the ecoFinity program from the Bellingham hospital are not sent to Waste Management’s
18 Seattle autoclave, where all the rest of the sharps material collected by Waste Management is pre-treated
19 for landfill disposal.⁹¹ Instead, Waste Management processes the sharps waste collected under the pilot
20 program through a different route which ultimately uses some portion of the recyclable materials in new
21 products.

22
23 ⁸³ Motion for Summary Determination ¶ 40.

24 ⁸⁴ Goldman Decl., Ex. 3.

25 ⁸⁵ Van Kirk Decl., Ex. C.

26 ⁸⁶ *Id.*

27 ⁸⁷ *Id.*

28 ⁸⁸ *Id.*

⁸⁹ *Id.*, Ex. G; Goldman Decl., Ex. 4.

⁹⁰ Goldman Decl., Ex.5 at 132:3-7.

1 52. Stericycle is inventing a new quantitative standard when it boldly states that a carrier is
2 only exempted from economic regulation if the material transported contains “more than incidental
3 recyclable content.”⁹² There is no such thing as a “*Haugen* rule.”⁹³ In favor of its newly-announced
4 “*Haugen* rule,” Stericycle ignores the more recent and precedential Commission decisions and rules
5 governing commercial recycling discussed above.

6 53. Importantly, at issue in *Haugen* was a full service biomedical waste service collecting
7 both sharps and all other kinds of biomedical wastes.⁹⁴ Waste Management is not offering full service
8 biomedical waste collection service to St. Joseph Medical Center. Stericycle’s attempts to apply the
9 *Haugen* decision are not applicable because Waste Management is not suggesting that its ecoFinity
10 program entitles it to collect all of the Bellingham hospital’s biomedical waste; it is only collecting
11 source-separated recyclable materials. Stericycle itself collects the rest. Unlike the situation in the old
12 biomedical waste proceedings on which Stericycle relies, the ecoFinity pilot program is not an attempt
13 to shoe-horn a broader scope of services into the exemption for commercial recycling.⁹⁵ If there ever
14 were a “*Haugen* rule,” it would not apply in this case because source separation is one of the most
15 important indicators of shipper intent to recycle.

16 54. Stericycle narrowly emphasizes a provision in the motor carrier statute as prohibiting
17 transportation by a commercial recycler of “incidental” amounts of recyclable materials without a solid
18 waste certificate.⁹⁶ But that statute is nothing more than the complementary transfer of regulatory
19 authority over commercial recycling within the Commission’s Transportation Title 81 from the solid
20 waste chapter to the motor carrier chapter. The statute specifically cautions that, in making the
21 affirmative statement of motor carrier oversight, “[n]othing in this chapter changes RCW
22
23

24 ⁹¹ Van Kirk Decl., Ex. D at 117:23-118:13.

25 ⁹² Motion for Summary Determination ¶¶ 4, 25.

26 ⁹³ *Id.* ¶ 42.

27 ⁹⁴ *In re Lowell Haugen d/b/a Med. Waste Mgmt. Sys., Inc.*, Order M.V. No. 148521, Hearing No. H-5024 (Apr. 27, 1995).

28 ⁹⁵ Goldman Decl., Ex. 2.

⁹⁶ Motion for Summary Determination ¶ 24 (citing RCW 81.80.470).

1 81.77.010(8)...⁹⁷ And under RCW 81.77.010(8), regulated solid waste collection does not include
2 collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator.

3 55. The motor carrier statute does not stand for the proposition that diversion rates are the
4 benchmark for determining whether legitimate commercial recycling is being performed. Instead, it
5 incorporates by reference the Commission's body of law under Ch. 81.77 RCW, making the deciding
6 factors the objective manifestations of the intentions of the shippers, the transporters, and the receiving
7 facilities. Conversely, the Commission's motor carrier statute, RCW 81.80.470, is not intended to allow
8 any motor carrier (lacking a G certificate) to collect solid waste that may incidentally contain recyclable
9 materials – but neither does it prohibit any entity from collecting recyclable materials that may
10 incidentally contain solid waste.

11 56. In its myopic emphasis on outcome quantities, Stericycle's logic is alarming. Stericycle
12 reasons that because the Whatcom County definition explicitly states that "residual" material after
13 removing recyclables is not considered recyclable materials, any haul involving waste of any amount
14 that needs to be landfilled after processing would require a solid waste certificate from the Commission
15 authorizing the service.⁹⁸ Stericycle's logic would completely eviscerate the concept of unregulated
16 commercial recycling, since there are almost always some residuals remaining after processing materials
17 to be marketed to recyclers. Only 100% pure loads of recyclable material could be considered
18 commercial recycling, according to Stericycle's reasoning.

19 57. Stericycle's position would effectively undermine numerous recycling programs where
20 the materials targeted for recycling constitute only a small percentage of the item being recycled. For
21 example, just yesterday, the Department of Ecology announced its final regulations for recycling
22 mercury in mercury-containing lights (e.g., spent fluorescent lamps)⁹⁹. Since the mercury content in
23 any fluorescent lamp is but a fraction of the overall lamp, only a certificated hauler could be a
24 transporter under the new program – at least in Stericycle's view. The Legislature might take a dim
25 view of any interpretation that would undermine its clear directive to increase recycling.

26 _____
27 ⁹⁷ RCW 81.80.470(2).

28 ⁹⁸ Motion for Summary Determination ¶ 29.

⁹⁹ Chapter 173-910 WAC.

