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2
3
4
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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 No. TG-120033

**WASTE MANAGEMENT'S POST-
HEARING REPLY**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION.....1

II. ARGUMENT.....1

**A. The Generators’ Unanimous Testimony Regarding Their Need for a
Competitive Alternative Is Determinative..... 1**

**B. The WRRRA Protestants’ Concerns Do Not Surmount the Evidence of the
Generators’ Need or the Lack of Risk to the Incumbents’ Viability. 6**

III. CONCLUSION8

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *In re Ryder Distribution Res., Inc.*,
4 App. No. GA-7514, Order M.V.G. No. 1761 (Aug. 11, 1995)..... 8

5 *In re Ryder Distribution Res., Inc.*,
6 App. No. GA-75154, Order M.V.G. No. 1596 (Jan. 25, 1993) 5, 8

7 *In re Sure-Way Incineration, Inc.*,
8 App. No. GA-868, Order M.V.G. No. 1451 (Nov. 30, 1990)..... 8

9 *In re Sureway Med. Servs., Inc.*,
10 App. No. GA-75968, Order M.V.G. No. 1663 (Nov. 19, 1993)..... 3, 8

11 *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*,
12 Docket No. TG-110553, Order 02 (July 13, 2011)..... 2

13 *Superior Refuse Removal, Inc. v. Wash. Utils. & Transp. Comm’n*,
14 81 Wn. App. 43, 913 P.2d 818 (1996) 1

1 **I. INTRODUCTION**

2 1. The post-hearing briefs of Protestants Stericycle of Washington, Inc. (“Stericycle”)
3 and the WRRRA Protestants fail to surmount the unanimous testimony of generators that they need,
4 and will benefit from, an alternative statewide service provider, and Protestants fail to overcome the
5 absence of any evidence that competition from Waste Management will create a material risk to the
6 Protestants’ economic viability.¹

7 **II. ARGUMENT**

8 **A. The Generators’ Unanimous Testimony Regarding Their Need for a Competitive**
9 **Alternative Is Determinative.**

10 2. Stericycle feverishly pleads an untenable entitlement to retain its iron grip on
11 Washington’s regulated biomedical waste (“RMW”) market. In doing so, it ignores the plain
12 directive of the Presiding Officer that “service to the satisfaction of the commission” is “focused on
13 customer needs.”² The Commission “does not support a presumption or predisposition for either
14 monopoly service territories or competition for the provision of biomedical waste collection and
15 disposal services.”³ Even in the context of traditional solid waste, it is incorrect to interpret the
16 statutory scheme as authorizing monopolies. As the Court of Appeals has held, because all
17 certificates are vulnerable if the customer needs are not being met, the statutory scheme does not
18 create an unconstitutional monopoly.⁴

19
20 _____
¹ Order 05 ¶ 11.

21 ² Order 05 ¶ 8. In the RMW market, the Commission **is not** concerned with “protect[ing] incumbent service providers
22 from competition.” Stericycle’s Post-Hearing Brf. ¶ 14.

23 ³ Order 05 ¶ 9. Stericycle is simply wrong when it contends that in the RMW services market, there exists a “presumption
24 in favor of exclusive service territories.” Stericycle’s Post-Hearing Brf. ¶ 2. Again, Stericycle is wrong when it argues
25 that in the case of biomedical waste, “RCW 81.77.040 has been uniformly interpreted by the Commission to favor
26 exclusive service territories.” Stericycle’s Post-Hearing Brf. ¶ 11. And, again, Stericycle is wrong that in regard to RMW
27 services, “the Commission has consistently acknowledged that the legislature’s intent expressed in RCW 81.77 favors
28 exclusive service territories over competition.” *Id.* ¶ 14. Likewise, the WRRRA is wrong that “there is nothing in this or
any record which changes the Commission’s oft stated preference for regulated monopoly service in the collection of
solid waste.” WRRRA Protestants’ Post-Hearing Brf. at 3:3-4 (quotation marks & citation omitted).

