

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of

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

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

DOCKET TG-120033

COMMISSION STAFF POST-
HEARING BRIEF

1 The Staff of the Washington Utilities and Transportation Commission (“Staff”) submits this post-hearing brief in accordance with the schedule established in the December 7, 2012 Notice in this docket. Staff focuses primarily on the issues of “fitness” under RCW 81.77.040 and concludes that Waste Management has demonstrated fitness. Staff also offers comment on the issue of whether the protestants “will not provide service to the satisfaction of the commission” under RCW 81.77.040, but expresses no opinion on the merits of that issue.

I. BACKGROUND

A. Waste Management’s Application

2 In the application that initiated this docket, Waste Management of Washington, Inc. (“Waste Management”) seeks approval to “transport Biomedical Waste for collection and disposal throughout the State of Washington.”¹ Biomedical waste is “solid waste” whose

¹ *In re Waste Mgmt.*, Docket TG-120033, Application at 2 (filed Dec. 30, 2011).

collection the Commission regulates under RCW Chapter 81.77.² Generally, a company must obtain a “G certificate” from the Commission before hauling solid waste for compensation in Washington.³ The Commission has interpreted the authority conferred by a general G certificate to include the authority to collect biomedical waste.⁴

3 Waste Management holds Certificate G-237, which authorizes it to collect solid waste throughout Skagit, Snohomish, King, Pierce, and Kittitas Counties, and in portions of Whatcom, Island, Kitsap, Mason, Chelan, Douglas, Okanogan, Grant, Lincoln, Benton, and Spokane Counties.⁵ The certificate expressly restricts Waste Management from collecting biomedical waste in a few areas of King County adjacent to Redmond,⁶ but Waste Management currently has authority to collect biomedical waste everywhere else within the service territory described in Certificate G-237.

4 Waste Management provided biomedical waste collection services in the early 1990s. In 1996, Waste Management sold its biomedical waste operation, but it did not sell the biomedical waste authority in Certificate G-237.⁷ In March 2011, Waste Management sought to resume offering biomedical waste collection services in Washington, and filed a tariff for collection of biomedical waste within the service territory described in Certificate

² *In re Biomedical Waste Carriers*, Docket TG-970532, Declaratory Order at 10 (Wash. Utils. & Transp. Comm’n, Aug. 14, 1998); *In re Rowland d/b/a Kleenwell Biohazard & Gen. Ecology Consultants*, Docket TG-920304, Final Order at 6 (Wash. Utils. & Transp. Comm’n, Jan. 25, 1993).

³ RCW 81.77.040. Under RCW 81.77.020, a company hauling solid waste under a contract with a city or town does not need a G certificate to perform that service, and the Commission does not regulate that service.

⁴ *Stericycle v. Waste Mgmt.*, Docket TG-110553, Order 02 ¶¶ 30, 37 (Wash. Utils. & Transp. Comm’n, July 13, 2011); see *In re Am. Envtl. Mgmt. Corp.*, Order M. V. G. No. 1452 at 7 (Wash. Utils. & Transp. Comm’n, Nov. 30, 1990) (“The Commission agrees that the permanent authority of existing G-certificate holders includes the authority to collect infectious waste”); *In re Sureway Med. Servs.*, Order M. V. G. No. 1663 at 5 (Wash. Utils. & Transp. Comm’n, Nov. 19, 1993) (“G-12 is a general solid waste permit, and therefore includes authority to collect and transport biomedical and biohazardous waste”); WAC 480-70-041 (“Unless the company’s certificate is restricted against doing so, a traditional solid waste collection company may also perform specialized solid waste collection service”).

⁵ Certificate G-237 was admitted during the evidentiary hearing in this docket as Exhibit JD-13.

⁶ The restriction appears in the paragraph labeled “(PID435)” on the fourth page of Exhibit JD-13 (Bates # WM000004).