1 58. Similarly, Stericycle’s contention that interim processing of the recyclable sharps waste
2 destroys the ability to collect it as commercial recycling would render even the most pure and
3 undeniably legitimate programs illegal.¹⁰⁰ Very few recyclables are delivered straight from the
4 generator to the recycler. Interim handling to sort and process the materials is commonly required.¹⁰¹
5 The “recycler” is actually only the end-of-the-line entity that actually transforms or remanufactures the
6 material.¹⁰² In this instance, Becton Dickinson is the recycler. Preparing the material for market at
7 Waste Management’s Vernon facility before delivering it to Becton Dickinson for reuse is not only
8 beside the point, it is common practice. The inquiry turns on where the material goes **after** being
9 processed by Talco. Only if all of it were disposed after treatment – which plainly is not the case here –
10 would it not be recycling.¹⁰³

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

15 59. Under the standards set forth in the Commission’s regulations and its seminal decision in
16 *Drop Boxes R Us*, Waste Management’s ecoFinity program qualifies as commercial recycling. That
17 case requires looking to the source of the material, which in this case is clearly a commercial generator.
18 It demands analysis of how the materials are collected and the fact that the sharps are source separated is
19 key, as is the evidence that St. Joseph has other arrangements for collecting its non-recyclable waste.
20 Commission precedent calls for evaluating how the materials are handled after collection, and in this
21 instance after being treated the sharps materials are separated for transformation, and delivered to a
22 recycler for remanufacture or reuse. And finally, under the Commission’s order as well as the
23 Department of Ecology transporter regulations, a critical point is whether the material collected is taken
24 to a landfill or not. Unlike the majority of sharps collected by Waste Management in Washington,
25 which are treated in Seattle and then delivered to a landfill for disposal, the recyclable material from the

26
27 ¹⁰⁰ *Id.* ¶ 39.

¹⁰¹ See WAC 173-350-310(2) (permits for interim solid waste handling facilities include material recovery facilities).

28 ¹⁰² RCW 70.95.030(18); WAC 173-350-100.

1 sharps waste is transported for processing and recycling. Only the residuals that cannot be processed or
2 recycled are taken to a landfill.

3 60. The Commission has not articulated a quantitative standard for commercial recycling,
4 and arguably that sort of certainty would be welcome (though this proceeding would not be the proper
5 forum to determine an issue which such broad-ranging impact). But its authority to police sham
6 recycling is nonetheless broad. Allowing Waste Management to continue its sharps recycling program
7 as commercial recycling will not create a new loophole, as Stericycle suggests. It would not, for
8 instance, allow a new entrant to evade regulation by claiming that its reuse of containers constitutes
9 recycling. Indeed, every solid waste company in the state reuses its garbage cans and drop boxes.
10 Despite Stericycle's histrionics, its sharps waste collection service involving reusable sharps containers
11 would not qualify as "recycling."¹⁰⁴ Neither new entrants nor existing carriers can "adapt their service
12 offerings to include a minimal recycling component" to evade the Commission's authority and rules.¹⁰⁵

13 61. Under current laws, the "handling, destination, and disposition" of the waste is
14 determinative of "the various intentions of generator, transporter, and receiver of the materials in
15 question."¹⁰⁶ Waste Management's ecoFinity program comports with the Commission's laws and
16 applicable regulations. Stericycle's Motion for Summary Determination should be denied, and instead
17 Waste Management should be granted summary determination in its favor dismissing Stericycle's
18 Second Claim based on the pilot ecoFinity program.¹⁰⁷

22 ¹⁰³ See, e.g., *In re Ryder Distribution Sys, Inc.*, Order M.V.G. No. 1536, App. No. GA-75563, at 6 (rejecting the contention
23 that the applicant was recycling because "substances will be disposed after treatment and will not be regularly or exclusively
24 recycled.").

25 ¹⁰⁴ Motion for Summary Determination ¶ 43.

26 ¹⁰⁵ *Id.*

27 ¹⁰⁶ *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 (citing to *Drop Boxes R Us*).

¹⁰⁷ It is accepted practice in Washington to grant summary determination to a nonmoving party on an adequate record. See
State Health Insurance Pool v. Health Care Authority, 129 Wn.2d 504 (1996); 4 Wash. Practice Series, Rules Practice CR 56
§ 17 (5th ed. 2006) (The courts "have long held that summary judgment may be granted in favor of the nonmoving party if it
becomes clear that he or she is entitled thereto.") (citations omitted).

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VI. CONCLUSION

For reasons based on both procedural and substantive grounds, Waste Management respectfully asks the Commission to rule in its favor, and dismiss this new iteration of administrative wastefulness in Stericycle's dogged pursuit to keep meaningful competition at bay, by:

a. Granting Waste Management's Cross-Motion for Summary Determination dismissing Stericycle's Complaint and Petition for Declaratory Relief or,

b. In the alternative, denying Stericycle's Motion for Summary Determination and granting Waste Management's Cross-Motion for Summary Determination, thereby dismissing the Second Claim of Stericycle's Complaint and Petition for Declaratory Relief.

DATED this 27th day of November, 2012.

SUMMIT LAW GROUP PLLC

By 

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

*Attorneys for Waste Management of
Washington, Inc. d/b/a WM Healthcare
Solutions 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, Adam Torem, Fronda Woods, and Stephen B. Johnson et al.

DATED at Seattle, Washington, this 27th day of November, 2012.

Handwritten signature of Kathy Moll over a horizontal line, with the name 'Kathy Moll' printed below.