

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Application of	)	DOCKET TG-120033
	)	
WASTE MANAGEMENT OF	)	
WASHINGTON, INC. D/B/A WM	)	ORDER 07
HEALTHCARE SOLUTIONS OF	)	
WASHINGTON	)	
	)	INITIAL ORDER GRANTING
For an Extension of Certificate G-237	)	APPLICATION
for a Certificate of Public Convenience	)	
and Necessity to Operate Motor	)	
Vehicles in Furnishing Solid Waste	)	
Collection Service	)	
.....	)	

**BACKGROUND**

- 1 On December 30, 2011, Waste Management of Washington, Inc. (Waste Management or Company), filed with the Washington Utilities and Transportation Commission (Commission) an application for an extension of authority under its Certificate G-237.<sup>1</sup> The Company requests authority to provide solid waste collection service for bio-hazardous wastes produced in Washington. Stericycle of Washington, Inc. (Stericycle) and other currently certificated companies operating with the territory Waste Management seeks to serve<sup>2</sup> filed protests against Waste Management’s application.
  
- 2 On October 1, 2012, Waste Management filed declarations and testimony in support of its application. Stericycle and WRRRA also filed testimony in support of their positions. Waste Management and Stericycle filed response testimony on November 16, 2012.

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<sup>1</sup> This certificate is held by Waste Management of Washington, Inc., d/b/a WM Healthcare Solutions of Washington.

<sup>2</sup> Washington Refuse and Recycling Association (WRRRA), Rubatino Refuse Removal, Inc. (Rubatino), Consolidated Disposal Services, Inc. (Consolidated), Murrey’s Disposal, Inc. (Murrey’s) and Pullman Disposal Services, Inc. (Pullman), filed jointly. We refer to these joint parties as the “WRRRA” or “WRRRA companies” for convenience.

- 3 The Commission conducted evidentiary hearings on December 3-6, 2012. The parties filed opening briefs by January 18, 2013, and response briefs on January 25, 2013.
- 4 Polly L. McNeil and Jessica Goldman, Summit Law Group, PLLC, Seattle, Washington, represent Waste Management. Stephen B. Johnson and Jared Van Kirk, Garvey Schubert Barer, Seattle, Washington, represent Stericycle. James K. Sells, Attorney at Law, Gig Harbor, Washington, represents WRRRA, Rubatino, Consolidated, Murrey's and Pullman. Steven W. Smith, Assistant Attorney General, represents Commission Staff (Staff).<sup>3</sup>

### DISCUSSION AND DECISION

- 5 The Commission determines whether to grant an application for a certificate of public convenience and necessity to operate as a solid waste collection company based on the requirements in RCW 81.77.040. When, as here, a company seeks to operate in a territory that is already served by another certificated company, the Commission may grant the application only upon finding: (1) the existing certificated company or companies “will not provide service to the satisfaction of the commission”; (2) the public convenience and necessity require the additional operations the applicant proposes; and (3) the applicant has the financial and operational fitness to provide the proposed service. The Commission finds that Waste Management has satisfied each of these statutory requirements and grants the application.

#### Existing Service to the Satisfaction of the Commission

- 6 “When an applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, the commission may . . . issue the certificate only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission.”<sup>4</sup> Prior Commission decisions state that “[t]he satisfactory nature of service by providers of specialized

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<sup>3</sup> In formal proceedings, such as this, the Commission’s regulatory staff participates like any other party, while the presiding administrative law judge (ALJ) or the Commissioners make the decision. To assure fairness, the Commissioners, the presiding ALJ, and the Commissioners’ policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

<sup>4</sup> RCW 81.77.040.

solid waste collection services is measured according to the specialized needs of customers.”<sup>5</sup>