⁷ See *Stericycle v. Waste Mgmt.*, Docket TG-110553, Order 02 at 4 n.3 (Wash. Utils. & Transp. Comm’n, July 13, 2011).

G-237. The Commission permitted the tariff to go into effect by operation of law.⁸

Stericycle filed a complaint, alleging that Waste Management had abandoned its biomedical waste authority under Certificate G-237, and urging that Waste Management must get new authority from the Commission before collecting biomedical waste. The Commission rejected those arguments and dismissed the complaint.⁹

5 On December 30, 2011, Waste Management initiated this docket by applying for an extension of authority to enable it to provide biomedical waste collection service in the remainder of the State of Washington outside the territory described in Certificate G-237. The Commission received protests from five companies that already serve all or part of the territory into which Waste Management proposes to expand.

B. Prior Orders in this Docket

6 The Commission must evaluate Waste Management's application under the standards of RCW 81.77.040:

A solid waste collection company shall not operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. . . .

Issuance of the certificate of necessity must be determined on, but not limited to, the following factors: [1] The present service and the cost thereof for the contemplated area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal, set out in an affidavit or declaration; [2] a statement of the assets on hand of the person, firm, association, or corporation that will be expended on the purported plant for solid waste collection and disposal, set out in an affidavit or declaration; [3] a statement of prior experience, if any, in such field by the petitioner, set out in an affidavit or declaration; and [4] sentiment in the community contemplated to be served as to the necessity for such a service.

⁸ WM Healthcare Solutions of WA – Tariff No. 2 (effective April 6, 2011), Docket TG-110552; *see* WAC 480-70-262(2).

⁹ *Stericycle v. Waste Mgmt.*, Docket TG-110553, Order 02 (Wash. Utils. & Transp. Comm'n, July 13, 2011).

(Numerals added.) The first three factors are sometimes called “financial and operational fitness.”¹⁰

7 In accordance with Commission precedent, the presiding officer has ruled that Waste Management has the burden to prove financial and operational fitness under RCW 81.77.040.¹¹ The presiding officer has suggested that the inquiry of whether an applicant has satisfactorily demonstrated its financial and operational fitness “may be reserved for the Commission or its Staff.”¹² Staff hereby provides its assessment of the evidence that Waste Management has presented.

II. ARGUMENT

A. Fitness

8 In Order 04 in this docket, the presiding officer provided guidance on the type of evidence that a company must present under RCW 81.77.040 to establish financial and operational fitness:¹³

The statute requires, at a minimum, a description and analysis of the facilities needed, the estimated attendant costs, and the assets the applicant commits to provide, to offer the requested service. The requisite description of the applicant’s experience must be sufficient to give credibility to that analysis, as well as reassurance that the applicant will provide service to the satisfaction of its future customers and the Commission. The Commission expects such information to be offered in the form of an affidavit or declaration, if not testimony, from one or more persons with personal knowledge of the facts and how they were developed and analyzed.

¹⁰ *In re Waste Mgmt.*, Docket TG-120033, Order 04 ¶ 6 (June 4, 2012); Order 01 ¶ 8 (April 16, 2012).

¹¹ *In re Waste Mgmt.*, Docket TG-120033, Order 04 ¶ 9 (June 4, 2012); Order 03 ¶ 13 (May 14, 2012); *see In re Ryder Dist. Res., Inc.*, Order M. V. G. No. 1761 at 5, 9 (Wash. Utils. & Transp. Comm’n, Aug 11, 1995); *In re Sureway Med. Servs., Inc.*, Order M. V. G. No. 1663 at 4 (Wash. Utils. & Transp. Comm’n, Nov. 19, 1993); *In re Am. Envtl. Mgmt. Corp.*, Order M. V. G. No. 1452 at 5 (Wash. Utils. & Transp. Comm’n, Nov. 30, 1990); *In re Sure-Way Incineration, Inc.*, Order M. V. G. No. 1451 at 8, 11 (Wash. Utils. & Transp. Comm’n, Nov. 30, 1990); *In re Nw. Unitech, Inc.*, Order M. V. G. No. 1367 at 4 (Wash. Utils. & Transp. Comm’n, Jan. 20, 1989).

