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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re Application of
WASTE MANAGEMENT OF
WASHINGTON, INC.
d/b/a WM Healthcare Solutions
of Washington
720 4th Ave. Ste 400
Kirkland, WA 98033-8136

Docket No. TG-120033

OBJECTION TO PREHEARING
CONFERENCE ORDER AND REQUEST
FOR CLARIFICATION

Pursuant to WAC 480-07-430(3), Protestant Stericycle of Washington, Inc.
("Stericycle") objects to the Prehearing Conference Order issued in this proceeding (Order 01;
service date April 16, 2012 – hereinafter, the "Order") and requests that the Order be
withdrawn and an appropriate order issued in its place. If the Order is not withdrawn,
Stericycle requests that the presiding officer issue factual findings clarifying the implicit
decision to decide the applicant's fitness on the current record and without a hearing. Should
the presiding officer decline to withdraw the Order or enter necessary factual findings,
Stericycle petitions the Commission for interlocutory review of the Order pursuant to WAC
480-07-810.

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I. Summary of Objection

Paragraph 8 of the Order improperly prohibits discovery by protestants on issues related to the Applicant's financial or operational fitness. The Order purports to prohibit such discovery because the protesting parties do not have a legitimate interest in seeking discovery of such matters, notwithstanding their obvious relevance to the Applicant's case in this proceeding.

Paragraph 8 of the Order provides in pertinent part as follows:

Discovery is limited to the scope of the parties' interest in the proceeding pursuant to WAC 480-07-400(3). Specifically, the protesting parties do not have a significant interest in, and may not conduct discovery on, issues related to Waste Management's financial or operational fitness to provide service under the extended authority for which it has applied. Such issues include, but are not necessarily limited to, the statutory factors of an estimate of the costs of facilities to be used to provide the proposed service, the [Applicant's] assets, or Waste Management's prior experience in the field.

Paragraph 8 of the Order is contrary to RCW 81.77.040, longstanding Commission precedent, and the Commission's discovery rules at WAC 480-07-400 through -425. Financial, operational, and regulatory fitness are essential requirements of any application for new authority on which the applicant bears the burden of proof. These requirements are statutory and have been contested by protestants in every reported medical waste application proceeding for the last 20 years. As necessary and contested elements of any application for new authority, including the Application here, protestants have a direct interest in Waste Management's fitness, and discovery related to that subject is necessary and proper under the Commission's rules, and for a full and fair hearing on the merits.

Paragraph 8 is further unauthorized by and inconsistent with the Commission's rules governing prehearing conferences and the orders that may be issued following such

1 conferences. WAC 480-07-430. The limitations on discovery imposed by Paragraph 8 of the
2 Order were not mentioned or discussed at the prehearing conference in this matter. Protestants
3 were not given notice that such discovery limitations would be considered by the presiding
4 officer or an opportunity to be heard in opposition to them.

5
6 For the foregoing reasons, the Order should be withdrawn, Paragraph 8 of the existing
7 Order should be deleted, and an appropriate Prehearing Conference Order should be issued
8 without the offending provision.

9 Alternatively, if it is the presiding officer's intent to make a dispositive finding with
10 respect to Waste Management's financial and operational fitness on the current record without
11 allowing Stericycle or the other protestants to contest such a finding and notwithstanding that
12 there is nothing whatsoever in the record to support Waste Management's fitness, then the
13 presiding officer should make that finding explicitly in an appropriate Order.
14

15 If the presiding officer declines to withdraw and amend the Order, or make plain his
16 dispositive ruling on the merits, Stericycle petitions for interlocutory review of the Order to
17 prevent substantial prejudice to protestants and to save the Commission and the parties the
18 substantial effort and expense of relitigating this Application when the Order is reversed
19 following an improperly limited hearing on the merits.
20

21 II. Argument and Analysis

22 A RCW 81.77.040 and longstanding Commission precedent Require Waste 23 Management to Establish its Financial and Operational Fitness at the Hearing; 24 Discovery Relevant to those Issues Must Therefore be Permitted.

- 25 1. Financial and operational fitness are statutory preconditions to any award of new
26 authority; those factors have always been, and on this Application must be,
determined by the Commission.