- 7 Waste Management provided the testimony of eight generator witnesses, all of whom testified to the need for a competitive alternative to the biomedical waste collection services they currently receive.<sup>6</sup> Three of those witnesses also testified that they had billing or customer service issues with Stericycle,<sup>7</sup> the only existing company with statewide authority to provide bio-hazardous waste collection service. Waste Management contends that this evidence demonstrates that Stericycle and the other existing companies will not provide service to the satisfaction of the Commission.
- 8 Stericycle and WRRRA disagree, arguing that the Commission has consistently held in prior cases that a desire for competition, standing alone, does not demonstrate that incumbent providers will not provide service to the satisfaction of the Commission. Stericycle and Staff also contend that the Stericycle billing and customer service issues Waste Management presented do not rise to the level of unsatisfactory service for purposes of the statute.
- 9 The Commission concurs with Stericycle and Staff that the billing and customer service issues that three of the generator witnesses describe do not support Waste Management’s contentions. Billing errors and disputes over service dates are not unique to biomedical waste collection and thus do not reflect any specialized customer need. The generators’ complaints here, moreover, while a matter of concern, do not reflect a pattern of poor service or systemic inadequacies that would support a finding that Stericycle will not provide service to the satisfaction of the Commission.
- 10 We also acknowledge that in decisions from the early 1990’s, the Commission stated its “view that mere desire for a backup carrier in the event of possible discontinuance of, or deterioration in, existing service, or mere preference for competition, does not

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<sup>5</sup> *In re Application GA-75154 of Ryder Distribution Services, Inc.*, Order M.V.G. No. 1596 at 11 (Jan. 25, 1993) (emphasis in original).

<sup>6</sup> Sell, Exh. No. JS-1T; Johnson, Exh. No. TJ-1T; Longhenry, Exh. No. JL-1T; Moore, Exh. No. RM-1T; Warner, Exh. No. DW-1T; Lycan, Exh. No. RL-1T; Patshkowski, Exh. No. CP-1T; Newcomer, Exh. No. EN-1T.

<sup>7</sup> Sell, Exh. No. JS-1T; Lycan, Exh. No. RL-1T; Patshkowski, Exh. No. CP-1T.

demonstrate a need for an additional carrier.”<sup>8</sup> The Commission has not revisited the issue since that time. We do so now.

11 Much has changed in the last 20 years. The introduction of competition into former regulated monopoly markets, such as the market for local telecommunications services, has resulted in consumer benefits from a choice of service providers and a corresponding reduced need for Commission regulation. In the transportation sector, the Commission expressed in a commercial ferry case that it is not in the business of granting exclusive service territories and may grant overlapping authority absent a showing that competition would be “ruinous.”<sup>9</sup> Even in the context of bio-hazardous waste collection, the Commission has observed that its “policy has historically encouraged competition.”<sup>10</sup>

12 The public, as well as the Commission, has come to demand greater consumer choice. Eight generator witnesses in this case testified to the need for more options among service providers. Most of those witnesses represent entities that have statewide operations,<sup>11</sup> and they must obtain service from Stericycle if, as one witness testified, the entity “prefers to have one statewide provider for the sake of efficiency and cost.”<sup>12</sup> The Commission has recognized that “single carrier service is a reasonable shipper need,”<sup>13</sup> but that need is not necessarily limited to having one option for statewide service. One generator with statewide operations prefers to obtain service

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<sup>8</sup> *Stericycle v. Waste Management*, Docket TG-110533, Order 02 Final Order on Cross-Motions for Dismissal and Summary Determination ¶ 37 (July 13, 2011).

<sup>9</sup> *In re the Applications of Dutchman Marine, LLC d/b/a Lake Washington Ferry Service, for Authority to Provide Commercial Ferry Service; and Seattle Harbor Tours Limited Partnership, for Authority to Provide Commercial Ferry Service*, Dockets TS-001774 & TS-002055, Second Supplemental Order - Commission Decision and Order Affirming Initial Order Granting Applications with Conditions (Oct. 19, 2001).

<sup>10</sup> *In re Application GA-75968 of Sureway Medical Services, Inc.*, Order M.V.G. No. 1674 at 4-5 (Dec. 20, 1993).

<sup>11</sup> See Sell, Exh. No. JS-1T; Johnson, Exh. No. TJ-1T; Longhenry, Exh. No. JL-1T; Moore, Exh. No. RM-1T (PeaceHealth); Warner, Exh. No. DW-1T; Lycan, Exh. No. RL-1T (Pathology Associates Medical Laboratories); Patshkowski, Exh. No. CP-1T (Providence Medical Group); Newcomer, Exh. No. EN-1T (University of Washington).

<sup>12</sup> Moore, Exh. No. RM-1T at 3:19-20; accord Lycan, Exh. No. RL-1T at 4:2-3 (“PAML desires to have a single contract with one RMW service provider for the sake of efficiency, pricing, and customer service.”).