¹² *In re Waste Mgmt.*, Docket TG-120033, Order 03 ¶ 16 (May 14, 2012).

¹³ *In re Waste Mgmt.*, Docket TG-120033, Order 04 ¶ 9 (June 4, 2012).

9 To demonstrate fitness, Waste Management has provided the declarations of four witnesses, with attachments: Jeff Daub (Exhibits JD-1T and JD-2 through JD-23), Mike Weinstein (Exhibits MAW-16T and MAW-17 through MAW-23), Jeff Norton (Exhibits JN-4T, JN-5, and JN-6), and Michael McInerney (Exhibit MM-1T).

1. Cost of Service and Facilities

10 Mike Weinstein provided testimony about the present service and the cost thereof for Waste Management's biomedical waste operations under Certificate G-237 during 2011 and the first eight months of 2012.¹⁴ Mr. Weinstein testified that Waste Management's biomedical waste services have operated at a loss, but that Waste Management's parent company has absorbed the loss.¹⁵

11 Mr. Weinstein projected that Waste Management's biomedical waste business will become profitable in 2015 if statewide authority is granted.¹⁶ Mr. Weinstein assumed that some of the business would come from former Stericycle customers, while some would come from market expansion attributable to an aging population and the implementation of the federal Affordable Care Act.¹⁷

12 The mere fact that some customers of existing providers may switch to Waste Management is not enough to suggest that the market cannot support competition.¹⁸ In any event, the record contains no evidence that the market for biomedical waste services is declining in Washington.

¹⁴ Weinstein, Exh. No. MAW-16T ¶¶ 2, 3; Exh. Nos. MAW-17, MAW-18.

¹⁵ Weinstein, Exh. No. MAW-16T ¶¶ 2, 3.

¹⁶ Weinstein, Exh. No. MAW-16T ¶¶ 5-10; Exh. No. MAW-21.

¹⁷ Weinstein, Exh. No. MAW-16T ¶ 9; *see* Weinstein, TR: 286:6-11.

¹⁸ *Cf. In re San Juan Airlines, Inc., d/b/a Shuttle Express*, Order M. V. C. No. 1899 at 7 (Wash. Utils. & Transp. Comm'n, March 7, 1991) (granting application for auto transportation authority; protestant predicted an adverse impact on its business but provided no proof of that assertion).

2. Assets to be Expended

13 Jeff Daub testified that Waste Management of Washington, Inc., currently uses its own staff, along with accounting staff from the national corporate headquarters of Waste Management, Inc., to provide biomedical waste services in Washington.¹⁹ He testified that fourteen Waste Management employees are “involved with” providing Waste Management’s biomedical waste services in Washington.²⁰ He did not say whether those employees work full- or part-time in biomedical waste services. Mr. Daub described the vehicles that Waste Management uses to transport biomedical waste.²¹

14 Mr. Daub testified that, if statewide authority is granted, Waste Management would require an additional driver and truck for biomedical waste services when biomedical waste revenue increases by 30 percent.²² He testified that the other equipment Waste Management uses for biomedical waste services has excess capacity that can absorb additional business.²³

15 Waste Management provided evidence that Waste Management’s parent company, as well as a corporate affiliate, will provide financial support during the initial years of biomedical waste operations, at least until mid-2015. Mike Weinstein testified that Waste Management’s parent company is a Fortune 200 company with annual revenues in the billions of dollars.²⁴ He asserted that Waste Management’s parent company will absorb Waste Management’s costs until its biomedical waste service achieves profitability, which Mr. Weinstein predicts will happen in mid-2015 if statewide authority is granted.²⁵ Michael McInerney, who identified himself as the President of WM Healthcare Solutions, Inc., a

¹⁹ Daub, Exh. No. JD-1T ¶¶ 5, 6.