⁴ *Superior Refuse Removal, Inc. v. Wash. Utils. & Transp. Comm’n*, 81 Wn. App. 43, 53, 913 P.2d 818 (1996). Stericycle
improperly relies on an earlier unpublished decision in this case. Stericycle’s Post-Hearing Brf. ¶ 8; GR 14.1(a) (“A party
may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of
Appeals are those opinions not published in the Washington Appellate Reports.”).

1 3. Rather, the testimony of waste generators as to their needs is determinative, including
2 a stated need for a competitive service alternative.⁵ In deciding whether the incumbent’s existing
3 service is satisfactory, the Commission does not test the generators’ stated needs for reasonableness
4 or legitimacy; the “Commission does not second-guess these customers’ stated needs but defers to
5 persons who have unique knowledge about the requirements of the service they need and declines to
6 tell a professional in the body of knowledge at issue that a service does or does not meet her or his
7 needs.”⁶ While it is “irrelevant” to Stericycle that **each** of the testifying generators has a need for a
8 competitive alternative to Stericycle,⁷ that testimony is conclusive of the Commission’s inquiry.⁸

9 4. Notwithstanding the Presiding Officer’s order that the specialized needs of customers
10 is to be determined by the customers,⁹ Stericycle attacks the customers’ unequivocally stated need
11 for competition for four reasons. Stericycle incongruously maintains that the generators have “not
12 identif[ied] any unmet needs for biomedical waste service.”¹⁰ Stericycle further contends that a
13 grant of statewide authority to Waste Management will “threaten[] the stability of cost-effective
14 service to rural generators.”¹¹ Furthermore, Stericycle argues that none of the generator witnesses is
15 qualified to testify regarding the generators’ needs.¹² Finally, Stericycle contends that the
16 generators’ testimony that a qualified service provider other than Waste Management would satisfy
17 their need for a competitive service alternative somehow undermines their stated need for a
18 competitive option. None of these arguments has any merit.

19
20 ⁵ Order 05 ¶ 10. As the Commission explained in Stericycle’s unsuccessful attempt to avoid competition from Waste
21 Management in Waste Management’s Certificate No. G-237 territory, “the Commission has historically found that
22 promoting competition in this segment of the industry is in the public interest because, among other things, it promotes
23 higher quality of service in terms of protecting the public health and safety.” *Stericycle of Wash., Inc. v. Waste Mgmt. of*
24 *Wash., Inc.*, Docket No. TG-110553, Order 02 at 14-15 (July 13, 2011).

25 ⁶ Order 05 ¶ 10 (quotation marks & citation omitted). The generators’ testimony is inherently reliable because they seek
26 only their own best interest and (unlike the lobbyists who offered testimony) are not affiliated with any of the competing
27 service providers. The Commission’s task, then, is to ensure that RMW generators get the service they require.

28 ⁷ Stericycle’s Post-Hearing Brf. ¶ 21.

⁸ Order 05 ¶ 15.

⁹ *Id.*

¹⁰ Stericycle’s Post-Hearing Brf. ¶ 3.

¹¹ *Id.*

¹² *Id.* ¶ 9.

1 5. *First*, the generators **have** identified an unmet need for RMW service. Stericycle
2 maintains that the generators’ stated need for a competitive service alternative must be disregarded
3 because it fails to establish a service failure as is required with a standard solid waste application for
4 authority.¹³ However, in the context of RMW service:

5 [T]he Commission will not limit its consideration to evidence of service
6 failures of the sort that usually are significant in neighborhood garbage
7 collection service, such as service refusals, missed pickups or garbage
8 strewn about. Rather, it will broaden the satisfactory service inquiry to
include need-related sufficiency of service considerations – whether the
existing service reasonably serves the needs of the specialized market.¹⁴

9 Hence, the generators’ unanimous testimony as to their need for a competitive service provider
10 properly states a need which the Commission will meet.¹⁵

11 6. *Second*, a grant of statewide authority to Waste Management **will not** threaten the
12 stability of service to rural generators. Stericycle warns of the “risk to generators in rural areas” if
13 statewide competition is allowed.¹⁶ In support of this proposition, Stericycle points to the prefiled,
14 written testimony of Jeff Mero, from the Association of Washington Public Hospital Districts
15 (“AWPHD”).¹⁷ But, Mr. Mero readily acknowledged that “some Washington hospitals and other
16 healthcare providers have expressed the desire for a choice of medical waste service providers and a
17 belief that competition among providers will enable them to obtain more responsive service and
18

19 _____
20 ¹³ *Id.* ¶ 16.