1 RCW 81.77.040 prohibits Waste Management from operating in the territory covered
2 by its Application unless the Commission grants it a certificate of public convenience and
3 necessity for the proposed service. RCW 81.77.040 further provides as follows:
4

5 Issuance of the certificate of necessity **must be determined on**, but not
6 limited to the following factors: The present service and the cost thereof
7 for the contemplated area to be served; an estimate of the cost of the
8 facilities to be utilized in the plant for solid waste collection and disposal .
9 . . . ; 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 ; a statement of prior experience, if any, in
such field by the petitioner . . . ; and sentiment in the community
contemplated to be served as to the necessity for such a service.

10 Thus, RCW 81.77.040 explicitly requires the Applicant to make a showing of – and the
11 Commission to determine whether to issue a certificate based on – “the cost” of the proposed
12 service; “the cost of the facilities to be utilized in the plant for solid waste collection and
13 disposal;” and “the assets on hand of the [applicant] that will be expended on the purported
14 plant for solid waste collection and disposal.”
15

16 As the Commission’s many decided cases interpreting RCW 81.77.040 demonstrate, all
17 of these “factors” are part of the complex of issues that go to the applicant’s financial and
18 operational “fitness” to conduct the proposed service – matters that an applicant must
19 demonstrate to prevail on its application. An applicant’s financial and operational fitness have
20 been contested and ruled on by the Commission in all prior medical waste application
21 proceedings, and the applicant has borne the burden of proof. *See Ryder Distribution*
22 *Resources, Inc.*, Order M.V.G. No. 1761, p.5, 9-10 (Aug. 11, 1995); *Sureway Medical Services,*
23 *Inc.*, Order M.V.G. No. 1663, p.4, 17 (Nov. 19 1993); *American Environmental Management*
24 *Corp.*, Order M.V.G. No. 1452, p.5 (Nov. 30 1990); *Sure-Way Incineration, Inc.*, Order
25 M.V.G. No. 1451, p.5, 8-10 (Nov. 30 1990). An applicant must specifically prove its financial
26

1 fitness to serve the new territory that is being sought in its application. *Sureway Medical*
2 *Services*, Order M.V.G. No. 1663, p.19.

3 These required showings have never been waived merely because the applicant for new
4 authority is a large company, has existing, profitable services, or even operates under existing
5 certificated authority. *See Ryder Distribution Resources*, Order M.V.G. No. 1761, p.5, 9-10
6 (addressing contested fitness of applicant who had been providing services under a temporary
7 certificate); *Sureway Medical Services*, Order M.V.G. No. 1663, p.4, 17 (addressing fitness of
8 entity currently providing service under certificate of entity's former owner); *American*
9 *Environmental Management*, Order M.V.G. No. 1452, p.4-5 (evaluating contested fitness of
10 applicant with existing, profitable tariffs and a parent entity with earnings of \$9 million); *Sure-*
11 *Way Incineration*, Order M.V.G. No. 1451, p.5, 8-10 (noting that Sure-Way had been operating
12 throughout Washington State for the three years prior to the hearing).
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15 By statute and under well-settled Commission precedent, Waste Management's
16 financial and operational fitness are necessary elements of this Application, and protestants
17 have a very strong interest in the litigation of those issues before the Commission.

- 18 2. Proof of Waste Management's fitness is essential to the Commission's
19 resolution of the Application, must be established at hearing, and must be
20 subject to discovery under the Commission's rules.

21 Astoundingly, Paragraph 8 of the presiding officer's Order explicitly acknowledges the
22 "statutory factors" that RCW 81.77.040 requires Waste Management to prove at the hearing on
23 its Application, while at the same time denying Stericycle and the other protestants the right to
24 conduct discovery concerning those issues. Unless the presiding officer wishes to make
25 explicit findings concerning these issues now, discovery must be allowed under both the
26 Commission's discovery rules and the Washington Administrative Procedure Act, RCW 34.05.

1 RCW 81.77.040 provides that the Commission may only grant a certificate that overlaps
2 the territory already served by an existing certificate holder after notice and hearing.

3
4 When an applicant requests a certificate to operate in a territory already
5 served by a certificate holder under this chapter, the commission may, after
6 notice and opportunity for a hearing, issue a certificate only if the existing
solid waste collection company will not provide service to the satisfaction
of the commission

7 This provision applies here, where Waste Management seeks a certificate to operate in a
8 territory already served by Stericycle and the other Protestants. Where a hearing on a contested
9 application is required, an applicant must present evidence at the hearing concerning the
10 “factors” specified in RCW 81.77.040 and other matters identified in the Commission’s
11 decided cases related to the applicant’s financial and operational fitness. Since the facts
12 relevant to Waste Management’s “financial and operational fitness” are matters on which
13 Waste Management must present evidence and bears the burden of proof at the hearing, and are
14 essential to the Commission’s decision on the Application, discovery must be allowed on those
15 issues.¹