²⁰ Daub, Exh. No. JD-1T ¶ 7.

²¹ Daub, Exh. No. JD-1T ¶¶ 14, 20; Exh. No. JD-12.

²² Daub, Exh. No. JD-1T ¶¶ 33-34.

²³ Daub, Exh. No. JD-1T ¶ 35.

²⁴ Weinstein, Exh. No. MAW-16T ¶ 12.

²⁵ Weinstein, Exh. No. MAW-16T ¶ 12; *see id.* ¶¶ 5-10; Exh. No. MAW-21.

corporate affiliate of Waste Management, testified that WM Healthcare Solutions, Inc., is “committed to providing any necessary logistical and financial support to Waste Management’s regulated biomedical waste services in Washington.”²⁶ Jeff Daub also testified that Waste Management “has the full financial backing of Waste Management, Inc.” to expand its biomedical waste services.²⁷

16 An applicant for biomedical waste authority must demonstrate the financial feasibility of the operation.²⁸ The test for financial feasibility is “whether the applicant has the financing to conduct the operations for a reasonable period; whether it has reasonably considered the costs of providing service; and whether those costs appear to be reasonable.”²⁹ Evidence of support from a parent company is evidence of financial fitness.³⁰ Here, the evidence shows that Waste Management has reasonably considered the reasonable costs of providing service, that Waste Management’s biomedical waste operation has been able to draw on ample financial resources from a financially viable parent company, and that those resources are likely to remain available to Waste Management for a reasonable period.

17 In a case involving an application for auto transportation authority under RCW 81.68.040 and WAC 480-30-126, whose language is somewhat similar to that of RCW 81.77.040, the Commission explained its approach to financial fitness:³¹

The Commission does not consider an applicant’s financial condition to be a critical element in a grant of authority, so long as there is credible evidence

²⁶ McInerney, Exh. No. MM-1T ¶¶ 1, 5.

²⁷ Daub, Exh. No. JD-1T ¶ 36. The 2011 Annual Report of Waste Management, Inc., was admitted as Exhibit JD-2.

²⁸ *In re Ryder Dist. Res., Inc.*, Order M. V. G. No. 1761 at 9 (Wash. Utils. & Transp. Comm’n, Aug 11, 1995); see *In re Sureway Med. Servs., Inc.*, Order M. V. G. No. 1663 at 4, 17, 19, 21 (Wash. Utils. & Transp. Comm’n, Nov. 19, 1993).

²⁹ *In re Ryder Dist. Res., Inc.*, Order M. V. G. No. 1761 at 9 (Wash. Utils. & Transp. Comm’n, Aug 11, 1995).

³⁰ *In re Am. Envtl. Mgmt. Corp.*, Order M. V. G. No. 1452 at 5 (Wash. Utils. & Transp. Comm’n, Nov. 30, 1990).

³¹ *In re Hartley, d/b/a Seattle Super Shuttle*, Docket TC-001566, Commission Decision & Order Reversing Initial Order Denying Application, ¶ 42 (Wash. Utils. & Transp. Comm’n, Feb. 15, 2002).

that the applicant has sufficient financing to begin operations and continue them for a reasonable period while its business is building.

Staff believes those conditions are met here.

18 Staff believes that Waste Management has demonstrated financial fitness.

3. Prior Experience

19 Since April 2011, Waste Management has had a biomedical waste tariff in effect within the territory covered by Certificate G-237.³² Jeff Norton testified that Waste Management began providing regulated biomedical waste services to Washington customers after the tariff took effect.³³ Mike Weinstein testified that Waste Management had 178 biomedical waste customers by the end of 2011, and 187 customers by the end of August 2012.³⁴ Jeff Norton said that Waste Management “presently” serves 220 biomedical waste customers in the G-237 territory.³⁵ The record contains no evidence that UTC Staff has received any customer complaints about Waste Management’s biomedical waste services.³⁶