21 ¹⁴ *In re Sureway Med. Servs., Inc.*, App. No. GA-75968, Order M.V.G. No. 1663 at 10-11 (Nov. 19, 1993).

22 ¹⁵ Of course, there also is abundant testimony regarding Stericycle’s standard service failures. Although Stericycle
23 acknowledges that its customers testified about its service errors, Stericycle trivializes and disparages the generators’
24 myriad complaints about Stericycle’s quality of service, just as it did at the time of the service errors. Hearing Tr. Vol. V
at 226:17-21. Contrary to the old adage, at Stericycle, the customer is always wrong. Stericycle disingenuously asks the
Commission to look favorably on the few formal complaints lodged with the UTC by Stericycle customers. However,
Stericycle did not advise its customers that complaints could be brought to the Commission so there can be no surprise
that complaints were not lodged there. Hearing Tr. Vol. VI at 448:1-11, 484:11-485:6.

25 ¹⁶ Stericycle’s Post-Hearing Brf. ¶ 35. The flexibility of Stericycle’s position is telling. In 2011, Stericycle argued that
26 **limiting** Waste Management’s RMW collection authority to **only its G-237 territory** would “pose an imminent threat of
further harm to Stericycle and to biomedical waste generators throughout the state that depend on Stericycle for service,
27 **particularly those generators in the more rural areas of the state beyond the service territories included in Waste
Management’s G-237.”** *In re Pet’n of Stericycle of Wash., Inc.*, Docket No. TG-110287, Comments of Stericycle of
28 Wash. ¶ 20 (Mar. 4, 2011).

¹⁷ Stericycle’s Post-Hearing Brf. ¶ 105.

1 better prices,”¹⁸ including rural AWPMD members Lake Chelan Community Hospital and Olympic
2 Medical Center, both of which offered testimony in support of Waste Management’s application.¹⁹
3 On the stand, Mr. Mero admitted that he knows nothing about Stericycle’s price structure and has no
4 knowledge regarding whether the prices Stericycle charges his members are competitive.²⁰ He
5 further testified on cross-examination that he was not aware of any adverse effect on either rates or
6 service levels in the year and a half in which Waste Management has been competing with Stericycle
7 in major parts of the State of Washington.²¹ Consequently, Mr. Mero is not in a position to know
8 anything about the impact of competition in rural areas.

9 7. What the evidence does show is that generators in rural areas will not be negatively
10 impacted by having a competitive option. Of course, all of these generators have previously been
11 contemporaneously served by two competing statewide service providers, and there has been no
12 suggestion that a single rural generator was negatively impacted by the competitive service
13 options.²² Moreover, Waste Management’s G-237 territory – which has been home to successful
14 competition between Waste Management and Stericycle for close to two years – includes many rural
15 areas, including Granite Falls, Ellensburg and parts of Kitsap County.²³

16 8. *Third*, the generator witnesses are qualified to testify regarding their needs.
17 Stericycle maintains that the generators’ testimony must be disregarded because they “have not
18 assessed the effects of competition in the regulated medical waste market, and or failed to consider
19 the possibility that competition might actually lead to cost cutting and lower quality services.”²⁴ To
20 start with, there is no evidence at all that competition from Waste Management in the remaining
21

22 ¹⁸ Ex. JM-1T ¶ 11.

23 ¹⁹ Ex. TJ-1T; Ex. JS-1T; Hearing Tr. Vol. VIII at 733:6-16.

24 ²⁰ Hearing Tr. Vol. VIII at 748:10-22; *id.* at 749:25-750:2.

25 ²¹ *Id.* at 751:12-17.