<sup>13</sup> *In re Application GA-75154 of Ryder Distribution Services, Inc.*, Order M.V.G. No. 1596 at 12 (Jan. 25, 1993).

from Waste Management but can only do so where the Company currently operates. Despite the need for a single provider, this generator uses Waste Management where it can and obtains service from Stericycle in all other areas of the state, but the generator will move all of its services to Waste Management if the Company receives statewide authority.<sup>14</sup> Consumers should not be forced to choose between using a preferred carrier and the benefits of having a single statewide provider.

- 13 The record also reflects the benefits of a competitive market. Waste Management presented compelling evidence that in the short time since it resumed bio-hazardous waste collection service in its solid waste collection service territory in competition with Stericycle, the Company has introduced product options at lower prices, which Stericycle has matched.<sup>15</sup> This evidence accords with the Commission's experience with competition in formerly monopoly markets and further supports the generator witness testimony of the need for a choice among service providers in this area.
- 14 Stericycle dismisses Waste Management's testimony and exhibits on this issue as "not relevant"<sup>16</sup> to the inquiry required under RCW 81.77.040 and as "not entitled to weight because it is not based on the generators' professional training and experience."<sup>17</sup> No professional training is necessary to recognize the benefits of competition or to support the need for more consumer choice. Nor is this evidence irrelevant to whether existing companies will provide service to the satisfaction of the Commission. The Commission will find companies' service satisfactory only to the extent that the service provided furthers the Commission's ultimate goal of ensuring that consumers have access to that service at fair, just, and reasonable rates, terms, and conditions.
- 15 The record evidence and Commission policy favoring effective competition demonstrate that the Commission's prior decisions that a desire for competition is insufficient to satisfy RCW 81.77.040 do not reflect the realities of the current marketplace. Accordingly, the Commission will not rely on those prior decisions to make the requisite determination in this case.

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<sup>14</sup> Lycan, Exh. No. RL-1T at 4:4-6.

<sup>15</sup> *E.g.*, Norton, Exh. No. JN-1T; *see* Waste Management Post-Hearing Brief ¶¶ 26-33 (summarizing the evidence of competitive benefits).

<sup>16</sup> Stericycle Response Brief ¶ 24.

<sup>17</sup> *Id.* ¶ 26.

16 Waste Management has demonstrated the need for, and positive results from, its entry into the statewide bio-hazardous collection services market. At least on this record and under the circumstances presented in this docket, the existing companies will not provide service to the satisfaction of the Commission without the statewide competitive alternative the Company would provide. Waste Management, therefore, has met its burden under RCW 81.77.040 with respect to this issue.

### **Public Convenience and Necessity**

17 “In determining whether the public convenience and necessity require an additional carrier, the Commission must balance needs of existing carriers for a customer base that is large enough for economic viability, considering their obligation to provide satisfactory service, with the public’s need for responsive service.”<sup>18</sup> The balance in this case supports Waste Management’s application.

18 The record evidence does not demonstrate that granting Waste Management statewide authority to collect bio-hazardous waste would have any significant impact on the economic viability of the existing companies. To the contrary, Stericycle represented from the beginning of this proceeding that its concern was profitability, not economic viability:

[O]ur position is not that Stericycle is going to be driven out of business by Waste Management, let’s be clear about that. It’s not that they will lose – that the territory involved here will lose a service provider. It’s that by cutting revenues, the cost per unit of revenue and cost per unit of waste will be – will increase, and of course the revenues would decrease. The question is whether that creates a feasible profit potential for Waste Management or for Stericycle.<sup>19</sup>

19 Even with respect to profit potential, Stericycle produced no credible evidence that competing with Waste Management on a statewide basis would have a significant impact on Stericycle’s profitability. Stericycle’s sole witness on this subject has no training or experience in accounting or financial analysis,<sup>20</sup> and he testified only in general terms concerning the decreased revenues that could result from possible loss

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<sup>18</sup> *In re Application GA-75154 of Ryder Distribution Services, Inc.*, Order M.V.G. No. 1596 at 15 (Jan. 25, 1993).

<sup>19</sup> TR at 38:10-19 (Aug. 8, 2012).