20 Waste Management is a corporate affiliate of WM Healthcare Solutions, Inc.³⁷ Michael McInerney testified that WM Healthcare Solutions, Inc., has been in the medical waste business since 2008 and serves customers in 45 states.³⁸ He said that WM Healthcare Solutions, Inc., is “committed” to providing logistical and financial support to Waste Management in Washington.³⁹

³² WM Healthcare Solutions of WA – Tariff No. 2 (effective April 6, 2011), Docket TG-110552. Paragraph PID435 of Certificate G-237 restricts Waste Management from collecting biomedical waste in a few areas of King County adjacent to Redmond.

³³ Norton, Exh. No. JN-4T ¶ 4.

³⁴ Weinstein, Exh. No. MAW-16T ¶¶ 2, 3.

³⁵ Norton, Exh. No. JN-4T ¶ 5. Mr. Norton signed his declaration, Exhibit JN-4T, on September 28, 2012.

³⁶ Norton, Exh. No. JD-1T ¶ 28; *see* Weinstein, Exh. No. MAW-16T ¶ 28; Exh. No. MP-21.

³⁷ *See* Daub, Exh. No. JD-1T ¶¶ 4, 5; McInerney, Exh. No. MM-1T ¶ 3.

³⁸ McInerney, Exh. No. MM-1T ¶ 4.

³⁹ McInerney, Exh. No. MM-1T ¶ 5.

21 Jeff Daub described the training that Waste Management provides to its employees who handle biomedical waste.⁴⁰ Mr. Daub described the procedures they use, and the methods Waste Management uses for disposal.⁴¹ As described, they appear to be consistent with the Commission's biomedical waste rules at WAC 480-70-426 through WAC 480-70-476, and the record contains no indication that Waste Management has violated those rules.⁴²

22 Mr. Daub testified that Waste Management leases the vehicles it uses to transport biomedical waste.⁴³ He provided copies of Waste Management's written lease agreements, as required by WAC 480-70-211(1).⁴⁴ Mr. Daub described Waste Management's liability insurance.⁴⁵

23 An applicant for biomedical authority must show that it has a disposal site available on a consistent, reliable basis.⁴⁶ Staff believes Waste Management has made that showing. Jeff Daub identified the disposal sites that Waste Management uses in Washington and Oregon.⁴⁷ He testified that Waste Management or an affiliated company owns or controls two of the sites, and demonstrated that Waste Management has contractual authority to use a third site.⁴⁸

24 In September 2011, the Washington Department of Ecology issued a Notice to

⁴⁰ Daub, Exh. No. JD-1T ¶¶ 8-9; Exh. Nos. JD-3, JD-4, JD-5, JD-6; *see* Exh. No. JN-5. Exhibit JD-4 is a copy of Waste Management's Medical Waste Protocol as of August 2010. Exhibit JN-5 is a copy of Waste Management's Medical Waste Protocol as of July 2012.

⁴¹ Daub, Exh. No. JD-1T ¶¶ 10-15, 17-18.

⁴² The record contains no indication that the protestants have violated WAC 480-70-426 through WAC 480-70-476.

⁴³ Daub, Exh. No. JD-1T ¶¶ 14-15, 20; Exh. No. JD-12.

⁴⁴ Exh. No. JD-12.

⁴⁵ Daub, Exh. No. JD-1T ¶ 16; Exh. No. JD-7. Staff has not evaluated whether the insurance meets the requirements of WAC 480-70-181.

⁴⁶ *In re Sure-Way Incineration, Inc.*, Order M. V. G. No. 1451 at 13 (Wash. Utils. & Transp. Comm'n, Nov. 30, 1990); *see* WAC 480-70-456.

⁴⁷ Daub, Exh. No. JD-1T ¶¶ 17-18.

⁴⁸ Daub, Exh. No. JD-1T ¶¶ 17-18; Exh. No. JD-11.