26 ²² See Waste Mgmt.’s Post-Hearing Brf. ¶¶ 23, 34. Emily Newcomer, of the University of Washington, testified on behalf
27 of an RMW generator which already has the option of turning to Waste Management as an alternative to Stericycle. And,
28 the University of Washington presently has contracts with both Stericycle and Waste Management because competition
offers the best prices for the best service. Hearing Tr. Vol. VII at 558:13-550:3.

²³ Hearing Tr. Vol. VII at 697:19-698:22; *id.* at 699:3-8.

²⁴ Stericycle’s Post-Hearing Brf. ¶ 22.

1 parts of the state will lead to lower quality services for generators.²⁵ Moreover, it is absurd that
2 Stericycle, which itself failed to properly assess the effects of competition,²⁶ now casts aspersions on
3 its customers for not retaining accountants or economists to support their third-party testimony.²⁷ Of
4 course, the Commission has never stated such a requirement. “Because the generators are
5 professionally involved in health care, they are in a unique position to evaluate the risks and benefits
6 of collection and disposal services from their own professional training and experience.”²⁸ Each of
7 the generators who testified is charged with managing RMW for the generators on whose behalf they
8 testified, and each is qualified based on his or her experience with Stericycle’s services, with the
9 benefits of other competitive services, with the nature of the waste at hand and its attendant liability,
10 and with the generators’ needs for high quality, cost-effective RMW service.²⁹ The generators’
11 testimony as to the benefits they will obtain from a competitive service alternative is amply
12 confirmed by the fact that **actual** competition from Waste Management **already** has caused
13 Stericycle to provide improved services at better prices in those parts of the state in which Stericycle
14 faces competition from Waste Management.³⁰

15 9. *Fourth*, the generators’ testimony about “generic competition” – that is, a need for a
16 meaningful competitive alternative whether from Waste Management or another qualified provider³¹
17 – **does not** undermine their stated need for a competitive option. As explained by the generators,
18 meaningful competition results in beneficial service quality and pricing.³² Notwithstanding these
19 “generic” benefits, it is undisputed that there is no RMW service provider other than Waste
20 Management which can, in fact, provide competitive statewide service.

21
22 ²⁵ See *supra* ¶¶ 6-7.

23 ²⁶ Hearing Tr. Vol. VII at 694:4-14.

24 ²⁷ The only “speculat[ion]” about the impacts on the generators from statewide competition, Stericycle’s Post-Hearing
25 Brf. ¶ 22, came from Stericycle. Hearing Tr. Vol. VII at 694:4-14.

26 ²⁸ *In re Ryder Distribution Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1596 at 11 (Jan. 25, 1993).

27 ²⁹ Ex. TJ-1T; Ex. JL-1T; Ex. RL-1T; Ex. RM-1T; Ex. EN-1T; Ex. CP-1T; Ex. JS-1T; Ex. DW-1T.

28 ³⁰ Waste Mgmt.’s Post-Hearing Brf. ¶¶ 26-35.

³¹ Stericycle’s Post-Hearing Brf. ¶ 20.

³² Ex. TJ-1T at 3; Ex. JL-1T at 3; Ex. RL-1T at 3-4; Ex. RM-1T at 4; Ex. EN-1T at 4; Ex. CP-1T at 3-4; Ex. JS-1T at 3;
Ex. DW-1T at 2-3.

1 10. In sum, it is the generators’ needs, **not Stericycle’s**, which are relevant here. The
2 generators have spoken with one voice in stating their need for an alternative statewide service
3 provider. That need for competition was not based solely on a philosophical opinion, but rather on
4 actual experiences with being bullied by Stericycle’s actions abusing its so-called monopoly. They
5 each had a reason for wanting competition, not to be second-guessed by the Commission and
6 certainly not by Stericycle. And despite Stericycle’s narrow view of what is properly included in the
7 scope of “service needs,” customer service is a manifestly reasonable ground for shipper demands
8 for competition.

