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7 BEFORE THE WASHINGTON STATE
8 UTILITIES AND TRANSPORTATION COMMISSION

9 In Re Application of Waste
10 Management of Washington,
11 Inc. d/b/a WM Healthcare
Solutions of Washington

Docket TG-120033

“WRRRA PROTESTANTS”
POST HEARING BRIEF

12 **COME NOW** Protestants Washington Refuse and Recycling Association;
13 Rubatino Refuse Removal, Inc.; Consolidated Disposal Services, Inc; Murrey’s
14 Disposal, Inc.; and Pullman Disposal Service, Inc., collectively referred to as
15 the “WRRRA Protestants,” and respectfully submit the following:

16 (1) **FACTS:** The basic facts here are not in dispute, although
17 interpretation and application of these facts certainly are at issue. There are,
18 however, some simple matters which perhaps have become unnecessarily
19 complicated over the course of this proceeding. First, this is an application
20 for new authority in areas currently served by one or, in some instances, two
21 certificated haulers. Secondly, it is a limited application, seeking only
22 “medical waste” authority. Third, the applicant already holds a “G Certificate”
23 for a significant amount of territory, in which it apparently offers medical
24 waste service. Finally, medical waste is “solid waste” and a G Certificate
25 holder has the right to provide this service, along with other solid waste
26 services pursuant to its permit. *see In re Rowland d/b/a Kleenwell
Biohazard*, TG-920304 (Jan. 25, 1993).

1 Thus, presently there are six entities actively providing medical waste
2 service in Washington. Stericycle (statewide), Rubatino (Everett), Murrey's
3 (portions of Pierce County), Consolidated (Central Washington), Pullman
4 (Pullman area), and Waste Management (G-237, which covers numerous
5 geographical areas). This causes there to be "overlaps" of territory in all areas
6 served by the five carriers, as Stericycle provides statewide service. In other
7 areas, Stericycle is the sole provider, although the incumbent G certificated
8 hauler can provide the service upon filing an appropriate tariff and meeting
9 the applicable safety regulations. *In re Sureway Medical Services*, Order
10 MVG 1663 at p. 5 (Nov. 19, 1993).

11 (2) **THE LAW:** Although this, and previous dockets, have occupied a
12 significant amount of the parties' and the Commission's time and energies
13 over the recent past, it is no more, nor less, than an application for the right
14 to serve territories currently served by certificated haulers. As such, it is
15 governed by **RCW 81.77.040**. Pursuant to that statute, an applicant must
16 provide proof that it is financially and operationally fit to provide the service,
17 demonstrate that there is a need "in the community" for the service, and from
18 WRRRA's perspective the most important factor here, that the existing
19 certificate holders "will not provide service to the satisfaction of the
20 Commission." The first "test" can be met, but the second and third conditions
21 must also be clearly proven, or the application must be denied. *In re*
22 **Superior Refuse**, MVG 1639 (June 30, 1993).

23 WRRRA will leave the argument over financial and operational fitness to
24 the applicant and protestant Stericycle; with the exception of concerns
25 regarding the projection by applicant that it will not begin to turn a profit
26 until 2015,¹ which are expressed below.

There most likely will be argument that medical waste is "different" from
"normal" municipal solid waste collection and disposal and thus requires

¹ Weinstein, Ex. MAW 16T

1 some measure of competition. The Commission gave support to this position
2 by granting statewide authority, providing, in theory at least, at least two
3 potential medical waste providers in every area in the state. However, there is
4 nothing in this or any record which changes the Commission's oft stated
5 "preference for regulated monopoly service in the collection of solid waste." *In*
6 *re Superior Refuse*, Order MVG 1639, at p. 4 (June 30, 1993). The grants of
7 statewide service resulted from, at the time, the failure of existing haulers to
8 meet the needs of the medical waste generators. *In re Ryder Distribution*
9 *Resources; In re Application of Stericycle of Washington*, Order MVG
10 1761 (consolidated hearing No. GA-77539) (Aug. 11, 1995). That clearly is not
11 the case here, as the entire state is being provided with competent and
12 effective medical waste service; and in the WRRRA Protestants' areas the
13 customer has the choice of two providers, a national company or a local
14 entity. If the Commission wants "competition," it already has it in these
15 territories.

16 The law does not, nor should it, carve out exceptions for multi-site
17 hospitals or hospital associations. It was painfully clear at hearing that the
18 apparent impetus behind this application is the desire of these medical
19 providers and their trade associations to have the ability to "cut a deal" for
20 statewide service (and beyond) by negotiating with two national providers.
21 That may make perfect business sense to them, but it is not the law.
22 Washington's very successful solid waste regulatory structure should not be
23 modified to meet the claimed needs of one class of generator. That is a far too
24 slippery slope for the Commission to even contemplate embarking upon.