<sup>20</sup> Dunn, TR at 656-57 (Dec. 5, 2012).

of business, without any demonstrable applicability to Stericycle's actual operations or Waste Management's market projections.<sup>21</sup>

20 Waste Management, on the other hand, provided substantial, un rebutted evidence that Stericycle's revenues, customer base, and revenue per customer have *increased* since it began competing with Waste Management within the Company's existing solid waste collection service territory.<sup>22</sup> Stericycle cannot plausibly contend on this record that the entry of Waste Management into the statewide market for bio-hazardous waste collection will have any negative impact on Stericycle's ability to provide satisfactory service.

21 The WRRRA companies similarly have not provided any evidence that granting Waste Management's application would pose a significant risk to their economic viability. Their witnesses provided only basic financial statements for their bio-hazardous waste collection operations and vague general statements that the entry of a third provider into their territories could adversely affect their rates or ability to provide service.<sup>23</sup> Such unsubstantiated fears do not rise to the level of demonstrating that authorizing Waste Management to operate statewide would threaten the existing providers' economic viability.

22 WRRRA nevertheless contends that Waste Management's potential customer "targets are obviously large, multi-site hospitals, leaving the local hauler the small, far less profitable customers, without much of a chance to compete for the large, usually geographically concentrated, generators."<sup>24</sup> The Commission has previously rejected

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<sup>21</sup> See Dunn, Exh. No. CD-1T.

<sup>22</sup> Weinstein, Exh. No. MAW-1T at 4:13-19.

<sup>23</sup> See Gingrich, Exh. No. MG-1T at 4 ("The addition of a third provider would further dilute the market, which most likely would lead to price competition with regular tariff revisions becoming necessary to compete."); Wash, Exh. No. MW-1T at 4 ("the addition of a third competitor could, and probably would, diminish our customer count to the point we would have to seek to raise rates or even withdraw from providing the service"); Felsted, Exh. No. DF-1T at 4 ("If we were to lose any portion of that [customer] base, we may well be placed in a situation where we would have to seek a rate increase, or even be forced to abandon our medical waste service"); Rubatino, Exh. No. ER-1T at 5 ("We believe that should a third provider have authority within our certificated area, the market would become further diluted and a 'three-way' competition would eventually lead to higher rates for the generator and have an adverse effect upon our ability to continue to provide the service at what we believe are fair and compensable rates.").

<sup>24</sup> WRRRA Protestants Reply Brief at 3:21-23.

this argument as irrelevant.<sup>25</sup> The record, moreover, contains no evidence that the WRRRA companies currently serve any large, multi-site hospitals. To the contrary, one WRRRA company witness testified that it does not serve any hospitals,<sup>26</sup> and another company witness testified that it already lost the only such customer to Stericycle and that major customers “are not generally in our area.”<sup>27</sup> WRRRA has not factually supported its theoretical “cream-skimming” concerns.

- 23 Ample record evidence supports Waste Management’s position that the expansion of its bio-hazardous operations statewide will enhance the public’s ability to obtain responsive service. As discussed above, the Company’s recent resumption of bio-hazardous collection service within its existing footprint has already resulted in more service options and lower prices for customers in those areas,<sup>28</sup> and eight generator witnesses testified to the need for a competitive alternative to the existing statewide service provider.<sup>29</sup> Waste Management, therefore, has satisfied its burden to prove that the public convenience and necessity require the service the Company proposes to offer.

### **Financial and Operational Fitness**

- 24 The statute requires the Commission to base its determination to issue a certificate of public convenience and necessity on several factors, including but not limited to “an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal”; “the assets on hand . . . that will be expended on the purported plant”; and the “prior experience, if any, in such field by the petitioner.”<sup>30</sup> Waste Management provided declarations of three witnesses to address these factors who

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<sup>25</sup> *In re Application GA-75154 of Ryder Distribution Services, Inc.*, Order M.V.G. No. 1596 at 8-9 (Jan. 25, 1993). As the Commission observed in that case, all “[r]egulated solid waste collection companies must provide universal waste collection without discrimination” or “unreasonable preferences.” *Id.* at 9. Waste Management has acknowledged that requirement and committed to serve all customers who request its service. TR at 334:20-23 (Weinstein).

<sup>26</sup> Felsted, TR at 709:1-2 (Dec. 5, 2012).

<sup>27</sup> Rubatino, TR at 814:9-14 (Dec. 6, 2012).

<sup>28</sup> *Supra* ¶ 12.

<sup>29</sup> *Supra* ¶ 8.