9 **B. The WRRRA Protestants’ Concerns Do Not Surmount the Evidence of the Generators’
10 Need or the Lack of Risk to the Incumbents’ Viability.**

11 11. The WRRRA Protestants acknowledge that multi-site RMW generators require
12 competition between two statewide service providers which “may make perfect business sense to
13 them.”³³ That fact, alone, is determinative here. The fact that statewide competition makes perfect
14 business sense to RMW generators will not be “second-guess[ed]” by the Commission.³⁴

15 12. However, the WRRRA Protestants speculate that it “is questionable at best” whether
16 they can successfully compete against two statewide providers in the various regions served by the
17 WRRRA Protestants if they are “left with the small, rural accounts.”³⁵ However, the WRRRA
18 Protestants have not supplied any evidence that having to compete with a second statewide provider
19 will materially threaten their “economic viability” or that competition from Waste Management will
20 **cause** them to have a base of small, rural accounts.³⁶ For example, Rubatino Refuse Removal, Inc.’s
21 president Edward Rubatino testified that he **already** lost the one major RMW generator in his area to
22 Stericycle, leaving a balance of approximately 200 small customers, and that his RMW business
23 **already** is unprofitable.³⁷ Murrey’s Disposal, in turn, has **never** lost one of its large customers to
24

25 ³³ WRRRA Protestants’ Post-Hearing Brf. at 3:14-18.

26 ³⁴ Order 05 ¶ 10.

27 ³⁵ WRRRA Protestants’ Post-Hearing Brf. at 5:8-13.

28 ³⁶ Order 05 ¶ 11.

³⁷ Hearing Tr. Vol. VIII at 813:3-7, 814:9-815:1, 816:24-817:5.

1 Stericycle and, in fact, is not aware of having lost **any** customers to Stericycle.³⁸ No evidence is
2 offered as to why this would change in the face of competition from Waste Management. Moreover,
3 it is undisputed that Murrey's Disposal is earning substantially more in net operating income than
4 what it is entitled to earn under an acceptable operating ratio and could lose substantial business
5 without creating any material risk to its economic viability.³⁹ Consolidated Disposal Services
6 **already** has lost to Stericycle its customers with multi-site locations,⁴⁰ and it could lose 35% of its
7 revenue and still be profitable.⁴¹ Pullman Disposal Service, Inc. **already** has a "very consistent"
8 customer base comprised of small RMW generators and no hospitals,⁴² and has not lost **any**
9 customers to Stericycle.⁴³ No evidence is offered as to why this would change with competition
10 from Waste Management. Finally, it is undisputed that **each** of the WRRR Protestants has
11 successfully competed with two contemporaneous statewide RMW service providers, Stericycle and
12 BFI.⁴⁴

13 13. The WRRR Protestants raise one concern in regard to Waste Management's financial
14 fitness, though they concede that it should not "bar a finding of current fitness."⁴⁵ They worry that
15 Waste Management's projection of profitability in 2015 is "nothing more than a projection" and that
16 there was no testimony regarding how long Waste Management would be "willing to subsidize a
17
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19 ³⁸ *Id.* at 823:15-825:19. Murrey's Disposal is a subsidiary of Waste Connections, Inc., *id.* at 823:7-10, a publicly traded
20 corporation (<http://www.wasteconnections.com/company/about-us.aspx>) "with, literally, billions of dollars to spend."
21 WRRR Protestants' Post-Hearing Brf. at 5:9.

22 ³⁹ Ex. MAW-4T at 16-17; Ex. MAW-14.

23 ⁴⁰ Hearing Tr. Vol. VIII at 837:8-838:2. The WRRR Protestants acknowledge that "they have learned to live with
24 competition from Stericycle for this particular waste stream." WRRR Protestants' Post-Hearing Brf. at 7:19.

25 ⁴¹ Hearing Tr. Vol. VIII at 840:3-13.

26 ⁴² Hearing Tr. Vol. VII at 708:4-14, 709:1-16.

27 ⁴³ *Id.* at 709:20-21. While the WRRR Protestants' customer bases **already** are small RMW generators, there is no
28 evidence whatsoever to support the contention in their brief that the "vast majority" of Washington RMW generators are
small, unaffiliated operations. WRRR Protestants' Post-Hearing Brf. at 6:20-22. Moreover, although the WRRR
Protestants take pains to discuss the "multi-site hospitals," *id.* at 3:14, Waste Management's application **also** is supported
by small RMW generators. *See, e.g.*, EX. TJ-1T (a rural community hospital); Ex. JL-1T (dental office); Ex. DW-1T
(dental office).