25 This scenario is important to the "public need" test. "An applicant must
26 establish that a public need exists for a proposed service." *Ryder/Stericycle*,
Order MVG 1761 at p. 10. Public need means not only that "sentiment in the
community" favors the need for the service, but that "satisfaction with existing
service" is lacking, *supra*. It is a two-pronged test, clearly designed to
preserve the regulatory system while, at the same time, allowing for the
specialized needs of certain generators. But it should be clear that, upon

1 application of the test; first the “public” includes more than just one class of
2 generator (i.e. multi-site health providers), and absolute consideration must
3 be given to the satisfactory, or unsatisfactory, nature of the existing
4 certificated service. The desire by a generator to simply try another service in
5 an attempt to save money (or for any other reason other than the
6 Commission’s determination of unsatisfactory service) is not a part of the test.
7 That is one reason why rates are by approved tariff and RCW 81.77.040 says
8 what it does. Without these statutory and common sense guidelines, the
9 regulatory system would be in serious jeopardy.

9 (3) **ARGUMENT:**

10 (a) **Fitness:** As indicated above, the WRRRA Protestants will
11 leave the fitness argument to applicant and Stericycle, with one concern that
12 bears some amount of scrutiny by the Commission. That is the issue of
13 eventual profitability of the proposed service, and the subsidization of same
14 by a parent company for a period of time. Applicant’s primary financial
15 witness, Mr. Weinstein, submitted testimony that the proposed service should
16 become profitable in 2015. *Ex. MAW 16T*. Applicant’s corporate parent, a
17 “Fortune 200 Company” with annual revenues in the billions of dollars “will
18 absorb losses until profitability is achieved.”²

18 While this is not necessarily unusual, nor does it bar a finding of
19 current fitness, it should raise some concerns. First, the 2015 profitability
20 date is nothing more than a projection or, at best, an educated guess. The
21 concern is that, what if it does not happen in 2015? There was no testimony
22 as to how long the corporate parent, in spite of its “billions of dollars,” is
23 willing to subsidize a losing operation. It did not get those billions of dollars
24 by losing money.

24 The concern from the Commission’s standpoint should be what
25 generators do in 2015, 2016 or 2017 if the profitability mark is not achieved

26 ² see also testimony of Jeff Daub, Ex. JD 1T

1 and applicant abandons the market, as it did when it sold its medical waste
2 operations in 1996. The Commission has stated that “. . . applicants have
3 been required to show that they have assets sufficient to begin and sustain
4 operations for a reasonable period of time so that profitability can be
5 determined.” **Ryder/Stericycle**, Order MVG 1761, at p. 9. Again, there was
6 neither testimony nor assurance from applicant as to how long, nor to what
7 extent, the parent’s subsidies will continue and, even more importantly, what
8 will happen if they do not continue.

9 Of even greater concern to the WRRRA Protestants is the fact that they
10 would be placed in direct competition with a provider who is being subsidized
11 by an international parent with, literally, billions of dollars to spend. They
12 already compete with one large, national company, and to expect that they
13 can successfully do so against two of them is questionable at best. That is
14 neither the purpose, nor the basis, for a regulated market and would most
15 certainly result in the local carrier being left with the small, rural accounts
16 while the nationals skim off the large urban (as in profitable) generators. This
17 is “cream skimming” of the most blatant and destructive sort.

18 (b) **Service to the Satisfaction of the Commission:** This is,
19 in WRRRA’s view, the most important part of **RCW 81.77.040**. It is the most
20 basic of statutory provisions which have allowed the regulatory system to
21 operate so successfully for all these years. Certainly, if a certificated hauler is
22 not providing the level of service rightly expected by the Commission, the
23 company should expect the possibility of an applicant filing to compete in that
24 territory. That is not the case here.

25 We have been through seemingly perpetual rounds of discovery,
26 arguments, interim rulings and orders, and four days of hearing. During this
entire time there has been no testimony whatsoever that the WRRRA
Protestants have not provided “service to the satisfaction of the Commission.”
There has not even been an allegation that they do not do so. Their direct
testimony on this most important of issues went unchallenged at hearing; not

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1 surprisingly since there is no evidence that these four certificated haulers are
2 doing anything other than providing this service to existing customers, and
3 standing ready to provide the same level of service to any generator within
4 their territories who desires it.

5 The "test" is simple:

6 If the service proposed by the applicant is necessary and is not
7 available from any of the protestants because they lack the
8 equipment, personnel, and disposal site, the protestants are not
servicing to the satisfaction of the Commission. *In re American*
Environmental Management Corp., MVG 1452, Hearing GA-874, at
p. 2) (emphasis added).

9 Each of the WRRRA Protestants (and Protestant Stericycle, for that matter)
10 offered uncontested evidence and testimony that they possess the "equipment,
11 personnel and disposal site" to meet the needs of present and future
12 customers. The Commission need not go further than that.