Comply regarding Waste Management's Seattle Biomedical Waste Treatment Facility.⁴⁹

Violations of the law bear on the issue of fitness, but they do not foreclose an applicant from establishing its fitness, especially where the applicant has discontinued unauthorized practices and has come into compliance.⁵⁰ Here, Jeff Daub's testimony indicates that Waste Management has taken steps to come into compliance, though it is unclear whether the matter has been finally resolved.⁵¹

25 Staff believes that Waste Management has demonstrated operational fitness.

B. Protestants' Service to the Satisfaction of the Commission

26 The record contains some evidence of deficiencies in the service provided by Stericycle, the principal protestant to Waste Management's application. Staff does not believe that these deficiencies, by themselves, are enough to support a finding that Stericycle will not provide service to the satisfaction of the Commission under RCW 81.77.040. Staff expresses no opinion on whether Waste Management has demonstrated that the biomedical waste collection and disposal service currently provided in the territory Waste Management proposes to serve does not satisfy the specialized needs of customers in that area as the customers determine those needs.

27 The Commission's rules require solid waste collection companies to provide new customers with a document describing the company's services, and to provide such a document to existing customers at least annually.⁵² The rules also require companies to provide a copy of the Commission's consumer brochure to new customers, and to notify

⁴⁹ Daub, Exh. No. JD-1T ¶ 26; Exh. No. JD-18.

⁵⁰ *In re Am. Envtl. Mgmt. Corp.*, Order M. V. G. No. 1452 at 5 (Wash. Utils. & Transp. Comm'n, Nov. 30, 1990).

⁵¹ Daub, Exh. No. JD-1T ¶ 26.

⁵² WAC 480-70-361(7).

customers annually of the availability of the brochure.⁵³ The rules require companies to tell a dissatisfied complainant that the Commission is available to review a complaint.⁵⁴ Two biomedical waste customer witnesses testified that they were not aware of having received such information from Stericycle.⁵⁵

28 Julie Sell, an employee of a Stericycle customer in Clallam County, said in her prefiled direct testimony that “Olympic Medical Center has no local Stericycle contact.”⁵⁶ During the hearing, Ms. Sell testified that Stericycle began providing a local contact in Kent, Washington, in October 2012, after her written testimony was filed.⁵⁷

29 In determining whether an existing provider “will not provide service to the satisfaction of the commission,” the Commission looks at the circumstances at the time an application is filed.⁵⁸ The fact that Stericycle provided a local contact in October 2012 is not evidence of the service it provided at the time Waste Management filed its application.

III. CONCLUSION

30 Staff concludes that the Waste Management has demonstrated financial and operational fitness for an extension of biomedical waste authority under RCW 81.77.040. Staff expresses no opinion on whether Waste Management has demonstrated that the biomedical waste collection and disposal service currently provided in the territory the Company proposes to serve does not satisfy the specialized needs of customers in that area as the customers determine those needs. Staff expresses no opinion on the impact that

⁵³ WAC 480-70-361(6).

⁵⁴ WAC 480-70-386(a).

⁵⁵ Lycan, TR. 448:1-11; Patshkowski, TR. 484:19-485:6, 486:1-4, 486:19-23.

⁵⁶ Sell, Exh. No. JS-1T 3:9.

⁵⁷ Sell, TR. 203 12-15.

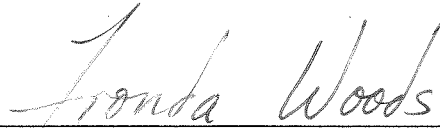
⁵⁸ *In re Ryder Dist. Res., Inc.*, Order M. V. G. No. 1596 at 6, 10 (Wash. Utils. & Transp. Comm’n, Jan. 25, 1993).

Waste Management's entry into territory presently served only by the protestants would have on the protestants.

DATED this 31st day of December 2012.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General of Washington

A handwritten signature in cursive script that reads "Fronda Woods". The signature is written in dark ink and is positioned above a horizontal line.

FRONDA WOODS, WSBA #18728
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