⁴⁴ Ex. MAW-4T at 15-19; Hearing Tr. Vol. VIII at 812:18-813:2.

⁴⁵ *Id.* at 4:17-18.

1 losing operation.”⁴⁶ The WRRRA Protestants misapprehend the financial fitness test. “The type of
2 detailed financial information necessary in a rate case is not required in an application for
3 authority.”⁴⁷ Rather, the Commission seeks only “to determine whether an applicant has enough
4 money to start and maintain operations” and “whether it has a source of funds to allow it to operate
5 **through the start up phase of business (when it most likely will not be profitable).**”⁴⁸ The
6 Commission does not require proof that proposed operations are certain to be profitable.⁴⁹ There can
7 be no serious argument that Waste Management has failed to meet this standard.⁵⁰

8 14. In short, the WRRRA Protestants cannot offer a statewide alternative to Stericycle to
9 satisfy the generators’ need – hence they cannot provide service to the satisfaction of the
10 Commission⁵¹ – and they have not established that competition from Waste Management will create
11 a material risk to their economic viability. As they concede, “[t]hey will continue to offer, and
12 provide, the service.”⁵²

13 III. CONCLUSION

14 15. Waste Management has proven that the RMW collection service currently provided
15 by Protestants does not satisfy the specialized needs of Washington’s waste generators, that its entry
16 into the market is no threat to Protestants’ economic viability, that the public’s needs for responsive
17 service outweigh any negative impacts on Protestants, and that Waste Management is fit to provide
18 RMW services statewide. If Waste Management is not deemed to have cleared the hurdle for

19 _____
20 ⁴⁶ *Id.* at 4:18-22.

21 ⁴⁷ *In re Sure-Way Incineration, Inc.*, App. No. GA-868, Order M.V.G. No. 1451 at 9 (Nov. 30, 1990).

22 ⁴⁸ *Id.* (emphasis added); *accord In re Sureway Med. Servs., Inc.*, App. No. GA-75968, Order M.V.G. No. 1663 at 19 (Nov.
23 19, 1993) (applicant need only demonstrate “that it could finance statewide operations for a reasonable period, until they
24 either become profitable or demonstrate that they lack feasibility”); *In re Ryder Distribution Res., Inc.*, App. No. GA-
25 7514, Order M.V.G. No. 1761 at 9 (Aug. 11, 1995) (“An applicant need not demonstrate profitability of proposed
26 operations as a prerequisite to entry. Rather, applicants have been required to show that they have assets sufficient to
27 begin and sustain operations for a reasonable period of time so that profitability can be determined.”).

28 ⁴⁹ *In re Sureway Med. Servs., Inc.*, App. No. GA-75968, Order M.V.G. No. 1663 at 19 (Nov. 19, 1993).

⁵⁰ *See* Waste Mgmt.’s Post-Hearing Brf. ¶¶ 52-61.

⁵¹ “The finding of failure of satisfactory service does not necessarily involve a moral judgment. A carrier may be found
unsatisfactory despite providing excellent service to the public within the terms of its certificate if the service does not
meet the reasonable requirements of shippers.” *In re Ryder Distribution Res., Inc.*, App. No. GA-75154, Order M.V.G.
No. 1596 at 2 (Jan. 25, 1993).

⁵² WRRRA Protestants’ Post-Hearing Brf. at 7:21.

1 Commission approval, Washington's RMW generators can be assured that they will not now or in
2 the future be allowed the competitive choice which they require.

3 DATED this 25th day of January, 2013.

4 SUMMIT LAW GROUP PLLC

5
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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 indicated below, pursuant to WAC 480-07-150.

Table with 2 columns: Recipient Information and Service Method. Rows include Washington Utilities and Transportation Commission, Gregory J. Kopta, Steven W. Smith, Stephen B. Johnson, James K. Sells, and various attorneys.

DATED at Seattle, Washington, this 25th day of January, 2013.

Handwritten signature of Deanna L. Schow in blue ink.

Deanna L. Schow