17 The Washington Administrative Procedure Act, RCW 34.05.446(2), provides only that
18 “[a]n agency may by rule determine whether or not discovery is to be available in adjudicative
19 proceedings and, if so, which forms of discovery may be used.” By rule, the Commission has
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21 ¹ As stated below, if the presiding officer wishes to make a finding that Waste Management is
22 financially and operationally fit to provide the proposed service on the basis of the current
23 record, he should do so explicitly, rather than via the implicit device of prohibiting discovery
24 on these statutory issues. Such a ruling would, of course, deny Stericycle and the other
25 protestants their right to a hearing on these issues, contrary to RCW 81.77.040. There is also
26 no evidence in the record to support such a finding. Thus, for example, there is nothing in the
present record to demonstrate that Waste Management has made arrangements to properly
dispose of the biomedical waste it proposes to collect. For all the Commission knows and for
all the record shows, Waste Management could currently be dumping its biomedical waste into
Capitol Lake. Waste Management’s waste disposal arrangements and practices are obviously
relevant to its “operational fitness” to provide the new service proposed by its Application and
an appropriate subject for discovery.

1 provided that methods of discovery in addition to subpoenas, including data requests and
2 depositions, "will be available to the parties" in four specified circumstances. WAC 480-07-
3 400(2) (emphasis added). The Order states that one of those circumstances exists, namely that
4 the Commission found in its discretion that the needs of this case require these methods of
5 discovery. The Commission's rule does not, however, permit the presiding officer to
6 preemptively bar available discovery from being addressed to subjects relevant to an
7 application proceeding, as the Order purports to do. Preemptive limitation of discovery not by
8 rule but by sua sponte order of the presiding officer is not allowed under the Commission's
9 rules and, therefore, is in violation of the Administrative Procedure Act.²

11 Furthermore, WAC 480-07-400(3) describes the scope of appropriate discovery in a
12 contested case and authorizes discovery of "information that is relevant to the issues in the
13 adjudicative proceeding or that may lead to the production of information that is relevant." The
14 facts that would support or refute a finding of Waste Management's financial or operational
15 fitness are clearly relevant to essential, statutory issues on which the Commission's decision
16 must be based. Discovery must be allowed for those facts to receive a full and fair hearing.

18 The Commission's discovery rules, particularly WAC 480-07-400(3) and WAC 480-07-
19

20 ² Full discovery is also required for the additional reason that the Order establishes this case as
21 precedential, a circumstance that triggers full access to discovery procedures. In paragraph 7,
22 the Order purports to find that this matter does not qualify for discovery under WAC 480-07-
23 400(2)(b), except at the discretion of the presiding officer. This is not the case. WAC 480-07-
24 400(2)(b)(ii) provides that discovery shall be available in "[a]ny proceeding that the
25 commission declares to be of a potentially precedential nature." The presiding officer has
26 ordered preliminary, advisory briefing on the legal standard that should govern consideration of
RCW 81.77.040's requirement that no new authority may be granted in territory already served
by another certificate holder unless "the existing solid waste collection company or companies
serving the territory will not provide service to the satisfaction of the commission." A 20 year
history of medical waste cases has already determined these legal standards. The presiding
officer has invited reevaluation of and possible departure from that precedent and, therefore,
this case is precedential and full discovery must be allowed.

1 420, provide the appropriate mechanism for the presiding officer to respond to complaints of
2 improper or abusive discovery, should they arise, without depriving protestants of their right to
3 conduct discovery on matters that are clearly relevant to the Commission's decision on Waste
4 Management's Application. The discovery rules provide the parties ample remedies in the
5 event that improper discovery requests are made. Waste Management does not need the
6 preemptive shelter offered by the presiding officer to protect its interests. There is no need for,
7 and the Commission's discovery rules do not authorize, a presiding officer to make a
8 preemptive strike on improper discovery where no improper discovery has taken place and the
9 matters in question are clearly relevant to the Commission's decision; in fact, such preemptive
10 action is inconsistent with the Commission's discovery rules and the APA.³ See, e.g., WAC
11 480-07-400(2)-(3); RCW 34.05.446(2).
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14 **B. The Order is Inconsistent with the Commission's Prehearing Conference Rule.**

15 The Commission's prehearing conference rule, WAC 480-07-430, authorizes
16 prehearing conferences in contested proceedings. WAC 480-07-430(2) requires that the
17 Commission "provide reasonable notice of . . . the matters to be addressed" at a prehearing
18 conference. The Notice scheduling the prehearing conference in this case made no mention of
19 possible discovery limitations subject matters the statute makes relevant to this proceeding.
20 WAC 480-07-430(3) authorizes prehearing conference orders as follows:
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22 The presiding officer may make an oral statement on the record or may
23 enter an order describing the actions taken at the prehearing conference
24 and agreements among the parties concerning all of the matters
considered.