13 (c) ***Sentiment in the Community: RCW 81.77.040***, in addition,
14 requires a showing of "need" for the service in the "community." It appears
15 that the term "community" here has been considered by the Commission to be
16 the "communities to be served," not necessarily a community as a whole, such
17 as a city or county. ***In re Application of American Environmental***
18 ***Management Corp.***, GA-874, Order MVG 1452, at p. 9. This probably does
19 make sense, at least for medical waste service. If so, then the "community"
20 being served here is the statewide conglomeration of medical waste
21 generators, the vast majority of whom, of course, have no connection,
22 business or otherwise, with each other. They are clinics, small doctors'
23 offices, dentists, hospitals, emergency care facilities, labs, nursing homes,
24 schools, veterinarians, rehabilitation centers, and on and on. The point here
25 is that the "community" being served is much more than two or three
26 statewide hospitals and associations as applicant's generator witness

1 selection would suggest.³ Again, none of applicant's witnesses expressed
2 knowledge, either personal or anecdotal, which even hinted at service failures
3 by the WRRRA Protestants. One can safely assume that is because there are
4 not any. This is a crucial, even mandatory, part of the test, and applicant has
5 seemingly not even tried to meet its burden here.

6 (4) **CONCLUSION**: Medical waste is different, there is no doubt
7 about that. But until and unless the Legislature changes the statutory
8 guidelines and the Commission changes the rules, there must be a showing
9 that conforms to the statutory language:

10 . . . When an applicant requests a certificate to operate in a
11 territory already served by a certificate holder under this chapter,
12 the Commission may, after hearing, issue the certificate only if
13 the existing solid waste company . . . will not provide service to
14 the satisfaction of the Commission. **RCW 81.77.040.**

15 This is the "master test," the rest only comes into play if this test is met.
16 In the late 1980's and early 1990's, this test was not difficult for applicants
17 like BFI and Stericycle to meet; at least as to the service being provided by
18 local, "traditional" solid waste haulers. Not all of them provided the service,
19 and those that did were just starting to do so and, admittedly, had a lot to
20 learn. It was no surprise that statewide authority was granted, and the WRRRA
21 Protestants have no problem with that. Like it or not, they have learned to
22 live with competition from Stericycle for this particular waste stream. They
23 have also learned to properly and safely provide the service (including delivery
24 for appropriate disposal). They will continue to offer, and provide, the service
25 because that is what a G certificate holder does.
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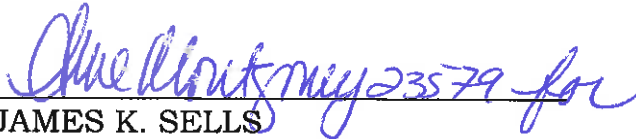
³ For example, at the American Environmental hearing (Order MVG 1452, 1990) applicant presented 18 generator witnesses from a variety of service providers in different areas of the state. In the "Ryder/Stericycle" hearing (Hearing GA-75154, Order MVG 1761), no fewer than 25 supporting generator witnesses testified, representing 30 of the state's 39 counties. (Order, p. 12)

1 The problem here is that each of the WRRR Protestants is already in
2 competition with Stericycle, and this application seeks to add a third
3 competitor to the mix. If the application were to be granted, one would have
4 to be beyond naïve to believe that the two national/international haulers
5 would not vigorously compete for the “big accounts,” leaving the local
6 company with the leftovers. That is not the way a regulated system is
7 supposed to work, and the Commission should not venture into this
8 unchartered territory without a much stronger showing than we have here.

9 Again, the WRRR Protestants recognize and support applicant’s right to
10 provide regulated medical waste service within its certificated territory. The
11 same is true for protestant Stericycle. Protestants should not be misjudged
12 on that issue. Nor should they be misjudged upon their adherence to the
13 statute, the rules and case law which require not only a “showing” that the
14 existing certificate holders (in this case the WRRR Protestants and Stericycle)
15 will not provide satisfactory service, but a “strong showing.” *In re RST*
16 *Disposal*, Order MVG 1402 (July 1989), pg. 15-16 (emphasis added).

17 Here, there has not only been the lack of a “strong showing,” there was
18 no showing at all. This application absolutely should be denied as to the
19 areas served by the WRRR Protestants, and very close scrutiny given it for the
20 areas served solely by Stericycle.

21 DATED this 17 day of January 2013.

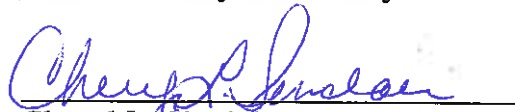
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by the method as indicated below, pursuant to WAC 480-07-150.

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Fronda Woods 1400 S. Evergreen Park Dr. SW PO Box 40128 Olympia, WA 98504-0218 <u>fwoods@utc.wa.gov</u> <u>BDeMarco@utc.wa.gov</u>	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email
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DATED at Silverdale, Washington, this 17th day of January 2013.


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