<sup>30</sup> RCW 81.77.040.



described in detail the Company's technical and operational fitness to provide the proposed service.<sup>31</sup>

- 25 Staff reviewed this evidence and concluded that Waste Management has demonstrated the requisite financial and operational fitness.<sup>32</sup> Neither Stericycle nor WRRRA address these issues except to express concerns about the limited time frame of Waste Management's profitability projections and the Company's subsidization by a large corporate parent. Staff responds that Waste Management provided testimony that the Company will continue to absorb losses until its proposed service is profitable and that support from a well-capitalized parent merely provides credible evidence that Waste Management has sufficient financing to demonstrate financial fitness.
- 26 The Commission concurs with Staff that Waste Management has demonstrated that the Company has the financial and operational fitness to provide statewide bio-hazardous waste collection service. The Protestants' stated concerns do not alter that conclusion. Profitability projections are necessarily based on speculation within a relatively short time period, and the availability of future funding from a corporate parent until a company's operations are profitable provides the Commission with greater confidence in the company's financial fitness. Waste Management has satisfied its burden to prove this statutory requirement.

### FINDINGS OF FACT

- 27 Having discussed above in detail the evidence received in this proceeding concerning all material matters, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:
- 28 (1) The Commission is an agency of the state of Washington, authorized by Titles 80 and 81 RCW to regulate in the public interest the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities, including solid waste companies.

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<sup>31</sup> Weinstein, Exh. Nos. MAW-16T through 23; Norton, Exh. Nos. JN-4T through 6; Daub, Exh. Nos. JD-1T through 23; McInerney, Exh. No. MM-1T.

<sup>32</sup> Staff's Post-Hearing Brief ¶¶ 9-25.

- 29 (2) Waste Management of Washington, Inc., is a solid waste company that, *inter alia*, provides bio-hazardous solid waste collection service within its existing service territory in the state of Washington.
- 30 (3) Waste Management of Washington, Inc., has demonstrated the consumer need for, and positive results from, its expansion into the statewide bio-hazardous collection services market.
- 31 (4) Waste Management of Washington, Inc., has demonstrated that the public's need for a competitive alternative to the existing service providers outweighs those providers' unsubstantiated claims of an adverse economic impact on their operations.
- 32 (5) Waste Management of Washington, Inc., has demonstrated that it has the financial and operational fitness to provide statewide bio-hazardous waste collection service.

### CONCLUSIONS OF LAW

33 Having discussed above all matters material to this decision, and having stated its findings, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

- 34 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings.
- 35 (2) Waste Management of Washington, Inc., has satisfied the requirements in RCW 81.77.040 for obtaining a certificate of public convenience and necessity to provide bio-hazardous waste collection service on a statewide basis:
- (a) Based on the record evidence and the circumstances presented in the application, the existing companies will not provide service to the satisfaction of the Commission without the statewide competitive alternative Waste Management of Washington, Inc., would provide;
  - (b) Granting the application will not significantly impact the needs of existing carriers for a customer base that is large enough for economic viability, considering their obligation to provide satisfactory service, and will enhance the public's ability to obtain responsive service, and as a result, the public convenience and necessity requires the proposed service;

(c) Waste Management of Washington, Inc., has the financial and operational fitness to provide the services proposed in the application.

**ORDER**

36 THE COMMISSION ORDERS that the application of Waste Management of Washington, Inc., for an extension of authority under Certificate G-237 to provide statewide bio-hazardous waste collection service is GRANTED.

Dated at Olympia, Washington, February 14, 2013.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

GREGORY J. KOPTA  
Administrative Law Judge

**NOTICE TO THE PARTIES**

This is an Initial Order. The action proposed in this initial order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order and would like it to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a Petition for Administrative Review (Petition). Section (3) of the rule identifies what you must include in any Petition as well as other requirements for a Petition. WAC 480-07-825(4) states that any party may file an Answer to a Petition (Answer) within (10) days after service of the Petition.

WAC 480-07-830 states that before the Commission enters a final order any party may file a petition to reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will not accept answers to such a petition unless the Commission requests answers by written notice.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final either by operation of law or on administrative review.

You must serve on each party of record one copy of any Petition or Answer filed with the Commission, including proof of service as required by WAC 480-07-150(8) and (9). To file a Petition or Answer with the Commission, you must file an original and seven (7) copies of your Petition or Answer by mail delivery to:

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