25 ³ Paragraph 8 of the Order, together with the "reminder" issued to the protestants in Paragraph
26 9 to avoid improper discovery, suggests a hostility to protestants' hearing rights that is
inconsistent with the neutrality that is appropriate prior to hearing and decision of this matter.

1 WAC 480-07-430(3). The substantive discovery limitations imposed by Paragraph 8 of the
2 Order were never discussed or even mentioned at the prehearing conference. No party
3 requested discovery limitations. The presiding officer did not raise the issue of discovery
4 limitations at the prehearing conference. No notice was given to Stericycle or the other
5 protestants that the presiding officer was considering such discovery limitations and no
6 opportunity was given to protestants to address them at the prehearing conference or otherwise.
7 Paragraph 8 of the Order is inconsistent with WAC 480-07-430(2) and (3) because “reasonable
8 notice” was not given that the presiding officer was considering the discovery limitations
9 imposed by Paragraph 8 of the Order and the discovery limitations imposed by Paragraph 8 do
10 not describe “actions taken at the prehearing conference” or “matters considered” at the
11 prehearing conference. Paragraph 8 cannot properly be included in the presiding officer’s
12 prehearing conference order, is not responsive to a motion by any party and is not authorized
13 under any other provision of the Commission’s hearing rules or the Washington Administrative
14 Procedure Act, RCW 34.05.
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17 Certainly, basic fairness requires that protestants must be given an opportunity to
18 address the proposed discovery limitations before they were imposed; more appropriately under
19 the Commission’s discovery rules, the presiding officer should have waited for an actual
20 instance of improper discovery and an appropriate motion by one of the parties, as provided for
21 in the Commission’s discovery rules at WAC 480-07-400 through -425.⁴
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23

24 ⁴ Possible carelessness about procedural fairness can also be discerned in the grant of the
25 Commission Staff’s late-filed petition to intervene in this matter only one day after it was filed.
26 Although Stericycle in fact has no objection to such intervention (and had tried earlier to
persuade the Staff that it should participate), the presiding officer’s decision to grant the
petition the day after it was filed, without allowing time for objection, was surprising.

1 the Commission should accept interlocutory review of the Order pursuant to WAC 480-07-810.
2 Interlocutory review is appropriate under WAC 480-07-810(2)(b) and (c). Stericycle and the
3 other protestants would suffer substantial prejudice if barred from seeking discovery on core
4 statutory issues that Waste Management must prove to prevail. Any other result would deprive
5 protestants of a full and fair hearing of Waste Management's contested fitness. This prejudice
6 would not be remediable on post-hearing review because discovery would not then be available
7 to bring the true facts to light. Finally, interlocutory review would save the Commission and
8 the parties the substantial effort and expense of re-litigating Waste Management's Application
9 after an uninformed and unfair finding of fitness is overturned on appeal.
10

11 DATED this 26th day of April, 2012.

12 Respectfully submitted,

13 GARVEY SCHUBERT BARER
14

15 By  _____

16 Stephen B. Johnson, WSBA #6196
17 Jared Van Kirk, WSBA #37029
18 Attorneys for Protestant Stericycle of
19 Washington, Inc.
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CERTIFICATE OF SERVICE

I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of Washington that, on April 26, 2012, I caused to be served on the person(s) listed below in the manner shown a copy of STERICYCLE OF WASHINGTON, INC.'s OBJECTION TO PREHEARING CONFERENCE ORDER AND REQUEST FOR CLARIFICATION:

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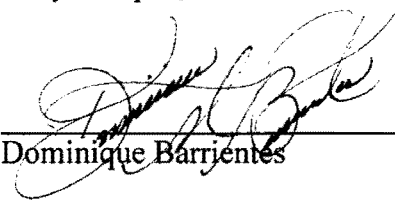
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17 Dated at Seattle, Washington this 26th day of April, 2012.

18 
19 _____
20 Dominique Barrientes